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## COMMENTARY

### ONE JUDGE'S ATTEMPT AT A RATIONAL DISCUSSION OF THE SO-CALLED WAR ON DRUGS

THE HONORABLE JUAN R. TORRUELLA\*

Adapted from Spotlight Lecture at Colby College, Waterville, Maine on April 25, 1996.

In *The Buried Mirror*, Carlos Fuentes, a well-known Mexican author and a former ambassador to the United States and the United Nations, observes that ever since Columbus' "dis-Orientation" in mistaking his discovery of the Indies for that of the islands off Asia: "the American continent has existed between dream and reality, in a divorce between the good society that we desire and the imperfect society in which we really live."<sup>1</sup> I believe this comment is *apropos* of the subject about which I am writing.

Our nation has been engaged in a "war on drugs" since at least the mid-1970's. As with other wars, there is confusion over purpose as well as disagreement over tactics. In the heat of battle we tend to lose sight of rationality and the continued need to search for the truth. Therefore, the time has come when we must stand back from the trenches to determine where we are, what we have accomplished, and where we want to go.

The discussion of this topic essentially involves considering the views of two divergent camps: those who urge that the present laws not be relaxed and even that, in some cases, they be made more stringent, and those who promote, in varying degrees, the decriminalization of the distribution and/or use of at least some presently illegal drugs.

Of course, part of the "problem" is defining the "problem." Those who believe government should reduce the availability of drugs cite a number of reasons for keeping drugs criminalized. Yet not all within this group embrace all those reasons. Some believe drugs are bad for those who consume them, and that it is the government's role to protect people from themselves. From this perspective, restricting drug use is analogous to protecting the public from unsafe food or to the prohibition of pornography, even if used privately. There are

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\* Chief Judge of the First Circuit of the United States Court of Appeals. The author wishes to acknowledge the valuable help provided by Russell Wheeler in editing the original speech. All errors and viewpoints, of course, are the author's.

<sup>1</sup> CARLOS FUENTES, *THE BURIED MIRROR: REFLECTIONS ON SPAIN AND THE NEW WORLD* 8 (1992).

others who justify the war on drugs not simply because of drugs' effects on users, per se, but because of what users do to others. Those who adhere to this view believe in the prohibition of drug use because users may commit criminal acts to get drugs, cause harm to others while under the influence, or deplete public resources in their treatment of addicts.

Whether any of these conditions are in fact "problems" depends in part on one's ideas of how people should live their personal lives and how society should function. It also depends on whether, from an empirical perspective, drug use has the consequences that its critics claim. Furthermore, once we conclude that there is a "problem," and we identify its nature, we must determine whether it is a problem worth dealing with and, if so, what is the best course of action. This in itself is the subject of much debate. We must be conscious of the fact that there is general disagreement regarding the ends that we pursue as well as the means by which we should conduct this so-called "war on drugs."

That said, I must confess that I have chosen this topic with some trepidation. The most obvious reason for this hesitancy is the fact that as a public official charged with deciding issues and cases related to drug offenses, I must do nothing which compromises, or even gives the appearance of compromising, the impartial adjudication of disputes arising under the laws that have been enacted by Congress.<sup>2</sup> Although judges must be cautious in speaking out on matters of public policy, we have an obligation to speak out when our work gives us a perspective on a particular issue that others do not have. In the matter of drugs, legislators and executive branch officials see the issue from an overall policy perspective, but are influenced, and properly so, by public opinion and public fears. Professors and other researchers see drug issues from the vantage points of their various disciplines, and those involved in various advocacy groups see the issue from their particular points of view.

Lawyers and judges who participate in drug litigation, however, see the drug issue on a case-by-case basis, and when they see enough of those individual cases, they should begin to see a mosaic. But while lawyers see the cases from the standpoint of the prosecutor or the criminal defendant, judges see both sides. All these perspectives are important in helping analyze the problem, but up until now the analysis has not been sufficiently informed by the judicial perspective.

I believe that there is sufficient intellectual room to allow for a rational discussion of the diverse questions raised by this subject. Judges have remained almost universally silent on drug-related issues<sup>3</sup> even though judges are in a unique position to significantly contribute, by virtue of their experience and observations while on the job, an important perspective on these complex social problems. This collective judicial experience is critical to improving the law, the

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<sup>2</sup> See MODEL CODE OF JUDICIAL CONDUCT Canons 2, 3 (1990).

<sup>3</sup> But see Robert W. Sweet, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996 at 34, 44 (U.S. District Judge for the Southern District of New York arguing that "our present policy [regarding drug use and distribution] debases the rule of law and that its fundamental premise is flawed.").

legal system, and the administration of justice.<sup>4</sup> After twenty-one years on the bench, ten of which were spent in a very active and intensive trial court, I believe that I have sufficiently lost my judicial innocence, at least to the extent of allowing me to write about this controversial subject. Furthermore, because my record as a sentencing judge hardly classifies me as being "soft" on crime and particularly on drug related crime, I can write from a position which is non-apologetic. It goes without saying that the views I am about to express are just that: my current views. They in no way represent those of the court on which I sit, its members, or the federal judiciary in general, and, of course, I reserve the right to change them. Nevertheless, let me assure all that I take my oath of office seriously and that I will continue to fully comply with it. The essence of the judicial role is to apply the law regardless of one's personal views or how one might try to change it if one sat, not in the courtroom, but in a legislative chamber.

My personal views on this subject have changed dramatically during my years on the bench. This has happened gradually. If I were to pick a point in time when this process started, it was towards the end of my district court tenure, and more specifically, as a result of a State Department-sponsored trip that I took to El Salvador in the mid 1980s to speak to the Salvadoran judiciary and bar regarding the American legal system. After the incident which I will presently describe, I realized that I had already unconsciously started to become frustrated with the drug laws and their administration, and with the obvious lack of tangible progress in containing what seemed to be a losing battle in the war against drugs. This gradual change in attitude came about in part because I intuitively felt that the severe sentences that I and some of my colleagues were handing out, along with massive government efforts, seemed to have little or no impact on the increasing flow of drugs into this country. I also detected a change in the nature of the defendants and groups that were appearing before me. While at first they seemed to be, at best, a bunch of disorganized amateurs, they more and more became well-organized professional criminals. I remember the defendant tried before me who was caught with \$10 million in manager's checks in his left shoe, and who owned a "coffee" farm in Colombia that was almost as big as Puerto Rico. The banker who testified said under oath that he saw nothing unusual about being presented with mountains of shopping bags full of \$20 to \$100 bills which the defendant brought on a regular basis, and which took three bank employees from 9 a.m. to 2 a.m. to count. This, and similar incidents, started me thinking that something was rotten in Denmark, and that the system was endemically flawed.

Toward the end of my tour in El Salvador, in the middle of a civil war, I spoke to a group of attorneys in one of the smaller cities. Somehow the discussion turned to issues related to drug enforcement. I expounded, I suspect somewhat long-windedly, my views that the United States needed the cooperation of Latin America to stop drug trafficking through stricter enforcement, stopping

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<sup>4</sup> SEE MODEL CODE OF JUDICIAL CONDUCT, Canon 4 (1990).

corruption, and eradicating illegal crops, among other measures. The audience was very polite. One or two of those present may have actually clapped when I finished. A hand was then raised in the back of the room. The speaker identified himself as a lawyer, who said to me very deferentially: "Honorable Judge, we very much appreciate your presence and the advice you have given us, but don't you think the United States could help us in solving this problem?" I answered that as I understood the situation we were already sending considerable sums in aid, and that we had a lot of resources committed to the interdiction of drugs from Latin America and the prosecution of violators. He responded, "Excuse me, your Honor, that is not the help we are in need of. What we need is for your country to stop consuming these drugs. If your people were not buying drugs, we would not be growing and selling them. We would rather sell you coffee, or oranges, or bananas, if you would only stop buying and consuming drugs." At first glance this is a rather trite and perhaps insignificant interchange, but it hit *me* like a sledgehammer between the eyes. It brought home what I had already suspected: that there might be something fundamentally wrong with our traditional approach to the drug problem in the United States.

This leads to a second reason for hesitating to choose this subject for discussion. This is a complicated issue, and reading government reports, scholarly journals, and interest group information only confirms its mind-boggling scope. Even worse, one is left with a persistent feeling that there may be no single answer, and certainly that there is no quick and easy solution. It is thus a particularly frustrating subject for me because I am generally result-oriented.

Drug enforcement policy<sup>5</sup> involves the consideration of issues as diverse as international and national politics, law enforcement, sociology, economics, organizational dynamics, and penology, to mention only the most salient. In addition, there are complex scientific, pharmacological and health questions involved. Various policy choices or alternatives also raise moral quandaries. Needless to say, this article discusses only a sampling of these topics and the manner in which they may help in providing solutions. We need a vigorous and frank public discussion of these issues.

One last caveat. Do not misinterpret anything that I say here today as an endorsement of *any* type of drug use, legal or illegal. Nothing could be farther from my personal beliefs. This is merely an attempt at a rational discussion of what I understand to be essentially a health and social, rather than criminal, problem.

I will try to lay out some basic, generally accepted facts, analyze what I think they mean, list the pros and cons that are claimed by the various exponents of the different viewpoints,<sup>6</sup> and express some very tentative conclusions. Despite

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<sup>5</sup> I should also point out that in describing government policy, what it has or has not accomplished, and whether it should be changed, we must keep in mind that drug use responds to numerous stimuli, public and private, including changing social mores, health prescriptions, demographics, and other similar factors.

<sup>6</sup> These viewpoints are status quo, legalization/decriminalization, preventive non-incarcerative sanctioning, treatment, taxation and regulation.

everything I have said, I am afraid you will be disappointed if you are reading this looking for sure-fire answers. In fact, I may very well be raising more questions than answers, but I believe raising questions may serve a useful purpose.

### I. THE MAGNITUDE OF THE PROBLEM

First, we must get a handle on the figures that delineate the issues. Because this article is directed almost exclusively at issues raised by the drug trade with and in the United States, we are faced with an initial distortion. This is caused by the inability to factor accurately in many of the transnational influences that have an indirect, but important, impact upon the solution of any national drug problem. For example, how is more or less enforcement in or by the United States affected by the failure to follow suit by the rest of the international community? Or, how will legalization in one jurisdiction be affected by the failure to carry out such action elsewhere? Will the drug trade, and/or drug addiction, move transnationally, as it is affected by these factors? These questions are far from exhaustive, but are sufficient to illustrate what is rather obvious: we are dealing with a subject that will not yield to mathematically-certain solutions. In fact, the inability to account for the effects of transnational influences is part of the larger problem of competing explanations for most drug-related trends that one encounters when trying to understand a complex phenomenon like drug use. This is not an appropriate forum for the kind of complex multi-variable analyses that would be necessary to isolate all the factors that might be associated with, for example, an apparent increase in the use of one drug or an apparent decrease in the use of another. Again, all I can do is present the facts I have found, tell you what I think they mean, and invite your consideration. Thus, for present purposes it is best to simply recognize that these conditions exist.

For our purposes, I will only cover marihuana, cocaine, and heroin, of the illegal psychoactive drugs,<sup>7</sup> and tobacco and alcohol of those that are legal. I have included tobacco and alcohol within the scope of this already complicated scenario because comparison between the societal treatment given to legal and illegal drugs, and the outcome of this treatment, is an important consideration in forming an opinion as to how to determine what course of action should be taken. As close as possible, the period covered will be from 1973, which is more or less the official commencement of the so-called war on illegal drugs, through 1994, which is the latest year for which complete statistics are available.

I would be surprised — in fact, disappointed — if at least some of you do not disagree, if not with the figures that I quote, then at least with some of the conclusions that I draw from them. It is very difficult to get truly comparative, yet complete, statistics. I admit to engaging in some extrapolation, and there are in-

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<sup>7</sup> The term "drug" means "articles (other than food) intended to affect the structure or any function of the body of man or other animals." Federal Food, Drug, and Cosmetic Act, ch. 9, 21 U.S.C.A. § 321(g)(1)(C) (1996); BLACK'S LAW DICTIONARY 497 (6th ed. 1990). I define "psychoactive drug" as a drug that works directly in, and on, the brain to change the way it functions.

stances of comparing apples with oranges when that is the best one can do. I have tried to be as objective as possible.

#### A. *Trends in the Use of Psychoactive Drugs in the United States*

There are approximately 48 million tobacco users,<sup>8</sup> 46 million alcohol users<sup>9</sup> and almost 12 million illicit drug users in the United States.<sup>10</sup> These groups are, of course, not mutually exclusive. There are undoubtedly many drug users who can be found within the ranks of more than one of these groupings.

##### 1. Tobacco

In 1970 the per capita consumption of tobacco for those over eighteen years old was ten pounds per year.<sup>11</sup> This figure dropped to five pounds per year by 1992, a 50% decrease in tobacco use. The percentage of cigarette smokers 18 years of age and older dropped from over 40% in 1965 to about 25% in 1990.<sup>12</sup>

##### 2. Alcoholic Beverages<sup>13</sup>

The average annual household expenditure for alcoholic beverages decreased from \$289 in 1987 to \$268 in 1993, after a peak period between 1990-1992 of \$293-\$301. This shows a 7.2% decrease in overall spending on alcoholic beverages between 1987 and 1993. Perhaps more revealing are the age group historical trends. In the twelve to seventeen year old group, 54% used alcohol in 1974 compared to about 41% in 1993, thus showing a decrease in teenage use. In the eighteen to twenty-six age category about 82% used alcohol in 1974, increasing to 87% in 1993. The alcohol consumption of those over twenty-six years old remained stable at about 90% throughout the period.<sup>14</sup>

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<sup>8</sup> See Avram Goldstein, *Drug Policy: Some Thoughts about Striking the Right Balance*, in SEARCHING FOR ALTERNATIVES 398, 400 (Melvyn B. Krauss & Edward P. Lear, eds., 1991).

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 1262 (1995) [hereinafter STATISTICAL ABSTRACT - 1995].

<sup>12</sup> See *National Center for Health Statistics (1992)*, cited in ARNOLD S. TREBACH & JAMES A. INCIARDI, *LEGALIZE IT? DEBATING AMERICAN DRUG POLICY* 110 (1993) [hereinafter *LEGALIZE IT?*]. The specific figures are from 42.3% in 1965 to 32.2% in 1983 to 25.4% in 1990. See *id.*

<sup>13</sup> See STATISTICAL ABSTRACT - 1995, *supra* note 11, at tbl. 721. See also BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 292 (1994).

<sup>14</sup> The actual figure varies between 87.6% and 92.9% divided between the 26-34 and over-35 age groups.

### 3. Use of Illicit Drugs

Illicit drug use declined significantly during the 1980s.<sup>15</sup> Drug use went from almost 14% for all persons over age twelve in 1979 to about 6% for that same group in 1993, a general decrease of about 59%.

#### a. Cocaine<sup>16</sup>

In 1974, about 3% of those twelve to seventeen years old reported using cocaine. This number declined to less than 1% by 1993, after peaking at over 4% for the 1979-1982 period. In the eighteen to twenty-five age group there was an overall decline from 8% in 1974 to 5% in 1993, with a peak of nearly 20% in the 1979-82 period. Cocaine use among those over twenty-six increased from half a percent in 1976 to nearly 2% in 1993, reaching a peak of around 4% in the 1982-85 period.

#### b. Marihuana<sup>17</sup>

In 1974, close to one in five persons aged twelve to seventeen used marihuana. This figure dropped to about one in ten by 1993, after a peak of over 20% during the 1977-1982 period. For ages eighteen to twenty-five this figure also decreased, from about a third in 1974 to about a fifth in 1993, with peak years of over 40% in the 1974-82 period. Again, there has been an increase in the twenty-six and older group from almost 4% in 1974 to over 6% in 1993, with the peak hovering around 10% in 1982 and 1985.

#### c. Heroin<sup>18</sup>

All age groups show a general decline in the use of this drug. Use among the twelve to seventeen year old age group went from 1% in 1974 to only two-tenths of a percent in 1993. Those in the eighteen to twenty-five year old bracket went from almost 5% to 0.4% in the same period, and those twenty-six years old and over declined from half a percent to a base that was too small to be statistically reliable from 1974 on.

### B. *Some Costs of Drug Use in the United States*

#### 1. Illegal Drugs

In 1988 the United States' federal drug control budget totalled \$4.7 billion.<sup>19</sup> By 1995, this figure had grown to \$13.2 billion.<sup>20</sup> Parenthetically, violent crime

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<sup>15</sup> See Office of National Drug Control Policy, *Drugs and Crime Data, Fact Sheet: Drug Use Trends* 2 tbl. 1 (June 1995).

<sup>16</sup> See *id.* at 3 fig. 1.

<sup>17</sup> See *id.* at 3 fig. 2.

<sup>18</sup> See STATISTICAL ABSTRACT-1995, *supra* note 11, at tbl. 217.

<sup>19</sup> See NATIONAL DRUG CONTROL STRATEGY 138 tbl. B-2 (1995).

<sup>20</sup> See *id.*



rates increased during this period, from 637 per 100,000 population in 1988 to 746 in 1993.<sup>21</sup> Drug distribution offenses represented roughly 40% of all federal prosecutions and 50% of all federal prison admissions in 1993.<sup>22</sup> Federal prison authorities report that about a third of federal inmates have moderate to severe substance abuse problems.<sup>23</sup> It is estimated that the average annual cost of maintaining one prisoner is \$21,352 per year, or \$58.50 per day.<sup>24</sup> In 1993, the national estimate for capital expenditures involving prisons was \$2.8 million. This total includes construction costs for new buildings, major repairs, and other improvements.<sup>25</sup>

State and local government expenditures for drug enforcement are substantial but more difficult to determine with precision. A 1991 study estimated that local governments' drug control expenditures totalled \$8.5 billion, a figure which, if accurate, has probably increased since then.<sup>26</sup> In 1990, state and local agencies made 1.1 million arrests for drug offenses,<sup>27</sup> as compared to the federal Drug Enforcement Administration's 22,000 arrests in the same year.<sup>28</sup> In 1970 approximately 10% of those admitted to state prisons were convicted of drug-related offenses; by 1989 this figure had risen to 30%.<sup>29</sup>

About 5,000 people die annually from "overdosing," which is a direct result of illegal drug use.<sup>30</sup> The estimated annual cost of illegal drug abuse in the United States is approximately \$167 billion.<sup>31</sup> In 1990 the federal government spent \$17.9 billion for hospital treatment and other health care costs associated

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<sup>21</sup> See *id.* at 144 tbl. B-11.

<sup>22</sup> See U.S. DEPARTMENT OF JUSTICE, A JUDICIAL GUIDE TO THE FEDERAL BUREAU OF PRISONS 5 (1995). In 1995 there were approximately 100,000 federal inmates, of which 61.4% were convicted of drug law violations (up from 25% in 1980). *Id.*

<sup>23</sup> See *id.* at 37. Federal prison authorities frankly state that "[i]t is particularly unrealistic to expect prison programs to effectively change inmates for the better given the context in which they operate: a setting defined by deprivation of society's freedoms." *Id.* at 53.

<sup>24</sup> See *id.* at 5.

<sup>25</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES 73 tbl. 4.24 (1993).

<sup>26</sup> See NATIONAL DRUG CONTROL STRATEGY, *supra* note 19, at 138 tbl. B-2.

<sup>27</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, DRUGS, CRIME AND THE JUSTICE SYSTEM 76 (1992).

<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 195.

<sup>30</sup> See Doug Bandow, *War on Drugs or War on America?*, 3 STAN. L. & POL'Y REV. 242, 245 (1991).

<sup>31</sup> "The annual economic loss to businesses from illegal drugs is estimated to be between \$60 and \$100 billion each year. In addition, it is estimated that drugs cost almost \$67 billion each year in terms of crime, as well as the medical and death-related expenses associated with the crimes." *Enforcement of Federal Drug Laws: Hearing before the Subcomm. on Crime of the Committee of the Judiciary*, 104th Cong., 1st Sess. 8 (March 30, 1995) (statement of Louis J. Freeh, Director of the F.B.I.).

with drug abuse.<sup>32</sup>

The federal drug control budget was nearly \$4 billion in 1987.<sup>33</sup> One can only assume that this number has risen dramatically since then.

## 2. Legal Drugs

### a. Tobacco

In 1965, the annual death toll from smoking related diseases was estimated at 188,000, a figure which more than doubled to 434,000 by the mid 1980s.<sup>34</sup> These figures do not include the almost 40,000 nonsmokers who die each year from ailments associated with the inhalation of passive smoke.<sup>35</sup> In all, tobacco use costs American society about \$120 billion per year.<sup>36</sup> The Centers for Disease Control and Prevention estimated that in 1995, the nation spent \$50 billion on smoking-related illnesses.<sup>37</sup>

Between 1989 and 1993, annual U.S. cigarette advertising and promotional expenditures grew from \$3.6 billion to \$6 billion.<sup>38</sup> Throughout most of this period, the government spent an estimated \$120 million a year on its anti-smoking efforts, mostly on medical research.<sup>39</sup>

Table 1

U.S. Cigarette advertising and promotional expenditures 1989-93 (in billions)

1989	\$3.617
1990	\$3.992
1991	\$4.650
1992	\$5.231
1993	\$6.034

a. TV and radio advertising was prohibited effective January 2, 1971.

### b. Alcohol

In 1991 there were about ten million alcoholics in the United States, with a

<sup>32</sup> See BUREAU OF JUSTICE STATISTICS, *supra* note 27, at 76.

<sup>33</sup> See James Ostrowski, *Thinking about Drug Legalization*, in THE CRISIS IN DRUG PROHIBITION 45, 60 (David Boaz, ed., 1990).

<sup>34</sup> See LEGALIZE IT?, *supra* note 12, at 159.

<sup>35</sup> See *Death Toll from Smoking Is Worsening*, N.Y. TIMES, Feb. 1, 1991, at A4.

<sup>36</sup> See Joel W. Hay, *The Harm They Do to Others: A Primer on the External Costs of Drug Abuse*, in SEARCHING FOR ALTERNATIVES, *supra* note 8, at 200, 216.

<sup>37</sup> See Mike Thomas, *Money to Burn*, ORLANDO SENTINEL, May 21, 1995, at 8.

<sup>38</sup> See FEDERAL TRADE COMMISSION, U.S. DEPT OF AGRICULTURE, TOBACCO SITUATION AND OUTLOOK REPORT tbl. 22, JBS-231 (June 1995).

<sup>39</sup> See Gary Rotstein & Lawrence Walsh, *Teens are Lighting Up*, PITTSBURGH POST-GAZETTE, July 21, 1995, at A1. See also CDC Lays Teen Smoker Blame, ASSOCIATED PRESS, July 20, 1995.

total of seventy-three million adults having been touched by this condition.<sup>40</sup> Each year there are some 45,000 alcohol-related traffic fatalities in the United States<sup>41</sup> and thousands of women who drink during pregnancy bear children with irreversible alcohol-related defects.<sup>42</sup> It is estimated that there are a total of 100,000 alcohol-related deaths each year in the United States.<sup>43</sup> The total annual cost of alcohol abuse in the United States for 1990, including governmental and private spending, as well as indirect costs such as lost productivity, was estimated at \$136 billion.<sup>44</sup> In 1994, roughly \$7.4 billion in Medicaid money spent by the federal government went to inpatient hospital care for alcohol, tobacco, and substance abuse treatment.<sup>45</sup> Two-fifths of all crimes leading to state prison sentences are committed under the influence of alcohol or drugs.<sup>46</sup>

Overall media advertising of alcoholic beverages (adjusted for inflation) decreased 46.5% between 1986 to 1993.<sup>47</sup> The beer industry alone spent approximately \$250 million in the last decade on programs to curb alcohol abuse.<sup>48</sup>

The salient facts from the above statistics can be summarized as follows. Between 1973 and 1993:

1. Illegal drug use decreased about 59% in the United States.
2. Government spending on drug-related law enforcement increased 12,000%.
3. Violent crime increased by 100%.
4. The use of alcoholic beverages decreased by 7%, and tobacco use decreased by 50%.
5. In 1993 the annual amount spent to promote alcohol consumption was \$880 million; the tobacco industry spent \$6 billion promoting its product. In that same year campaigns against alcohol abuse spent \$25 million, and anti-smoking efforts \$120 million. The federal government's anti-drug campaign cost \$1.59 billion in 1994.
6. The combined annual cost to society of alcohol and tobacco abuse (\$383 billion) was 2.29 times the total cost of drug abuse (\$167 billion).

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<sup>40</sup> See ALCOHOLISM AND DRUG ABUSE WEEKLY 1 (Oct. 9, 1991).

<sup>41</sup> See CENTERS FOR DISEASE CONTROL, MORBIDITY AND MORTALITY WEEKLY, 40:821-25 (Dec. 6, 1991).

<sup>42</sup> See George Steinmetz, *Fetal Alcohol Syndrome*, NAT'L GEOGRAPHIC MAG., Feb. 1992, at 36, 36-39.

<sup>43</sup> See Cristine Russell, *Taxing Vices*, WASHINGTON POST, October 30, 1990, at Z07.

<sup>44</sup> See Ledby Smithers, "Pioneers" Demand More Media Attention for Alcoholism, SUBSTANCE ABUSE REPORT 3 (June 15, 1991).

<sup>45</sup> See Joseph A. Califano, Jr., *America in Denial*, WASHINGTON POST, Nov 14, 1993, at C7.

<sup>46</sup> See BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES 1987 3 (1992).

<sup>47</sup> See *Despite Progress, FTC Urged to Crack Down on Alcohol Advertising*, FOOD LABELING NEWS, June 29, 1995 (citing a report released by the Center for Science in the Public Interest.)

<sup>48</sup> See generally *Preventing Alcohol Abuse*, THE BEER INSTITUTE (1995).

Table 2  
Drug Use Comparison

	USERS (IN MILLIONS)	RATE OF USERS TO U.S. POPULATION (250 MILLION)	ANNUAL SOCIETAL COSTS (IN BILLIONS)	DIRECT DEATHS (IN THOUSANDS)	PERCENTAGE OF DIRECT DEATHS BY USERS
TOBACCO	46.3 <sup>a</sup>	1:5	\$147 <sup>a</sup>	474 <sup>a</sup>	1%
ALCOHOL	105 <sup>a</sup>	2:5	\$136.3 <sup>c</sup>	100 <sup>a</sup>	.1%
ILLCIT DRUGS	11.5 <sup>c</sup>	1:25	\$167 <sup>i</sup>	5 <sup>i</sup>	.04%

a 1991 d 1994 g 1990 (includes users and passive smokers)

b 1991 e 1991 h 1990 (includes both traffic fatalities and deaths caused by disease)

c 1991 f 1994 i 1991 (by overdose)

Table 3  
Comparison of Advertising Campaigns Promoting Use vs. Anti-Abuse (in billion dollars) - 1993

	USE PROMOTION (IN BILLIONS)	ANTI-ABUSE PROMOTION (IN BILLIONS)	PERCENTAGE CHANGE IN USE
TOBACCO <sup>a</sup>	\$6.034	\$0.12	-50.0% <sup>f</sup>
ALCOHOL <sup>a</sup>	\$0.088	\$0.025 <sup>c</sup>	-7.2% <sup>f</sup>
ILLCIT DRUGS	N/A	\$1.59 <sup>d</sup>	-59.1% <sup>a</sup>

a 1993

b 1993

c Based on average of \$250 million over the past decade. See a.48 of text.

d 1994

e 1970-1992

f 1987-1993

g 1979-1993

Table 4  
Federal Government Spending/Drug User - Ratio (1994)

	FEDERAL GOVERNMENT SPENDING (IN MILLIONS)	USERS IN MILLIONS	AMOUNT SPENT/USERS	ANNUAL DEATHS (IN THOUSANDS)
TOBACCO	\$43,680.0	46.3	\$943.41	474 <sup>d</sup>
ALCOHOL	\$11,905.0 <sup>a</sup>	1 05.0 <sup>a</sup>	113.38	100 <sup>a</sup>
ILLCIT DRUGS	\$24,257.0 <sup>c</sup>	11.5	\$2,109.30 <sup>c</sup>	5 <sup>b</sup>

a This amount is determined as follows:

amount \$43,560 (million) for health and rehabilitation  
+ 120 (million) anti-abuse campaign  
\$43,680 (million)

b This amount is reached as follows:

\$11,880 (million) for health and rehabilitation  
+ 25 (million) anti-abuse campaign  
\$11,905 (million)

c This amount is reached as follows:

\$12,100 (million) for drug enforcement  
1,597 (million) anti-abuse campaign  
+ 10,560 (million) for health and rehabilitation  
\$24,257 (million)

d 1986

e If drug enforcement is excluded this

c is \$1,057.13

f 1990

g 1990

h 1991

What conclusions do these statistics suggest about illegal drug use? Has the war on drugs been a success? Is the present strategy cost-effective? Does the present legislative approach to legal drugs tell us anything that might be helpful in dealing with illegal drugs?

In devising a rational drug policy, the challenge is to find least-cost solutions to the problems created by the age-old fact that some human beings consume more mind-altering substances than are good for them (or their neighbors), and by the modern fact that the amount and variety of available psychoactives is rap-

idly increasing.<sup>49</sup> Proponents of all approaches, ranging from legalization to upholding the current status quo, claim that their views are supported by cost/benefit analyses.

A superficial overview of the facts and statistics that I have quoted leads to the conclusion that the tremendous investments made by the government in law enforcement efforts in the war on drugs have resulted in rather modest reductions in use when compared to the results of the relatively insignificant educational investments made by the government to discourage tobacco and alcohol use. A second preliminary conclusion is that there is some correlation — although not necessarily a causal connection — between increases in violent crime and more vigorous enforcement of prohibition. Lastly, although the societal costs of tobacco and alcohol use appear to be more than two times greater than that of using illicit drugs, government spending related to the use of illegal drugs is twice that spent for tobacco and alcohol abuse. A similar disparity is that although there are ten times more tobacco and alcohol users than users of illegal drugs, government spending on users of illegal drugs is twice the amount spent on tobacco and alcohol users.

## II. MAINTAIN THE PRESENT POLICY OR ADOPT A NEW ONE? WEIGHING THE ARGUMENTS

Policy analysis in this area requires more than accounting for the mass of empirical data about usage, cost, and trends that I have just summarized. There are also a plethora of arguments for maintaining the present policy and for adopting a fundamentally different approach. The arguments not only view the empirical data differently; they import different moral and legal dimensions to the debate over drug policy.

The current policy calls for attacking both the supply and the demand sides of the illegal drug equation through methods such as continued international enforcement, border interdiction, domestic efforts to reduce the available supply, attacks on the economic base of traffickers through criminalizing money laundering and through seizures, and various educational and rehabilitation programs. Not all proponents of the current policy favor all of these tactics, and not all consider each of them to be equally effective or important.

Similarly, there is disagreement among those who favor a fundamental shift in current policy towards "legalization" or "decriminalization" of drug use. These terms, although technically distinct, are often used almost interchangeably. Some advocates of legalization want all psychoactive substances to be available to any willing buyer. However, most would limit legal availability to adults, and apply the new policy to only some of the currently illicit substances. "Legalization" is also used to describe programs in which addicts with established drug habits would have legal access through clinics. This approach is also usually within the scope of "decriminalization." Most advocates of "decriminalization," however,

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<sup>49</sup> See Ethan A. Nadelmann, *Beyond Prohibition: Evaluating the Alternatives*, in *SEARCHING FOR ALTERNATIVES*, *supra* note 8, at 248.

would keep distribution illegal, at least by private persons, but would end arrests of consumers.

Alternatives to prohibition come in several forms, among them decriminalization, limitation, regulation, and taxation.<sup>50</sup> Under a decriminalization regime, drugs would remain illegal but possession would be treated like a minor traffic violation, with little or no loss of liberty and minimal fines imposed on the possessor. The limitation models would make drugs legally available, but only through specially licensed institutions and professions. This approach has also been called the "medicalization" model.<sup>51</sup> Under the regulation and taxation proposals, the controls would be similar to those presently applied to alcohol use. This latter model is the preferred solution of many knowledgeable commentators favoring legalization.<sup>52</sup>

The conflicting ideals of these two basic positions arise from disparate responses to some basic questions.

- a. Is the current policy capable of effectively limiting drug use?
- b. Which alternative imposes greater costs on society, permitting or prohibiting the use of drugs?
- c. Does the current policy adequately promote education, treatment, and law enforcement, and is there an adequate balance between these three courses of action?
- d. What can we learn from the various attempts at drug legalization?
- e. Is the current policy basically fair in its application?

The following section summarizes the contrasting answers to these five questions and describes some tentative responses.

#### A. *Is the Current Policy Capable of Effectively Limiting Drug Use?*

Proponents of the current policy claim that the fact that dangerous drugs are illegal is one of the most powerful deterrents to their use.<sup>53</sup> They point to the reduction of 59.1% in overall drug use from 1979 to 1993 as proof of this contention.<sup>54</sup> A comparison between the number of people that use illegal drugs with those that use alcohol and tobacco also illustrates this point.

Opponents of the current policy may concede that it has reduced drug use, just as Prohibition reduced alcohol consumption, but they also argue that the "war on drugs" initiative is cost ineffective when compared to the results

<sup>50</sup> See Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355, 383 (1996).

<sup>51</sup> See LEGALIZE IT?, *supra* note 12, at 79.

<sup>52</sup> See *id.* at 80.

<sup>53</sup> See Edwin Meese III, DRUGS, CHANGE, AND REALISM, in SEARCHING FOR ALTERNATIVES, *supra* note 8, at 290.

<sup>54</sup> Melvin Levitsky, a former Assistant Secretary of State for International Narcotic Matters, defends the federal government's drug policy as working on both the supply and demand side. See SEARCHING FOR ALTERNATIVES, *supra* note 8, at 360; see also *Against Legalization of Drugs*, in LEGALIZE IT?, *supra* note 12, at 161.

achieved. The 12,000% increase in the enforcement budget between 1973 and 1993 has been highly cost ineffective, producing only a 59% decrease in illegal drug use. In comparison, the modest amounts spent by the government in tobacco use education have apparently contributed to a 50% drop in the use of tobacco for that same period. Opponents argue further that, viewed from a broader perspective, the economic forces of supply and demand make it virtually impossible to control the drug trade in any realistic sense.

Attempts to decrease the supply of illegal drugs have achieved only limited success. Law enforcement officials readily acknowledge that they intercept only a small percentage of drug shipments from abroad.<sup>55</sup> Attorney General Janet Reno said in 1993 that "she had always been struck" by a statement federal officials made to a Dade County, Florida grand jury in 1983 at a time when stepped-up federal efforts had managed to interdict only about 25% of the drugs entering the southeastern United States. She quoted the officials as saying that 75% of the entering drugs would have to be cut off before interdiction was effective, a figure which they described as "economically prohibitive."<sup>56</sup>

Even assuming that effective interdiction could be achieved along with successful crop eradication in source countries, the resulting squeeze in the supply of drugs available to the North American consumer would be counterproductive, resulting only in an increase in the prices of illegal drugs. As a result, addicts would have to commit more crimes to acquire the needed cash to pay for drugs at a higher price,<sup>57</sup> and more criminals would have an incentive to enter the drug trade because of the greater opportunities for higher profits.<sup>58</sup> Marihuana is reported to be the number one cash crop in the United States.<sup>59</sup> Five hundred dollars worth of heroin or cocaine in a source country brings a return of as much as \$100,000 on the streets of most American cities.<sup>60</sup> What other product permits a tax-free markup of 20,000%? Yet, the black market created by prohibition allows this increase.<sup>61</sup>

It is pretty obvious to most observers that *users* of illegal drugs are *de facto* and morally the principal cause of our drug dilemma. In the United States alone, one million people use cocaine at least once a week, and five million regularly

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<sup>55</sup> Information received from a private interview with highly placed DEA officials. It is estimated that less than 10% of the drug contraband into the United States is interdicted. See also Robert Clifton, *The Decriminalization of Drugs*, 32 CT. REV. 14, 15 (1995).

<sup>56</sup> See Ronald J. Ostrow, *Reno Questions Funding of Drug Interdiction Efforts*, LOS ANGELES TIMES, May 8, 1993, at A2.

<sup>57</sup> It is estimated that at least 40% of all property crimes in the United States are committed by illegal drug users to support their habits. See James Ostrowski, *The Moral and Practical Case for Drug Legislation*, 18 HOFSTRA L. REV. 607, 647 (1990).

<sup>58</sup> See Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons from Economics*, 1994 U. CHI. LEGAL. F. 207, 223.

<sup>59</sup> See Katherine Bishop, *New Front in Marijuana War: Business Records*, N.Y. TIMES, May 24, 1991, at B6.

<sup>60</sup> See Robert McNamara, *The War on Drugs is Lost*, NATIONAL REVIEW, Feb. 12, 1996, at 42.

<sup>61</sup> See *id.*

use marihuana.<sup>62</sup> As the Salvadorian lawyer said to me, "If you weren't using it, we wouldn't be growing it and selling it to you." The need to emphasize demand reduction is recognized by many leading experts,<sup>63</sup> although no proposal takes into account the hard facts of real politics. The only places where there is real, no-nonsense demand side enforcement against users are Malaysia, Singapore, and some Muslim countries. There, the possession of *any* amount of illegal drugs is a hanging offense.<sup>64</sup> I do not favor such draconian measures, and regardless of my preferences, I do not believe the public desires such demand side enforcement, and for that reason I do not believe that prohibition can stem the demand for illegal drugs in the United States. The tremendously lucrative black market, estimated at \$150 billion a year in the United States alone,<sup>65</sup> is likely to continue unabated.

Political reluctance to enforce drug prohibition laws against young people inspired the decriminalization of marihuana in eleven states during the 1970s.<sup>66</sup> An attorney involved in lobbying attempts to reduce the penalties for simple possession explained to the Utah state senate, "These are your kids, after all."<sup>67</sup> Another lobbyist stated that "the courts would be reluctant to convict in marihuana possession cases since the marihuana problem was hitting middle-class families and Mormon youth."<sup>68</sup> Although such tolerance was typically not exhibited towards minority users,<sup>69</sup> the fact is that we cannot put all users in jail, even if we wanted to. More than one in forty American males between the ages of fourteen and thirty-four are already incarcerated.<sup>70</sup>

One possible lesson to be gleaned from this scenario is that drug *use*, legal and illegal, is principally a health problem which is best handled by keeping it in the open to allow for treatment and education.<sup>71</sup> Peter Reuter<sup>72</sup> concludes that

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<sup>62</sup> See William F. Buckley, *The War on Drugs is Lost*, NATIONAL REVIEW, Feb. 12, 1996, at 36.

<sup>63</sup> See Schulhofer, *supra* note 58.

<sup>64</sup> See Nadelmann, *supra* note 49, at 243.

<sup>65</sup> See Sweet, *supra* note 3, at 44.

<sup>66</sup> See, e.g., 1975 Cal. Stat. ch. 248, p. 641; 1975 Colo. Sess. Laws ch. 115, p. 433; 1975 Me. Laws ch. 499, p. 1368; 1976 Minn. Laws ch. 42, p. 101; 1977 Miss. Laws ch. 482, p. 925; 1978 Neb. Laws bill 808, p. 817; 1977 N.Y. Laws ch. 360; 1977 N.C. Sess. Laws ch. 862, p. 1178; 1973 Or. Laws ch. 680, p. 1521.

<sup>67</sup> Albert DiChiara & John F. Galliher, *Dissonance and Contradictions in the Origins of Marijuana Decriminalization*, 28 LAW & SOC'Y REV. 41, 45 (1994).

<sup>68</sup> *Id.*

<sup>69</sup> The United States already has the world's highest per capita prison population. See *U.S. Prison Population Sets Record*, CHICAGO TRIBUNE, Aug. 10, 1995 at 4; see also James Bakalar & Lester Grinspoon, *The War on Drugs: A Peace Proposal*, 330 NEW ENG. J. MED. 357 (1994).

<sup>70</sup> See Todd Clear, *Tougher is Dumber*, N.Y. TIMES, Dec 4, 1993, at A21.

<sup>71</sup> See ABA SPECIAL COMMITTEE ON THE DRUG CRISIS, *NEW DIRECTIONS FOR NATIONAL SUBSTANCE ABUSE* 28 (1994).

<sup>72</sup> See Peter Reuter, *On the Consequences of Toughness*, in *SEARCHING FOR ALTERNATIVES*, *supra* note 8, at 151.



decreases in marihuana use among teenagers, particularly in the 1980s, are related more to a changed perception of the health dangers of such use than to enforcement efforts. It is difficult to understand why illegal drug addiction should be treated differently from alcoholism or nicotine addiction; all are basically public health problems.<sup>73</sup>

*B. Which Alternative Imposes Greater Costs on Society: Permitting or Prohibiting the Use of Drugs?*

Proponents of the current policy argue that the harm caused by drugs is not restricted to users. These proponents deal effectively with the so-called "libertarian" point of view, espoused by at least a minority of respectable persons from diverse walks of life,<sup>74</sup> which states that criminal sanctions should not prohibit personal conduct which does no harm to others. It is not the business of government, libertarians say, to protect people from themselves. An individual should be free to engage in the private use of drugs because the right to ingest substances is part of the right to self-determination.

The alleged right to self-determination rests on an undeclared constitutional foundation. More important, however, is the fact that drug use does cause harm to others. Proponents of the current policy point to such secondary effects as crime, accidents, and public nuisances. All these effects involve innocent victims quite distinct from the users. Drug use also imposes various costs on society, such as lost productivity and prenatal injuries.<sup>75</sup> The annual external cost of cocaine and heroin use combined has been estimated at \$23 billion.<sup>76</sup>

Moreover, public opinion is overwhelmingly against legalization.<sup>77</sup> Legalizing drugs is not only unpopular but would send the wrong message, particularly to younger age groups.

Opponents of the current policy do not dispute the costs associated with drug use. They argue, however, that prohibition is the best way to reduce those costs. Legalization, they say, would eliminate the criminal enterprise endemic to the illegal drug market as well as most of the related negative downstream effects.

Before comparing dollar costs, it is important to consider the libertarian argument that prohibition exacts its own toll on the very concept of a free society. One does not have to embrace the libertarian argument to see a moral contradiction in our current approach to drugs. Milton Friedman, a Nobel Prize-winning

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<sup>73</sup> See Steven Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 HOFSTRA L. REV. 751, 752 (1990); see also Karst J. Besterman, *War Is Not the Answer*, 32 AM. BEHAVIORAL SC. 290, 292 (1989).

<sup>74</sup> See Thomas Szasz, *The War On Drugs Is Lost*, NAT'L REV., Feb. 12, 1996, at 45-47.

<sup>75</sup> See Mark A.R. Kleinman, *The Optimal Design of Drug-Control Laws*, in SEARCHING FOR ALTERNATIVES, *supra* note 8, at 196-97.

<sup>76</sup> See Hay, *supra* note 36, at 215.

<sup>77</sup> See *id.* See also Robert L. Peterson, *Legalization: The Myth Exposed*, in SEARCHING FOR ALTERNATIVES, *supra* note 8, at 324; Diane Colosanto, *Widespread Opposition to Drug Legalization*, Gallup News Service Poll, Vol. 54, No. 35 (January 17, 1990).

economist, believed that "freedom is a tenable object only for responsible individuals."<sup>78</sup> Opponents of the current policy note that very few people today would seriously argue in favor of the criminalization of tobacco or alcohol use. Nevertheless, opponents compare the 20,000 deaths directly attributed to the use of illicit drugs with over 500,000 deaths annually caused by alcohol and tobacco use. In fact, "[a]lcohol is the drug most associated with many forms of violence, including domestic violence."<sup>79</sup> Furthermore, the ills of tobacco use have been documented and are scientifically indisputable. Where, then, is the morality in prohibiting drug use but not alcohol or tobacco use?<sup>80</sup>

Whatever the moral argument, we also need to consider the social and economic costs of the current policy and ask whether the costs of an alternative policy would be as great. Opponents argue the following: prohibition inflates the price of drugs, inviting new criminals to enter the trade; reduces the number of police officers available to deal with violent crime; fosters adulterated, even poisonous drugs; and contributes significantly to the transmission of HIV.<sup>81</sup>

Moreover, prohibition has created an underground economy which allows criminal elements to control and influence a huge pool of economic power. Competition for this economic power is directly responsible for most so-called "drug-related violence." America's experience with the Eighteenth Amendment provides a case history. The murder rate not only rose when Prohibition began, and remained high for the duration, but in fact *declined for eleven consecutive years after it ended*.<sup>82</sup> Whatever violence is associated with the multi-billion dollar alcohol industry today is undeniably insignificant when compared to the violence that accompanied Prohibition.<sup>83</sup>

Competitive or "turf" related drug violence is intrinsically related to prohibition. Therefore, it is logical to conclude that such violence would virtually disappear with the elimination of the drug black market.<sup>84</sup> Economic compulsive crime, or crime that addicts commit to finance an expensive habit, should also decline dramatically with the repeal of prohibition.<sup>85</sup> That leaves "psychopharmacological" crime, that is, crime induced primarily by the impact of the drug upon the body and emotions of the user. A study of this last group

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<sup>78</sup> Thomas Szasz, *Idleness and Lawlessness in the Therapeutic State*, 30 SOCIETY 17 (1995).

<sup>79</sup> SUBSTANCE ABUSE AND MENTAL HEALTH HANDBOOK 9.

<sup>80</sup> The German courts have held it is unconstitutional on equal protection and privacy grounds for the government to allow the use of some intoxicants, such as alcohol, while criminalizing others, such as marihuana and hashish. See Stephen Kinzer, *German Court Allows Possession of Small Amounts of Marijuana*, N.Y. TIMES, May 3, 1994, at A12. For a similar analysis, see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-7, at 1325-26 (2d ed. 1988).

<sup>81</sup> See Kurt Schmoke, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 40.

<sup>82</sup> See Milton Friedman, *The War We Are Losing*, in SEARCHING FOR ALTERNATIVES, *supra* note 8, at 56.

<sup>83</sup> See Ostrowski, *supra* note 57, at 650.

<sup>84</sup> See LEGALIZE IT?, *supra* note 12, at 120.

<sup>85</sup> See *id.*

revealed that in only 7.5% of homicides involving drugs was a psychopharmacological label justified, and even then the most common drug involved was alcohol.<sup>86</sup>

More people die every year as a result of the war against drugs than from what we call, generically, overdosing.<sup>87</sup> Milton Friedman, a legalization advocate, has estimated that as many as 10,000 homicides a year are plausibly attributed to the drug war.<sup>88</sup>

Since the sums of money generated by the illegal drug trade are so large, prohibition has placed tremendous economic power in the hands of organized crime. This economic power results from both the large amounts of money drugs generate and the fact that there is an unregulated market of illegal products. This power leads to the corruption of law enforcement officers, public officials, and related politicians.<sup>89</sup> The most salient example of this subversion can currently be observed in Colombia with its alleged election funds scandal, where some claim that the Cali drug cartel partially financed President Samper's election campaign.

Opponents of the current policy claim that it creates general contempt for the law with more serious and permanent societal costs. Both federal and state laws prohibiting drug use are frequently violated with impunity by many citizens. According to the Office of National Drug Control Policy, "[t]here are too many drugs in America, and too many Americans use them."<sup>90</sup> They could well have added "even in our jails," for even in the allegedly secure environment of our prisons, illegal drug use runs rampant.

Finally, opponents point to the vast resources that would be freed up if we abandoned our current policy. In the area of crime prevention alone, 400,000 policemen as well as billions of dollars in federal and state law enforcement and penal expenditures could be used for treatment, education and "regular" police work.<sup>91</sup> Additionally, our court systems could then handle not only the non-drug criminal docket but the societally important civil docket as well.

Tax revenues from alcohol and tobacco amount to \$38.82 billion every year.<sup>92</sup>

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<sup>86</sup> See *id.*

<sup>87</sup> See Schmoke, *supra* note 81, at 40.

<sup>88</sup> See Friedman, *supra* note 82, at 57. The average homicide rate during the 1950s was 4.8 per 100,000 people; 5.7 in the 1960s; 9.5 in the 1970s; and 9.1 in the 1980s. See *id.* at 56.

<sup>89</sup> See McNamara, *supra* note 60, at 43.

<sup>90</sup> OFFICE OF THE NATIONAL DRUG CONTROL STRATEGY, *National Drug Control Strategy* 2 (1990).

<sup>91</sup> Arrest for simple possession of marihuana is the fourth most common cause of arrest in the United States. See Bakalar & Grinspoon, *supra* note 69, at 357.

<sup>92</sup> Alcohol taxes collected in 1994 totalled approximately \$33.9 billion (\$6.8 billion for domestic alcohol excise taxes, \$27 billion on inventories held, and \$110.6 million special occupational tax). Tobacco taxes collected in 1994 totalled approximately \$5.2 billion (\$5.8 billion in tobacco excise taxes and \$2.6 million in floor stock taxes). See *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1996: Hearings on H.R. 2020 before the U.S. Senate Subcomm. of the Comm. on Appropriations*, 104th

It is fair to assume that the legalization of presently proscribed drugs would allow for their taxation in substantial amounts. Certainly the revenues from their taxation would be higher than at present. The precedent for reaping public funds from the wages of sin is certainly well-established. Additionally, the presently tax-free *income profits* derived from the sale of illegal drugs would come into the mainstream of *income taxation*.

*C. Does the Current Policy Adequately Promote Education, Treatment, and Law Enforcement, and Is There a Proper Balance Among These Three Courses of Action?*

There is almost unanimous agreement among independent observers that the apportionment of anti-drug funding is lopsided.<sup>93</sup> Historically, about three-fourths of available funds have been earmarked for supply reduction (enforcement, interdiction and foreign assistance initiatives), with only one-fourth of the money being assigned to demand reduction (prevention and treatment).

Yet treatment is seven times more cost-effective than prohibition. One dollar spent on treatment of an addict reduces the probability of continued addiction seven times more than one dollar spent on incarceration. Unfortunately, treatment for addicts is currently unavailable to almost half of those who would benefit. Yet we are willing to build more and more jails even though at one-seventh the cost of building and maintaining jail space, and of pursuing, detaining and prosecuting the drug user, we could subsidize effective medical care and psychological treatment.<sup>94</sup>

Proponents of the current policy argue that the pharmacological effects of drug use justify prohibition. E. Leong Way<sup>95</sup> describes a hierarchy of drugs according to their addictiveness and harm, placing cocaine and alcohol at the top, and marihuana and tobacco at the bottom.<sup>96</sup> Avram Goldstein claims alcohol and tobacco are "our greatest health problems," and that legalizing other substances will only create further problems.<sup>97</sup> Cocaine and opiate use can cause toxic reactions, death by overdose and the spread of AIDS among needle-sharing addicts. Cocaine, which is an extremely potent central-nervous system stimulant, has the physical effects of increasing body temperature, heart rate, and blood pressure, all of which can cause serious bodily injury or death. Heroin is, of course, highly addictive.

Even marihuana, which many regard as having few if any serious health effects, has not been the subject of wide-scale study. There is, however, at least

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Cong., 1st Sess., 199-272 (1995) (testimony of John W. Magaw, Director, Bureau of Alcohol, Tobacco, and Firearms).

<sup>93</sup> See *LEGALIZE IT?*, *supra* note 12.

<sup>94</sup> See Buckley, *supra* note 62, at 37.

<sup>95</sup> Way is a renowned scientist and professor of pharmacology, toxicology, and pharmaceutical chemistry at the University of California, San Francisco.

<sup>96</sup> See E. Leong Way, *Pharmacologic Assessment of Dependence Risks*, in *SEARCHING FOR ALTERNATIVES*, *supra* note 8, at 396.

<sup>97</sup> See Goldstein, *supra* note 8, at 400.

some credible evidence that marihuana causes lung damage. Researchers at the University of California, Los Angeles reported that smoking one joint produces four times the respiratory burden in smoke particulates and four times the absorption of carbon monoxide than smoking a single tobacco cigarette.<sup>98</sup> They found that one "toke" of marihuana delivers three times more tar to the mouth and lungs than one puff of a filter-tipped cigarette, four times more tar in the throat and lungs, and increases carbon monoxide levels in the blood fourfold to fivefold. Aside from the health consequences of marihuana use, research by the Center for Psychological Studies in New York City suggests that marihuana use severely affects the social perceptions of heavy smokers.<sup>99</sup> Proponents also note that the pharmacological effects of most illegal drugs (as well as alcohol) increase the users' risk of becoming victims of violent crime.

Finally, although mandatory civil commitment is controversial, considerable statistical evidence supports this approach. A definite correlation exists between the length and intensity of treatment and rehabilitative success.<sup>100</sup>

Opponents of the current policy tend to emphasize the modest health risks associated with at least some drugs, particularly marihuana. For example, Harvard's Lester Grinspoon documented the alleged medical benefits of marihuana.<sup>101</sup> Few opponents claim that all drugs are benign. Most argue instead that the national effort to control their use should be fought as a public health war, and that the government should put addicts into the public health system as it has done with abusers of alcohol and tobacco.<sup>102</sup> Prohibition has led to deaths through the use of adulterated drugs, and is a principal cause of the spread of the HIV virus, especially among African-Americans. Direct consequences of prohibition include prostitution for drugs and "crack babies."

#### D. *What Can We Learn from the Various Attempts at Drug Legalization?*

The repeal of Prohibition and the re-legalization of alcohol may prove constructive in reconsidering current American drug policy. Proponents say that, whatever its faults, Prohibition proved that the law can reduce the use of dangerous substances. Prohibition reduced alcohol consumption by 30% to 50%,<sup>103</sup> and led to a dramatic decline in both cirrhosis deaths and hospital admissions for al-

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<sup>98</sup> See Donald Ian MacDonald, *Marihuana Smoking Worse for Lungs*, 259 J.A.M.A. 3384 (June 17, 1988).

<sup>99</sup> See Herbert Hendin et al., *Living High: Daily Marijuana Use Among Adults* 155-159 (1987).

<sup>100</sup> See Mitchell Rosenthal, *The Logic of Legalization: A Matter of Perspective*, in *SEARCHING FOR ALTERNATIVES*, *supra* note 8, at 233-34.

<sup>101</sup> See Lester Grinspoon, *Marijuana in a Time of Psychopharmacological McCarthyism*, in *SEARCHING FOR ALTERNATIVES*, *supra* note 8, at 379.

<sup>102</sup> See Schmoke, *supra* note 81, at 40.

<sup>103</sup> See Paul Aaron and David Musto, *Temperance and Prohibition in America: A Historical Overview*, in *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* 164-65 (Mark H. Moore & Dean P. Gerstein, eds., 1981).

cohol related psychosis.<sup>104</sup> The repeal of Prohibition resulted in a substantial increase in alcohol consumption among both the privileged and the poor.<sup>105</sup> Data substantiates Lewis's claim: from 1916-1919, per capita consumption of alcohol for the drinking age population in the United States was 1.96 gallons. It dropped to 0.90 gallons during Prohibition, increased to 1.54 gallons between 1936-1941, and was up to 2.43 gallons by 1989.<sup>106</sup> To be sure Prohibition failed to eliminate drinking entirely and produced a black market. The lessons of the Prohibition era, however, should guide us in refining current policy rather than cause us to throw up our hands and hopelessly assume that history only repeats itself.

Proponents point out that the annual societal cost of tobacco and alcohol is 2.3 times that of prohibited drugs, and that the former group causes almost a hundred times as many deaths annually than the latter. Legalization of alcohol and tobacco has had serious effects on society, and the social harms caused by the legalization of presently illegal drugs could conceivably nullify any or most predicted benefits.

Furthermore, say proponents, legalization could increase the supply of drugs, thus lowering prices and putting drugs within the economic reach of more people.<sup>107</sup> Alcohol use since the end of Prohibition tends to support the conclusion that legalization will increase drug use.<sup>108</sup> This assertion gains support since the rate of use of tobacco (1:5) and alcohol (2:5) as well as the absolute number of users (46.3 and 105 million) far outstrips that of prohibited drugs (1:25 and 11.5 million).

Proponents of the current policy regarding illegal drugs argue that legalization and decriminalization of drugs in other countries failed to deal with the problems that substance abuse causes. Opponents of the current policy view these experiences in a more favorable light.

Probably the most frequently studied country in this regard is the Netherlands. Proponents of the current policy argue that the *de facto* decriminalization of soft drugs resulted from the absence of policy and belated adaptation to already ex-

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<sup>104</sup> See M.H. Moore, *Actually, Prohibition was a Success*, N.Y. TIMES, October 16, 1989, at A21.

<sup>105</sup> See ANDREW SINCLAIR, *PROHIBITION: THE ERA OF EXCESS* 398 (1962).

<sup>106</sup> See *LEGALIZE IT?*, *supra* note 12, at 109-110.

<sup>107</sup> See Grossman et al., *Rational Addiction and the Effect of Price on Consumption*, in *SEARCHING FOR ALTERNATIVES*, *supra* note 8, at 77 (citing a study of cigarette addiction and concluding that addictive substances are very responsive to price. The conclusion with cigarettes was that a 10% decrease in price yields between 7% and 8% increase in demand.). *But see* Jeffrey Miron, *Drug Legalization and the Consumption of Drugs: An Economist's Perspective*, in *SEARCHING FOR ALTERNATIVES*, *supra* note 8, at 74-75 (contending that data from the Prohibition era leads to the conclusion that drug legalization will cause only a small increase in drug usage). The Drug Policy Foundation Advising Board found as a result of a national poll that if there is a repeal of prohibition only 9.6% of the adult population might try marihuana and 1.7% might try cocaine. See *LEGALIZE IT?*, *supra* note 12, at 108.

<sup>108</sup> See Aaron & Musto, *supra* note 103.

isting circumstances, and not the outcome of rational, well-considered action.<sup>109</sup> "Drug tourists" from Germany, Belgium, Luxembourg and France flock to the Netherlands because of its permissive rules for soft drugs.<sup>110</sup> Although transnational comparisons can be unreliable or misleading,<sup>111</sup> I think it fair to say that Dutch drug policy has generally worked better than U.S. drug policy.<sup>112</sup> Dutch drug policy has evolved in partial opposition to the internationally dominant ideology of prohibitionism. While fully in line with international control policies against wholesale drug trafficking, Dutch policy on drug use has sought de-escalation and normalization. Problematic drug use is accepted as an inevitable, but limited and manageable, social and public health problem. Harm reduction is the core concept, and translates into extensive low level and non-conditional prescriptions for methadone, social-medical assistance for drug users, and large-scale free needle exchange programs.<sup>113</sup>

The average age of heroin addicts in the Netherlands has been increasing for almost a decade. HIV rates among Dutch addicts are dramatically lower than in the United States. Police do not waste resources on non-disruptive drug users but focus on major dealers or petty dealers who create public nuisances. Regulation of the decriminalized marijuana markets occurs in a quasi-legal fashion far more effectively and inexpensively than in the United States.<sup>114</sup> The level of use in the Netherlands is substantially lower than in countries waging a "war on drugs" such as the United States and, until recently, Germany.

Those who would maintain the current policy, point to the experiences of other countries. For example, in 1964 Great Britain instituted a policy of providing medical prescriptions to heroin addicts, but discontinued the policy in 1983 due to a 100% increase in the numbers of addicts and a corresponding increase in the crime rate.<sup>115</sup> Switzerland created a "zone" of legalized drug use in a Zurich park. The number of drug addicts increased from a few hundred in 1987 to over 20,000 by early 1992, of whom about 20% were foreigners. In ending this experiment, the authorities claimed an unacceptable increase in drug use, violence, crime and health care costs. Spain and Italy, which legalized the use (although not the distribution) of cocaine and heroin, have the highest rates of both drug use and overdose of all European countries. At least one of the United

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<sup>109</sup> See Marcel de Kort, *The Dutch Cannabis Debate*, 24 J. DRUG ISSUES 417 (1994).

<sup>110</sup> See Marlise Simon, *Drug Floodgates Open, Inundating the Dutch*, N.Y. TIMES, April 20, 1994, at A4.

<sup>111</sup> See LEGALIZE IT?, *supra* note 12, at 9-12.

<sup>112</sup> See, e.g., ARNOLD S. TREBACH, *THE GREAT DRUG WAR* 105-106 (1987).

<sup>113</sup> See Ethan Nadelman, *Thinking Seriously about Alternatives to Drug Prohibition*, DAEDALUS, Summer 1992, at 85, 88.

<sup>114</sup> See Ethan Nadelmann, *The War on Drugs Is Lost*, NATIONAL REVIEW, Feb. 12, 1996, at 39.

<sup>115</sup> See DRUG ENFORCEMENT ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, *DRUG LEGALIZATION: MYTHS AND MISCONCEPTIONS* 17 (1994). But see HORACE FREELAND JUDSON, *HEROIN ADDICTION IN BRITAIN: WHAT AMERICANS CAN LEARN FROM THE ENGLISH EXPERIENCE* (1974), for a different view.

States, Alaska, deemed its 1975 decriminalization of marihuana a failure. In 1990, Alaska voted to recriminalize the use of marihuana.<sup>116</sup>

But opponents of our current policy can point to the experience of the states that decriminalized the possession of small amounts of marihuana for personal consumption in the 1970s.<sup>117</sup> No increase in the level of marihuana use took place in these states. Indeed, marihuana consumption declined in those states, just as it did in states that retained criminal sanctions against marihuana.<sup>118</sup> The Netherlands saw similar results when it decriminalized marihuana consumption in 1976.<sup>119</sup>

The success of these programs depended at least partially on law enforcement support.<sup>120</sup> Unfortunately, such support is unlikely in the United States, since many law enforcement agencies fear that drug reform would endanger their jobs or funding.<sup>121</sup> One could cynically note that both the law enforcement community and the traffickers oppose legalization in all its varieties, although for different reasons.

#### E. *Is the Current Policy Basically Fair in Its Application?*

Proponents of the current policy argue that, whatever problems the current system creates, any change will work to the greater disadvantage of the least fortunate members of society. Legalization, they argue, will lower the price of drugs. Since drug use among the poor is more sensitive to price reduction, a proportionately higher number of people in those groups will use drugs as a result of legalization. Legalization will thus increase drug use most among the poor, and in this country, an obvious link exists between being poor and being a racial minority. Thus, the argument goes, the poor generally, and racial minorities in particular, will feel the heaviest brunt of drug use's physical harm to users, as well as the secondary costs of increased crime, accidents, and public nuisances.

Opponents of the current policy argue that it produces much more profound unfairness in society than any program of decriminalization or legalization would create.

Enforcement of prohibitions results in a devastating impact on the rights of the individual citizen. The control costs seriously threaten the preservation of values central to our form of government. The war on drugs has contributed to a distortion of the Fourth Amendment wholly inconsistent with its basic purposes. In particular, we have seen major changes in search and seizure law brought about

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<sup>116</sup> See *Mowing the Grass*, TIME, Nov. 19, 1990, at 47.

<sup>117</sup> See JAMES A. INCIARDI, THE WAR ON DRUGS II 43 (1992).

<sup>118</sup> See Ethan Nadelman, *Isn't It Time to Legalize Drugs?*, BOSTON GLOBE, Oct. 2, 1988, at A23.

<sup>119</sup> See *id.* See also Henk Jan van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717 (1990).

<sup>120</sup> See DiChiara & Galliher, *supra* note 67, at 70.

<sup>121</sup> See TREBACH, *supra* note 112, at 356-357.



by Congress' and the courts' zeal to support the enforcement of drug prohibition. I will not make a full laundry list, but courts have allowed the issuance of search warrants in drug cases based on anonymous tips;<sup>122</sup> jeopardized the attorney-client relationship through the forfeiture of fees;<sup>123</sup> and permitted grand juries to inquire into the attorney-client relationship.<sup>124</sup> Some of the most egregious actions committed by the government are in the area of forfeitures; courts have permitted abuses which seriously undermine principles of legality and due process.<sup>125</sup>

A Congressional regime requiring the imposition of high mandatory minimum sentences and a series of nondiscretionary sentencing guidelines has caused a substantial number of individual injustices in the federal courts. The rule of law is debased by the imposition of such disproportionate criminal sanctions.

As a judge, it troubles me that often the worst penalties for drug trafficking are not imposed on those most culpable. For example, one set of people controls the importation and sale of drugs, but quite another handles the low-level work. These are the so-called "mules," often poor people, conscripted to smuggle or sell drugs by powerful organizations. Depending on prosecutor preferences, many mules are charged, tried, and convicted in a futile attempt to reduce their numbers — futile because an inexhaustible supply of people are willing to take a chance on drug dealing in order to make a little money. Although I would be the last to justify their commission of crimes for profit, the fact is that these

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<sup>122</sup> See, e.g., *Illinois v. Gates*, 462 U.S. 213, 243-246 (1983) (upholding warrant issued based on a partially corroborated anonymous tip, and noting in that an anonymous letter could, by itself, support a finding of probable cause); *United States v. Johnson*, 64 F.3d 1120, 1124-26 (8th Cir. 1995) (suggesting that if anonymous tip is predictive in nature, and the prediction comes true, the tip is corroborated sufficiently to create reasonable suspicion and justify a search); *United States v. Williams*, 3 F.3d 69, 72 (3d Cir. 1993) (emphasizing the fact that anonymous informant was the housekeeper, thereby justifying police reliance on her information in affidavit to obtain warrant); *United States v. Bishop*, 890 F.2d 212, 216 (10th Cir. 1989) (upholding FBI agents' obtaining warrant based on anonymous tip under the "good faith exception"); *United States v. Martinez*, 764 F.2d 744, 746 (10th Cir. 1985) (affirming under "totality of circumstances" a magistrate's finding of probable cause to issue a search warrant based on an anonymous tip).

<sup>123</sup> See, e.g., *In re Forfeiture Hearing As To Caplin & Drysdale*, 837 F.2d 637, 641 (4th Cir. 1988) (en banc); *United States v. Nichols*, 841 F.2d 1485, 1492 (10th Cir. 1988) (construing provisions of the Comprehensive Forfeiture Act of 1984 as allowing the forfeiture of assets needed to pay for a defendant's counsel of choice).

<sup>124</sup> See, e.g., *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir. 1990) (concluding that information regarding attorney fee arrangements between drug dealers and their lawyers is not protected by attorney-client privilege and its disclosure does not violate realtors' clients' rights to counsel); *United States v. Saccoccia*, 898 F. Supp. 53, 62 (D.R.I. 1995) (concluding that the government should be allowed to depose counsel and require that they produce relevant documents in order to determine the amount, form and source of payments made to counsel in connection with representation of drug defendants).

<sup>125</sup> See *Application of Kingsley*, 802 F.2d 571 (1st Cir. 1986) (Torruella, J., dissenting).

people, who have little information to trade to the prosecutors, receive heavy sentences. The "big fish," if caught at all, work out deals with the government which may leave them with light sentences or even free from prosecution. This goes beyond mere injustice in the inequality of treatment. It is an essentially immoral outcome, and it tarnishes our entire judicial system.

The following may sound like an exaggeration, but I invite your consideration. Throughout the history of humankind, citizens have been willing to give up their collective civil rights in the name of, and in exchange for, an illusory achievement of "law and order." Seen from one viewpoint, there undoubtedly existed a large measure of law and order in Hitler's Germany or Trujillo's Dominican Republic. In the long run, however, the surrender of fundamental principles in exchange for temporary peace has proven to be short-sighted. I do not say we have reached such a crossroads, but I do say that when it comes to those accused of drug violations, I detect considerable public apathy regarding the upholding of rights cherished since this land became a constitutional Republic. People who sell drugs to children and the like are not very nice people, and I do not defend such heinous conduct. However, the nation does not, and cannot, have one constitution for the "good guys" and another for the "bad guys." Whenever we relax our fundamental standards to catch the latter, the net stretches wide enough to include the former. This is too high a price to pay, particularly in an attempt to patch the holes of an enforcement system which is simply not working well.

Opponents also argue that the war on drugs has had a lopsided impact on minorities.<sup>126</sup> Throughout the drug war, "non-whites [have been] arrested and imprisoned at four to five times the rate of whites, even though most drug crimes are committed by whites."<sup>127</sup> The racial impact of prohibition is further seen when one considers that one in three African-American males are imprisoned or under penal supervision for drug offenses.<sup>128</sup>

Seventy-three thousand African-Americans have contracted drug-related AIDS or have already died from it. Among people who inject drugs, African-Americans are about five times as likely as whites to be diagnosed with AIDS. In fact, for African-Americans the risk of getting AIDS is seven times greater than the risk of dying from an overdose.<sup>129</sup> At the very least, legalization of drugs would eliminate or greatly reduce multiple-needle use, the principal cause of AIDS infection among African-Americans.

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<sup>126</sup> See Ostrowski, *supra* note 33, at 315.

<sup>127</sup> McNamara, *supra* note 60, at 43; see also PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH STATISTICS SOURCEBOOK 62 (1995) (in 1993 illicit drug users were 74% white, 14% black and 9% Hispanic).

<sup>128</sup> See McNamara, *supra* note 60, at 43.

<sup>129</sup> See Schmoke, *supra* note 81, at 41.

## III. TENTATIVE CONCLUSIONS

No important ideological battle has been won solely because one side has better statistics than the other. Moreover, there are limits to our prudent reliance on statistics. What the hard sciences and the social sciences proclaim as true in one age often turns out to be untrue after further research. We often discard policies based on those proclamations, only to find that additional information removes the scientific underpinnings of the new policies. For example, our society generally indulged alcohol consumption until fairly recently. Then the conventional medical wisdom began to counsel total abstinence, only to recently proclaim the benefits of moderate consumption of red wine in avoiding heart attacks. Prior to the Surgeon General's 1964 report on cigarettes, many authorities touted smoking as helpful to relieving stress. Sociologists and criminologists once had great faith that many criminals could be rehabilitated. Congress thus provided very few restrictions on the criminal sentences judges could impose, in order to let parole authorities determine when inmates should be released. In the last fifteen years, that whole model has been discarded.

The current Congressional policy regarding illegal drugs is apparently set in stone with no intention of engaging in further assessment of the issues raised by prohibition. Thus, § 5011 of the Anti-Drug Abuse Act proclaims that "Congress finds that legalization of illegal drugs, on the Federal or State level, is an unconscionable surrender in a war in which, for the future of our country and the lives of our children, there can be no substitute for total victory."<sup>130</sup> This rhetoric was followed by a proclamation in § 5251(B): "[i]t is the declared policy of the United States to create a Drug-Free America by 1995."<sup>131</sup> No one seems to have noticed the passing of this deadline without its inflexible goal even being approached, much less reached.

We must avoid the comfortable assumption that if only we can gather and analyze enough data, we will find the solution to our problems. Empirical evidence sheds important light on whether the present policies are ineffective, but the people of this country require more than empirical evidence to decide whether current policies are inconsistent with the principles of democracy and whether our democratic society is capable of assessing the profound policy problems it faces.

Many difficult questions are not readily answered by most proponents of legalization or criminalization, but these questions are clearly relevant to the problem:

What forms of governmental regulation, if any, are appropriate instead of prohibition? To what degree, if any, should private distribution of drugs be permitted? As to importation, what controls are appropriate? Is a regulatory regime similar to one now used to control alcoholic beverages appropriate for some, if not all, drugs? How should a new regulatory regime treat children, adolescents or pregnant women? What kinds of prevention and treat-

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<sup>130</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5011, 102 Stat. 4181, 4296.

<sup>131</sup> *Id.*

ment programs should there be and how should they be funded?<sup>132</sup>

Unfortunately, much of the public discussion of these issues has been shrouded in semi-hysteria, not unlike that engendered by Joseph McCarthy's senatorial investigations about national security in the 1950s.

I believe that Judge Martin Haines' perceptive comments in an article in the *New Jersey Law Journal*<sup>133</sup> are appropriate:

[The] decades-long indoctrination of the public in the need for a drug war as the only solution to the very serious problem of drugs has had serious consequences. It has prevented the consideration of any clearly necessary, intelligent alternatives to a war that has not worked. Few public officials dare to advance alternatives. Doing so threatens the loss of the next election, or the next appointment.<sup>134</sup>

#### IV. CONCLUSION

Based upon my experience as a judge and the relevant authorities cited, the following are my tentative conclusions:

1. There are mountains of conflicting evidence and views about the proper course for this country's drug policy. This demonstrates the imperative need for an objective multidisciplinary study to assess the facts independently, and recommend courses of conduct to be followed. This study requires a bipartisan commission, appointed jointly by Congress and the Executive, composed of persons of unquestioned prestige. As part of this process there must be a truly national debate to create consciousness and consensus about these problems, and to urge people to keep an open mind about the issues.<sup>135</sup> Lastly, the government must act upon the recommendations made by such a commission. Our political leadership needs the courage to let the chips fall where they may and to deal with them once fallen. Perhaps a national referendum might determine the issue of decriminalization.

2. A need exists for pilot tests of limited decriminalization, probably commencing with marihuana, and always excluding minors.<sup>136</sup> Any such tests should take care that in treating people differently, even for test purposes, their rights to due process and equal protection are not sacrificed.<sup>137</sup>

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<sup>132</sup> THE COMMITTEE ON DRUGS AND THE LAW, *A Wiser Course: Ending Drug Prohibition*, 49 REC. ASS'N. B. N.Y.C. 521, 525 (June 1994).

<sup>133</sup> Martin Haines, *Drug War: America's War of Self Deception*, 134 N.J.L.J. 616, 632 (June 21, 1993).

<sup>134</sup> *Id.*

<sup>135</sup> See Anthony Lewis, *Futility of the Drug War*, N.Y. TIMES, Feb. 5, 1996, at A15.

<sup>136</sup> See COMMITTEE ON SUBSTANCE ABUSE AND HABITUAL BEHAVIOR, NAT'L RESEARCH COUNCIL, AN ANALYSIS OF MARIHUANA POLICY 16-30 (1982); see also NAT'L COMMISSION ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA, PROBLEM IN PERSPECTIVE 458-461 (1973); REPORT OF THE INDIAN HEMP DRUGS COMMISSION (1894) cited in LEGALIZE IT?, *supra* note 8, at 103-104.

<sup>137</sup> See FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE

3. Chronic abuse of illegal drugs should be treated in a fashion similar to other chronic diseases, like alcoholism, and countermeasures appropriate to such health problems should be implemented to a greater extent.

4. Pending the definitive study proposed, the funding of enforcement efforts should shift toward an intense educational campaign at all levels.<sup>138</sup> The availability of funds to escalate treatment levels aimed at rehabilitation must also greatly increase.

#### V. EPILOGUE

Two balloonists drifting over Maine came upon a farmer digging potatoes. They called down, asking him where they were, but the farmer appeared not to notice them and continued digging. They insisted, "Hey you, where are we?" Without missing a stroke or looking up, the farmer answered, "In a balloon, you damned fools!" Are we in a balloon, floating in a dream above reality, without a notion as to where we are or where we are going?

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LAW, FEDERAL JUDICIAL CENTER, EXPERIMENTATION IN THE LAW 26-27 (1981).

<sup>138</sup> See James A. Inciardi and Duane C. McBride, *Legalization: A High Risk Alternative in the War On Drugs*, 32 AM. BEHAVIORAL SCIENTIST 259, 285 (1989); see also Schulhofer, *supra* note 58, at 208.