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ARTICLES

DÉJÀ VU: A FEDERAL JUDGE REVISITS THE WAR ON DRUGS, OR LIFE IN A BALLOON*

HONORABLE JUAN R. TORRUELLA**

The so-called “War on Drugs” is a perfect example to which one can apply the semi-humorous play on words, “we have met the enemy and he is us.”¹ Not much more is humorous about this “War.”

Fourteen years ago, when in the course of a lecture at Colby College in Maine I first made public my private views regarding this subject, it was already clear to me that we, as a society, were our own worst enemy in dealing with this overpowering social problem. I also suspected, although not to the extent that I perceive today, that nothing that I was doing in support of this “War,” which was mostly enforcing our laws and putting people behind bars, would be likely to change the situation in any measurable degree. I later developed my presentation into a law review article published by several academic journals.² After a detailed analysis of the statistics related to the consumption of both legal and illegal drugs in the United States, I proposed that an “objective multi-disciplinary study” be carried out by a bipartisan commission appointed by the Executive Branch and Congress to “assess the facts independently, and recommend courses of conduct” to confront the issues raised by the illegal drug problem.³ I further suggested that, in the meantime, pilot programs

* See generally Juan R. Torruella, *One Judge’s Attempt at a Rational Discussion of the So-Called War on Drugs*, 6 B.U. PUB. INT. L. J. 1, 28 (1996); 14 YALE J. ON REG. 235, 267 (1997); 66 REV. JUR. U.P.R. 1, 39 (1996).

** Judge, U.S. Court of Appeals for the First Circuit. The Author wishes to acknowledge the support of Margarita Mercado, Ana Cristina Gomez, and Guillermo Rebollo Gil for their help in researching and editing this article. The opinions and content are attributable only to the Author.

¹ Attributed to Walt Kelly, from a 1970 cartoon used in an Earth Day poster. BARTLETT’S FAMILIAR QUOTATIONS, 418 n.1 (John Bartlett and Justin Kaplan, eds., 17th ed. 2002). The original quote, “We have met the enemy and they are ours,” is a message attributed to Commodore Perry announcing his victory at the Battle of Lake Erie on September 10, 1813. *Id.* at 418.

² See Juan R. Torruella, *One Judge’s Attempt at a Rational Discussion of the So-Called War on Drugs*, 6 B.U. PUB. INT. L. J. 1, 28 (1996).

³ *Id.* at 27.

decriminalizing some drugs, such as marijuana, be considered.⁴ Of course, not much has happened as far as the suggested commission⁵ or study are concerned, but some progress has been made in some states as far as decriminalizing marijuana possession for personal or medical reasons.

The Colby lecture and my article received a modicum of notoriety, not so much because of their content, which was hardly radical with its ultimately moderate proposals that were certainly not new, but rather because I was then the Chief Judge of the U.S. Court of Appeals for the First Circuit. Undoubtedly, certain segments of the public were taken aback, perhaps disapproving that someone in my position was speaking out on what was obviously a controversial subject, and further, because I criticized, however mildly, a governmental policy and course of action that at first glance appeared enshrined in virtuosity. This reaction was not unexpected on my part, for I must confess that when I chose to speak out on this matter, I was hoping to jump start much needed public discussion, even at the risk of some disapproval for my views. I believed then, and still do, that the citizenry benefits from receiving the perspective of one whose duty it is to enforce the laws that provide the framework for this "War."

Sufficient time has passed since my last formal incursion into this subject to allow me to take stock of where we stand today on this "War on Drugs," update my viewpoint as to the "War's" success or failure, and express a more definite and less timid course of action than the one I adopted in my previous article on this question. Although I will be principally discussing the subject as it affects the United States, it is obvious that on this shrinking planet such a myopic view of a problem of international dimensions can hardly be geographically con-

⁴ *Id.*

⁵ To my knowledge, the closest legislation has been the "National Criminal Justice Commission Act of 2010" proposed by Senator Jim Webb on March 26, 2009. National Criminal Justice Commission of 2010, S. 714, 111th Cong. (2010). The bill would "create a blue-ribbon commission charged with undertaking an 18-month, top-to bottom review of our entire criminal justice system. Its task [would] be to propose *concrete*, wide-ranging reforms designed to responsibly reduce the overall incarceration rate; improve federal and local responses to international and domestic gang violence; restructure our approach to drug policy; improve the treatment of mental illness; improve prison administration; and, establish a system for reintegrating ex-offenders." Press Release, Sen. Jim Webb, Sen. Webb's National Criminal Justice Commission Act of 2009, Summary (Mar. 2009), [http://www.pretial.org/Docs/Documents/nationa%20commission%20on%20criminal%20justic\[1\].pdf](http://www.pretial.org/Docs/Documents/nationa%20commission%20on%20criminal%20justic[1].pdf). A companion bill was passed by the House of Representatives on July 27, 2010. Press Release, Jim Webb, U.S. Senator for Virginia, Webb's National Criminal Justice Commission Act Wins Approval in House of Representatives (July 28, 2010), <http://webb.senate.gov/newsroom/pressreleases/07-28-2010-02.cfm?renderforprint=1>. See Senator Jim Webb, Floor Speech to Introduce the National Criminal Justice Commission Act of 2009 (March 26, 2009), <http://webb.senate.gov/issuesandlegislation/Senator-Webbs-floor-speech-introducing-the-criminal-justice-legislation.cfm>, for Senator Webb's cogent remarks upon the introduction of this bill in the Senate.

tained in such a manner.⁶

THE WORLD OF ILLEGAL DRUGS

I initiate the discussion by referencing two United Nations statistics: (1) it is estimated that 3.5 to 5.7% of the world's adult population uses illegal drugs,⁷ and (2) that this illegal industry generates \$320 *billion* in annual revenues.⁸ To put these figures in context, approximately 250 *million* persons⁹ use illicit drugs worldwide, and the annual revenue generated by the sale of this illegal contraband is higher than the annual public budgets of Colombia, the Dominican Republic, India, Switzerland, and Venezuela, to mention just a few examples.¹⁰ Regarding this last point, perhaps it is worth remembering that even a small part of the economic power generated by these unlawful enterprises allowed the Escobar drug cartel in Colombia in 1986 to offer to pay that country's \$10 billion national debt in exchange for the freedom to engage in its nefarious,¹¹ but extremely profitable, activities.¹² It is estimated that the Mexican and Colombian drug cartels alone generate between \$18 and \$39 *billion* from the wholesale distribution of illicit drugs.¹³

⁶ See generally EUROPEAN COMMISSION, A REPORT ON GLOBAL ILLICIT DRUG MARKETS 1998-2007 (Peter Reuter & Franz Trautmann eds., European Communities 2009) [hereinafter EUROPEAN COMMISSION REPORT 1998-2007]; see also *id.* at 31 tbl.2; *Failed States and Failed Policies: How to Stop the Drug Wars*, ECONOMIST (Mar. 5, 2009), <http://economist.com/node/13237193>.

⁷ U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 12, 123 (2010).

⁸ U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 170 (2007) [hereinafter WORLD DRUG REPORT 2007].

⁹ As of September 1, 2010, the world population was estimated at 6.86 billion persons. World POPClock Projection, U.S. CENSUS BUREAU, <http://www.census.gov/ipc/www/pop-clockworld.html> (last visited Feb. 17, 2011).

¹⁰ C.I.A.—THE WORLD FACTBOOK, COUNTRY PROFILES: BUDGET (2010), available at: https://www.cia.gov/library/publications/the-world-factbook/fields/print_2056.html [hereinafter WORLD FACTBOOK].

¹¹ See Adam Dunn, *Reporter Pursues Escobar Story in "Killing Pablo,"* CNN.COM (May 31, 2001), http://articles.cnn.com/2001-05-31/entertainment/killing.pablo_1_killing-pablo-colombian-government-pablo-escobar?_s=PM:SHOWBIZ.

¹² The profit margin in the markup of the raw materials from production to retail sale (\$650/kilogram for cocaine leaf in Colombia to \$120,000 for 100 milligrams of pure retail cocaine powder in Chicago; and, \$500/kilogram for opium in Afghanistan to \$135,000 for 100 milligrams of pure retail heroin powder in London [circa 2000]) is probably only surpassed by items such as gold, uranium and diamonds. See EUROPEAN COMMISSION, REPORT 1998-2007, *supra* note 6, at 23 tbl.1. However, it is worth noting that most of the domestic distribution revenues go to the lowest levels of the system to compensate for the higher risks of penal sanctions and violence from competing organizations, but those at the higher echelons make the great individual fortunes generated by the illegal drug trade. See *id.* at n.6.

¹³ NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 49 (2009).

WHAT IS THE GOAL THAT WE HOPE TO ACHIEVE BY PURSUING THE "WAR ON DRUGS"?

Analysis of the dual factors brought to light by the cited U.N. statistics, namely, (1) the huge number of people using illegal drugs (which in turn creates the market forces that generate large-scale unlawful commerce), and (2) the tremendous profits rewarding the risk-takers and entrepreneurs¹⁴ that engage in this illegal trafficking,¹⁵ holds the key to understanding and dealing with (notice I do not use the word "resolving") the issue before us. This analysis must commence by inquiring as to the goals pursued by those that promote the present strategy.

In 1998, in what I believe was an overly optimistic and unrealistic goal, the U.N. declared that its stated purpose in promoting and backing the "War on Drugs" at an international level, was the achievement of "a world free of drugs." By the year 2008, the U.N. pledged to "eliminate or significantly reduce the manufacturing, marketing, and trafficking of psychotropic substances."¹⁶ As we now know, and surely suspected at the time, if one was at all knowledgeable in this field, this was a euphoric vision that was quickly tempered by the realities of the international illegal drug trade. When the U.N. made its aspirational announcement in 1998, the total world production of opium was approximately 4,346 metric tons, and the production of cocaine was approximately 825 metric tons.¹⁷ By 2007, production had *increased* to 8,870 metric tons of opium, and 994 metric tons of cocaine.¹⁸ In the case of marijuana, although produced in 170 countries, it was difficult to quantify with any degree of accuracy whether production increased or decreased during this 1998-2007 period because producers grow it in small plots or indoors in hydroponic operations.¹⁹

A brief survey of the major problem countries, although hardly comprehensive, is worthwhile to give some idea of the global nature and scope of this intractable problem:²⁰

¹⁴ See *Feds Net More Than \$3.5 Million in Cash Smuggling Operation*, PUERTO RICO DAILY SUN, Nov. 7, 2009, at 6.

¹⁵ See EUROPEAN COMMISSION, REPORT 1998-2007, *supra* note 6, at 12.

¹⁶ U.N. Non-Gov't Liaison Serv., *Countering the World Drug Problem Together*, NGLS ROUNDUP, July 1998, at 6, <http://www.un-ngls.org/orf/pdf/27drugs.pdf>.

¹⁷ EUROPEAN COMMISSION, REPORT 1998-2007, *supra* note 6, at 31 tbl.2.

¹⁸ *Id.* See also WORLD FACTBOOK, FIELD LISTING: ILLICIT DRUGS, available at: <https://www.cia.gov/library/publications/the-world-factbook/fields/2086.html?countryName=&countryCode=®ionCode=X>. The C.I.A. World FactBook estimated 865 metric tons for cocaine and 1,000 metric tons for heroin in 2007. *Id.*

¹⁹ EUROPEAN COMMISSION, REPORT 1998-2007, *supra* note 6, at 13.

²⁰ The following information surveying the major problem countries was obtained from the CIA World Factbook. See WORLD FACTBOOK, FIELD LISTING: ILLICIT DRUGS, <https://www.cia.gov/library/publications/the-worldfactbook/fields/2086.html?countryName=&countryCode=®ionCode=X>. The CIA's listing is hardly comprehensive. A brief perusal

Afghanistan. Afghanistan is the world's largest producer of opium, even after a 22% decrease in the acreage of poppies under cultivation in 2008, which reduction was mainly caused by reason of the "other War." In 2007, Afghanistan produced 648 metric tons of heroin. The Taliban—notwithstanding its allegedly Islamic fundamentalist composition—as well as other antigovernment groups, participate in and profit from the opiate trade, which is a key source of funding for the Taliban, at least inside Afghanistan. Widespread corruption and political instability impede counter-drug efforts.

Burma. Next to Afghanistan, Burma is the world's second largest producer of illicit opium. In 2008, it produced 340 metric tons, an increase of 26% over the prior year. The illicit drug trade is a major source of funding for the area controlled by the United Wa State Army, located in the northeastern semi-independent part of the country bordering on the People's Republic of China. Burma is a major source of heroin for Southeast Asia and Europe.

Colombia. Columbia is the world's leading coca leaf cultivator with 167,000 hectares under cultivation in 2007, a 6% increase over 2006, notwithstanding an aggressive aerial eradication program funded by the United States, which in 2005 alone targeted close to 130,000 hectares. Colombian sources produce 535 metric tons of cocaine and supply nearly all of the U.S. market, as well as much of European consumption. Colombia has also become an important producer of opium with most of the heroin extracted going to the United States.

Dominican Republic. The Dominican Republic is an important transshipment point for drugs from South America destined for the U.S. and European markets. It has replaced Puerto Rico as a transshipment point because of Puerto Rican law enforcement's aggressive efforts.²¹ The Dominican Republic is also used as a transfer point for ecstasy shipments from Belgium and the Netherlands headed for the U.S. and Canadian markets. It is also a major money laundering site for Colombian drug cartels.

India. India is the world's largest producer of licit opium, a reminiscence of the 19th Century Opium Wars. An undetermined quantity of legally produced opium is believed to be diverted to illicit international markets. India is also a major illicit producer of methaqualone.

Iran. Despite vigorous enforcement and interdiction on the Afghanistan border, Iran is an important transshipment point for heroin to Southeast Asia. Iran also suffers from one of the highest opiate addiction rates in the world.

of the Factbook reveals that practically all countries are somehow involved in some facet of the illegal drug trade, be it producing, acting as a transit point, or money laundering the illicit gains, or any combination of these activities.

²¹ See Lorraine Blasor, *Drug Czar Chief: Cocaine Transit Via P.R. Down, Threat Reduced*, THE SAN JUAN STAR, May 27, 1998 (Drug Czar Bary McCaffey, said "the \$92 million the federal government has pumped into Puerto Rico to fight drug smuggling, plus an additional \$8 million for the Drug Trafficking High Intensity Zone office here, is 'beginning to pay off.'").

Mexico. Mexico is a major drug producing nation and transshipment point into the United States; 90% of the cocaine imported into this country comes from South American sources. In 2007, Mexico produced 19 metric tons of heroin for importation mostly into the western U.S., and about 15,800 metric tons of marijuana, also for U.S. consumption. Mexican drug cartels are reportedly operating widely throughout the United States with varied intensity. Cartels are the largest suppliers of cocaine, marijuana, and methamphetamine to the U.S. market. Mexico is also an important money laundering base for the illicit drug industry.

Netherlands. The Netherlands is a major source of U.S. bound ecstasy, as well as a significant money laundering center.

Panama. Panama is a major cocaine transshipment point and a primary money laundering center for narcotics revenue, particularly within the Colón Free Zone with its concentration of international banks.

Peru. Until 1996, Peru was the world's largest producer of coca leaf, but it is now second behind Colombia, with about 210 metric tons of cocaine produced in 2007. Although some of the cocaine ends up in the U.S. markets, increasingly, it is being shipped to Brazil, Chile, Argentina, and Bolivia, or transshipped to Europe and Africa.

South Africa. South Africa is the world's largest market for illicit methacholine (a pharmaceutical depressant, referred to as "madrax" in Southeast Asia and Africa) imported from India through various East African countries.

Spain. Despite rigorous law enforcement efforts, Spain is a major transshipment point for cocaine and hashish (the resinous exudates of the cannabis or hemp plant) destined for the European market. It is also a major money laundering site for Colombian drug cartels and organized crime.

Switzerland. Despite foreign pressure, Switzerland remains an important repository of illegal drug proceeds and layered money laundering schemes because of its banking laws.

United States. The U.S. is the world's largest consumer of cocaine (shipped from Colombia through Mexico and the Caribbean). It is also a major consumer of Colombian and Mexican heroin, marijuana, ecstasy, and methamphetamine. The U.S. is also an illicit producer of marijuana, depressants, stimulants, hallucinogens, and methamphetamine, mostly for local consumption. Despite strict banking controls, there is a tremendous amount of money laundering taking place by various illicit drug organizations and organized crime.

This general trend in the increase in production of illicit drugs was noted by the European Commission in 2008 in its Report on Global Illicit Drug Markets. Covering the period from 1998-2007, the European Commission stated categorically that its study "found no evidence that the global drug problem was re-

duced.”²² This conclusion was not of uniform applicability throughout the world or throughout this period, as in fact the drug problem generally improved in rich countries, while worsening in a few large developing or transitional countries.²³ Nevertheless, perhaps because the U.N. realized that its stated goal of a “drug free world” was unattainable, in 2009, the U.N. did an about-face, and embraced drug decriminalization as an alternative to the penal model it previously supported.²⁴ In a report, the United Nations lavished praise on Portugal’s innovative drug strategy that, since 2001, had removed criminal sanctions for personal drug possession, emphasizing instead treatment over incarceration.²⁵

The agenda of the United States, the originator of the “War on Drugs” and the prime exponent of this strategy since then, has remained substantially unaltered since its commencement in the early 1970s. In 1988, Congress stated: “The 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 there can be no substitute for total victory.”²⁶ This rhetoric was followed by a proclamation to the effect that: “It is the declared policy of the United States to create a Drug-Free America by 1998.”²⁷ In support of its prohibitionist model, the United States became a party to several treaties²⁸ and multi-national covenants,²⁹ and enacted domestic statutes³⁰ clearly aimed at promoting a drug-free society, intolerant of *certain* selectively designated

²² EUROPEAN COMMISSION, REPORT 1998-2007, *supra* note 6, at 9.

²³ *Id.*

²⁴ U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 163 (2009).

²⁵ *Id.* at 168. See also Ryan Grim, *UN Backs Decriminalization in World Drug Report* (June 24, 2009, 9:06 AM) http://www.huffingtonpost.com/2009/06/24/un-backs-drug-decriminali_n_220013.html?view=print (last updated July 25, 2009, 5:12 AM).

²⁶ Anti-Drug Abuse Act of 1988, 21 U.S.C. § 1501 (1994).

²⁷ *Id.* § 1502 note.

²⁸ See, e.g., Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407 (*amended by* 1972 Protocol Amending the Single Convention on Narcotic Drugs, March 25, 1972); Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543; U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 20, 1988, 1582 U.N.T.S. 95.

²⁹ By 1998, the United States was a party to nineteen maritime drug interdiction agreements. INTERNATIONAL CRIME CONTROL STRATEGY – JUNE 1998, PART V DENYING SAFE HAVEN TO INTERNATIONAL CRIMINALS, THE WHITE HOUSE, INTERNATIONAL CRIME CONTROL STRATEGY (June 1998), <http://www.fas.org/irp/offdocs/iccs/iccsv.html>. See also George K. Walker, *Self-defense, The Law of Armed Conflict and Port Security*, 5 S.C. J. INT’L L. & BUS. 347, 379 (2009) (“The United States has negotiated over 20 bilateral treaties dealing with drug traffic interdiction. These variously allow boarding, pursuit, entry to investigate, overflight and orders to land aircraft, seaward of the territorial sea of a state party, with western hemisphere countries and States with Western Hemisphere dependencies.”).

³⁰ See, e.g., Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513 84, Stat. 1236 (1970) (codified at 21 U.S.C. §§ 801-971).

drugs³¹ that were earmarked as subject to criminal proscription. Although this is the policy promoted and followed by the Federal Government³² and most of the states, as will be presently discussed, fifteen U.S. jurisdictions have experimented with various schemes aimed at the decriminalization and medicalization of marijuana.³³ The legitimacy of these state laws in light of the federal government's constitutional supremacy in this field seems to place these experiments in legal doubt, although the present administration announced in October 2009 that federal prosecutors would no longer prosecute medical users in those states.³⁴ Nevertheless, these programs bear close scrutiny given the other issues (other than the legality of these programs) that they raise, and perhaps, solve.³⁵

³¹ Alcohol and tobacco were, of course, controlled, but not proscribed except for minors.

³² As a point of historical fact, under the Marijuana Tax Act of 1937, transfers of marijuana by physicians and dentists to their patients were legal if the doctor or dentist had paid a tax on the marijuana of \$1 a year. Marijuana Tax Act of 1937, Pub. L. No. 238, ch.553, § 2, 50 Stat. 551 (1937). Transfers by a marijuana dealer directly to a patient were also legal if done pursuant to a prescription by a doctor or dentist who was registered under the Act. *Id.* § 6(b). For a cogent history of drug legislation in the United States, see Margarita Mercado Echegaray, *Drug Prohibition In America: Federal Drug Policy And Its Consequences*, 75 REV. JUR. U.P.R. 1215 (2006).

³³ *Alaska* (Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act, ALASKA STAT. ANN. §§ 17.37.010-17.37.080 (West 2005)); *Arizona* (Drug Medicalization, Prevention and Control Act, ARIZ. REV. STAT. ANN. §§ 13-3412 (2005) (West)); *California* (Compassionate Use Act, CAL. HEALTH & SAFETY CODE. §11362.5 (West 2005)); *Colorado* (COL. CONST. art. XVIII, § 14; COLO. REV. STAT. ANN. § 18-18-406.3 (West 2006)); *Hawaii* (Medical Use of Marijuana Act, HAW. REV. STAT. § 329-121-329-128 (West 2005)); *Maine* (Maine Medical Marijuana Act, ME. REV. STAT. ANN. 22 § 2383-B(5) (2005)); *Massachusetts* (Massachusetts Medical Marijuana Act); *Michigan* (Michigan Medical Marijuana Act, MICH. COMP. LAWS §§ 33.26421-333.26430 (2008)); *Montana* (Montana Medical Marijuana Act, MONT. CODE ANN. §§ 50-46-101-50-46-210 (2005)); *Nevada* (Medical Use of Marijuana Act, NEV. REV. STAT. §§ 453A.010-453A.810 (2005)); *New Jersey* (New Jersey Compassionate Use Medical Marijuana Act, N.J. STAT. ANN. § 24:61-1-Pub. L. (West 2010)); *New Mexico* (Lynn and Erin Compassionate Use Act, N.M. STAT. ANN. §§ 26-2B-1-26-2B-7 (West 2007)); *Oregon* (Oregon Medical Marijuana Act, OR. REV. STAT. ANN. §§ 475.300-475.346 (West 2005)); *Rhode Island* (The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. GEN. LAWS ANN. § 28.6 (West 2005)); *Vermont* (Marijuana Use by Persons with Severe Illness Act, VT. STAT. ANN. 18 §§ 4472-4474d (West 2005)); and, *Washington* (Washington Medical Use of Marijuana Act, WAS. REV. CODE ANN. §§ 69.51A.005-69.51A.092 (West 2005)), as well as the *District of Columbia* (Legalization of Marijuana for Medical Treatment Initiative Amendment Act of 2010, D.C. Res. 18-399).

³⁴ Memorandum from the U.S. Dep't of Justice, Office of the Deputy General for Selected U.S. Attorneys, (October 19, 2009), (*available at* <http://blogs.usdoj.gov/blog/archives/192>).

³⁵ See Zachary Malinowski, *Growing Pains: R.I. Marijuana Growers, Patients Double in a Year*, PROVIDENCE JOURNAL, Sept. 17, 2010; Christopher J. Girard, *Thousands Attend*

HAVE WE ACCOMPLISHED OUR GOAL?

In my view, the one proposition that seems to be beyond ken is that if the purpose of the “War on Drugs” has been to substantially reduce or even eradicate illegal drug production and consumption, then the “War on Drugs” has failed in accomplishing or even coming close to its goal. I do not see how we can avoid the conclusion that the “War on Drugs” has not only long been lost, but that our defeat has for some time been at high human³⁶ and material costs. This conclusion is neither a new or startling proposition, nor is it defeatist, as is claimed by some. It is, rather, standing up and facing the unforgiving facts.³⁷

In this respect, it is essential to be mindful that the basic underlying law that permeates and dictates the entire illegal drug conundrum, is the *economic law of supply and demand, not the laws that I help to enforce*. To this end, it is the huge American consumer pool,³⁸ most of whose members are never held accountable for creating the demand for the “product,” which in turn fuels the motor generating this entire dilemma. As has been aptly stated, “the United States remains the source of the appetite that sets the industry in motion.”³⁹

Marijuana Rally, Police Arrest Two, Issue 34 Citations at Gathering, BOSTON GLOBE, Sept. 19, 2010.

³⁶ *Mexico: 28,000 Killed in Drug Violence Since 2008*, P.R. DAILY SUN, Aug. 4, 2010, at 7, <http://www.prdailysun.com/?page=news.article&id=1280900829>; Tracy Wilkinson, *Revenge Killings Raise Stakes in Mexico Drug War, Cartel Suspected in Slaying of Family of Late Hero*, THE BOSTON GLOBE, Dec. 23, 2009, http://www.boston.com/news/world/latinamerica/articles/2009/12/23/family_of_hero_of_drug_war_in_mexico_slain/ (Cartel’s message is loud and clear to troops involved). In large part, this blood bath in Mexico has been the result of the success of the Drug Enforcement Administration in squeezing off the Caribbean drug conduit into the United States, and by default re-routing it from South America into the United States through Mexico. See Kevin Hartnett, *From Small Corners to Big Cartels, the Drug War’s Unintended Consequences*, PENN GAZETTE, Nov./Dec. 2009, <http://www.upenn.edu/gazette/1109/gaz04.html>.

³⁷ See Robert W. Sweet, *Number Five in The War on Drugs Is Lost*, NAT’L REV., Feb. 12, 1996, at 13. The author, a distinguished U.S. District judge in the Southern District of New York, was one of the pioneer voices in denouncing the floundering of our drug policies. See also STEVEN B. DUKE & ALBERT G. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993); Nichols D. Kristof, Op-Ed, *Drugs Won the War*, N.Y. TIMES, June 13, 2009, <http://www.nytimes.com/2009/06/14/opinion/14kristof.html>; Kurt Schmoke, *Number Three in The War on Drugs Is Lost*, NAT’L REV. Feb. 12, 1996, at 8. The author, a former mayor of the City of Baltimore, supported decriminalization and other drug reform policies while in office.

³⁸ Although my present observation is directed at the U.S. scenario alone, this is obviously a tunnel vision of the problem, for there is a very substantial European market, as well as elsewhere throughout the World. See generally EUROPEAN COMMISSION, REPORT 1998-2007, *supra* note 6, at 11-12.

³⁹ Hartnett, *supra* note 36. In 2008, 16% of Americans had used cocaine, a rate four times higher than any country in the world. *Id.* Furthermore, apart from New Zealand, whose inhabitants match Americans puff for puff of marijuana at a 42% rate, no other coun-

One perhaps not entirely satisfactory way of measuring the success or failure of the conduct of this “War” in the intervening years since I last expressed myself on this issue, is to look at the available comparative statistics between the two time periods, conscious of course of the fact that in the shadowy world of illegal drugs and their use, statistics are particularly suspect.⁴⁰ There are, however, certain hard facts which cannot be easily disputed. We start with an accounting of the material costs of the “War.”

WHAT HAVE BEEN THE COSTS TO THE AMERICAN TAXPAYER OF THE “WAR ON DRUGS”?

In 1973, when the “War” commenced, the total federal expenditures on enforcement of the illegal drug laws of the United States were less than \$100 million.⁴¹ By 1994, this figure had risen to \$12.184 *billion* annually, more than 121 times the 1973 number.⁴² That amount increased to \$14 *billion* only two years later in 1996 when I wrote my original article on this subject.⁴³ I will not detail the step by dreary step upward of this sum since 1996 to the present, suffice it to say that the law enforcement expenditures of the United States had risen to \$44.1 *billion* yearly by 2009, with a total of approximately \$1 *trillion* spent since the commencement of the “War” in 1973.⁴⁴ Furthermore, state expenditures related to illegal drug enforcement were estimated in a 1987 study at

try comes close to us in marijuana usage, not even the liberal Dutch at 20%, or the Italians, where fewer than one in ten have ever used it. *Id.* See also News Release, Substance Abuse and Mental Health Servs. Admin., U.S. Dep’t of Health and Human Servs., National Survey Reveals Increase in Substance Use from 2008-2009 (Sept. 16, 2010), <http://www.samhsa.gov/newsroom/advisories/1009152021.aspx>. I am again reminded of the *ri-posté* of the lawyer in El Salvador, which I refer to in my earlier article on this subject, when he said to me on occasion of my lecturing in his country during the mid-1980’s, and in answer to my statement that the United States was providing his country with all kinds of material help in fighting the “War on Drugs”: “Excuse me your Honor, that is not the help that 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.” Torruella, *supra* note 2, at 4.

⁴⁰ EUROPEAN COMMISSION, REPORT 1998-2007, *supra* note 6, at 13-14.

⁴¹ BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1995 (115th ed. 1995) [hereinafter STATISTICAL ABSTRACT]; Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 574 (1995).

⁴² DRUGS & CRIME CLEARINGHOUSE, OFFICE OF NAT’L DRUG CONTROL POLICY, FACT SHEET: DRUG DATA SUMMARY 5 (June 1995).

⁴³ *Id.* at 9; see also Schmoke, *supra* note 37, at 40-41.

⁴⁴ See Andrew Gaug, *War on Drug Rages On*, NEWS-PRESS NOW.COM, <http://www.newspressnow.com/news/2010/aug/08/war-drugs> (last visited Feb. 9, 2011). A recent study released by the National Center on Addiction and Substance Abuse at Columbia University found that federal, state, and local governments spent \$467 billion in 2005 on substance abuse and addiction. THE NAT’L CENTER ON ADDICTION AND SUBSTANCE ABUSE AT

\$5 billion annually, a figure that most certainly has increased considerably since then.⁴⁵ In the meantime, the U.S. Coast Guard estimates that it is only able to seize “at best 8 to 10% of drugs smuggled by sea.”⁴⁶ It is also worth mentioning that between 1984 and 1993, state and local drug arrests grew by 59%.⁴⁷

The obvious question to be posed is, what results and benefits have we as a society received from this huge investment of public funds?

THE HUMAN COSTS OF THE “WAR ON DRUGS”

The most critical ramifications and consequences of the “War on Drugs” are the human costs of this course of action. After almost forty years of doggedly presenting the same order of battle and strategy to the enemy, in which we have made tremendous investments in both public rhetoric and treasure to say nothing of out-and-out law enforcement emphasis at all levels, I believe the public has a *right to expect and demand* that some major progress be shown in the solution, or at least amelioration, of what is probably the single-most recurring internal social problem in the United States, with the possible exception of our economy, a not totally unrelated problem if we consider the useless drain that the “War on Drugs” has been on our national treasure.

We commence our scrutiny by stating the undeniable fact that the United States has the highest prison population in the world, with approximately 2.3 million inmates incarcerated in federal and state institutions.⁴⁸ This represents more persons in prison than even the People’s Republic of China, whose population is six and a half times that of the United States.⁴⁹ Furthermore, and of relevance to evaluating the efficacy of the present policies regarding illegal drugs, it is worth taking note of the fact that the prison population in the United

COLUMBIA UNIV., SHOVELING UP II: THE IMPACT OF SUBSTANCE ABUSE ON FEDERAL, STATE AND LOCAL BUDGETS I (2005) [hereinafter SHOVELING UP II].

⁴⁵ Ethan A. Nadelman, *Drug Prohibition in the United States: Costs Consequences, and Alternatives*, 245 SCI. 939, 940 (1989). Recent estimates show that federal, state, and local governments spend \$44.1 billion annually enforcing drug prohibitions. Kristof, *supra* note 37. In 2005, state governments spent \$135.8 billion on substance abuse and addiction. SHOVELING UP II, *supra* note 44, at 2. It is worth mentioning that between 1981 and 1986, state and local drug arrests grew by 59% and thereafter increased an additional 23% from 1986 to 1991. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, DRUG AND CRIME FACTS, 8 (1991) [hereinafter FACTS 1991].

⁴⁶ H.R. REP. NO. 96-323, at 4 (1974).

⁴⁷ BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, DRUG AND CRIME FACTS, 11 (1994) [hereinafter FACTS 1994].

⁴⁸ THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2010), available at http://www.sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Dec2010.pdf (last visited Feb. 9, 2011) [hereinafter FACTS ABOUT PRISONS AND PRISONERS].

⁴⁹ THE NEW YORK PUBLIC LIBRARY DESK REFERENCE BOOK 887-900 (4th ed. 2002). China’s population is 1.261 billion, while the United States’ population is 275.5 million. *Id.*

States rose from a total of about 200,000 state and federal prisoners in 1970, to 1,540,805 in 2008, to which must be added the 785,556 inmates confined in local detention centers for a total of over 2.3 million persons under confinement.⁵⁰ This was at a cost of \$20-30,000 per year per inmate for keeping prisoners in federal prisons in 1994, and with \$50,000 to \$100,000 per prisoner for building new facilities depending on the level of security and climate.⁵¹ The Federal Bureau of Prisons estimated in 1994 that it cost \$58.50/day or \$21,352/year to keep a federal inmate.⁵² State and local costs for incarceration are difficult to establish with certitude.

If we count the number of persons under probation or supervised release programs, the total number of persons under penal supervision in the United States exceeds 7 million.⁵³ With only 5% of the world's total population, the United States has 25% of the world's prison population.⁵⁴ In fact, in 2008, more than one in every 100 Americans resided in a prison or jail.⁵⁵ Furthermore, the number of drug-related crimes in the United States resulting in imprisonment rose from 41,000 in 1980 to nearly 500,000 in 2008,⁵⁶ an exponential increase which although attributable in part to more vigorous and effective law enforcement efforts, also speaks volumes of the failure to achieve the "War's" goal of eliminating or substantially reducing illegal drug activities in this country. In 2006, 53% of all federal prisoners were incarcerated for drug-related violations.⁵⁷ In fact, by the year 2007, the number of arrests for crimes related to illegal drugs exceeded arrests for all other crimes, with arrests for illegal drugs totaling 12.5% of the arrests for all crimes.⁵⁸

The statistics for drug use, although at times encouraging, have on the whole and in the long run been discouraging and certainly confirm the conclusion that

⁵⁰ FACTS ABOUT PRISONS AND PRISONERS, *supra* note 48. In 1980, only 8% of those admitted to state prisons were convicted of drug-related offenses, while by 1993 this figure had increased to 26%. ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1994 10 (1995).

⁵¹ Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25-27 (1994).

⁵² FEDERAL BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, A JUDICIAL GUIDE TO THE FEDERAL BUREAU OF PRISONS 5 (1995) [hereinafter JUDICIAL GUIDE].

⁵³ FACTS ABOUT PRISONS AND PRISONERS, *supra* note 48.

⁵⁴ SUSANNE M. KIRCHHOFF, CONGRESSIONAL RESEARCH SERVICE, ECONOMIC IMPACTS OF PRISON GROWTH 9 (2010), <http://www.fas.org/spp/crs/misc/R41177.pdf>.

⁵⁵ THE PEW CHARITABLE TRUSTS, THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 3 (2008).

⁵⁶ MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2 (2007), available at http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

⁵⁷ WILLIAM J. SABOL, HEATHER COUTURE & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2006 9 (2007).

⁵⁸ FEDERAL BUREAU OF INVESTIGATIONS, CRIME IN THE UNITED STATES 2004, UNIFORM CRIME REPORTS, PERSONS ARRESTED, available at http://www2.fbi.gov/ucr/cius_04/persons_arrested/index.html (last updated Feb. 17, 2006).

our present prohibitionist model has been a failure and has not achieved any substantial progress in achieving its stated goal. This is particularly apparent when we compare the overall results in the illegal drug arena with that of the principal legal drugs: alcohol and tobacco.

In 1996, when I first spoke out on this subject, there were approximately 46.3 million tobacco users,⁵⁹ 103 million alcohol users,⁶⁰ and 11.7 million illicit drug users in the United States.⁶¹ Present⁶² estimates are 69.7 million for tobacco users,⁶³ 130.6 million for alcohol users,⁶⁴ and approximately 21.8 million illicit drug users.⁶⁵

Transposing this information to practical terms:

(1) *Tobacco* has approximately 69.7 million users in the United States⁶⁶ and causes more fatalities in the United States than the total of all those caused by alcohol, HIV, automobile accidents, illicit drugs, homicides, and suicides.⁶⁷ The annual death toll of tobacco-related deaths went from 188,000 in 1965 to 434,000 in the late 1980s,⁶⁸ to about 435,000 at present.⁶⁹ The result is that the

⁵⁹ Joan Beck, *Smokers Dispute the Facts, But They Are Still the Facts*, CHI. TRIB., Apr. 14, 1994, available at http://articles.chicagotribune.com/1994-04-14/news/940414003_1_preventable-death-environmental-tobacco-smoke-deaths-from-cardiovascular-disease.

⁶⁰ *U.S. Drug Abuse Level Unchanged, Survey Shows*, 109 PUB. HEALTH REP. 829, 829 (1994), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1403590/pdf/pubhealthrep00057-0111.pdf>.

⁶¹ DRUGS & CRIME CLEARINGHOUSE, OFFICE OF NAT'L DRUG CONTROL POLICY, FACT SHEET: DRUG USE TRENDS I (1995) [hereinafter DRUG USE TRENDS].

⁶² The best available data is the 2009 National Survey on Drug Use and Health. See OFFICE OF APPLIED STUDIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH: VOLUME I, SUMMARY OF NATIONAL FINDINGS (2009) [hereinafter 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH].

⁶³ *Id.* at 42. This figure is for Americans 12 years or older, which is 27.7% of that population. *Id.* at 4. Cigarette smoking among young adults 18 to 25 decreased significantly between 2002 and 2009, but remained the highest of all age groups. *Id.* at 42. Cigarette smoking among youths aged 12 to 17 declined approximately 4% between 2002 and 2009. *Id.* at 4.

⁶⁴ *Id.* at 3. This figure is for persons over the age of 12, and is equivalent to more than half of the U.S. population over 12 years old.

⁶⁵ *Id.* at 1. This figure is for persons over the age of 12. Approximately 22.2 million Americans over the age of 12 reported having had a dependency on drugs or abuse in their use, which represents about 8.9 % of the U.S. population, which is almost twice the reported figure of 5% for the world as a whole. See *id.* at 2.

⁶⁶ *Id.* at 4.

⁶⁷ See Ali H. Mokdad et al., Abstract, *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238 (March 10, 2004) available at <http://jama.ama-assn.org/content/291/10/1238.abstract>.

⁶⁸ *Smoking-Attributable Mortality and Years of Potential Life Lost-United States, 1988*, 40 MORB. MORT. WKLY. REP. 62 (1991), available at <http://www.cdc.gov/mmwr/preview/>

average cost of a pack of cigarettes is \$5.51, of which taxes average \$1.45 per pack plus the federal cigarette tax of \$1.01 per pack, all of which is paid by the consumer.⁷⁰ Of course, the costs to society are not limited to just the outright deaths of the individuals, with the obvious emotional and sentimental costs to family and friends, but also involves the intangible loss to the community of a person's many-faceted contributions to society. A more accountable cost is the fact that in the United States close to 8.6 million persons suffer from tobacco-related illnesses,⁷¹ with an annual direct cost to the federal and state governments of \$96 billion,⁷² including \$30.9 billion in healthcare and disability benefits paid for the treatment of diseases and illnesses associated with this drug.⁷³

(2) *Alcohol* is the most commonly used drug in the United States, with almost twice the number of users as those using tobacco in its various modalities, and six times more users than illegal drugs. In 1991, it was estimated that there were 10 million alcoholics in the United States, with about 73 million adults being affected by this condition.⁷⁴ That year, there were an estimated 45,000 alcohol-related traffic fatalities⁷⁵ in the United States,⁷⁶ which were only part of

mmwrhtml/00001886.htm. To these should be added about 40,000 nonsmokers who died of inhalation from passive smoke. See *Death Toll from Smoking Worsening*, N.Y. TIMES, Feb. 1, 1991, available at <http://www.nytimes.com/1991/02/01/us/death-toll-from-smoking-is-worsening.html>.

⁶⁹ Mokdad et al., *supra* note 67, at 1239. To this must be added an estimated 50,000 adults who died from smoke-related illnesses. See *Health Effects*, AMERICAN LUNG ASSOCIATION, <http://www.lungusa.org/stop-smoking/about-smoking/health-effects/> (last visited Feb. 9, 2011).

⁷⁰ Eric Lindblom, *State Cigarette Excise Tax Rates & Rankings*, CAMPAIGN FOR TOBACCO-FREE KIDS (Aug. 3, 2010), <http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf>.

⁷¹ *Study: 8.6 Million Americans Sick with Tobacco-related Illnesses: Few Quitters Get the Help Needed to Succeed*, AMERICAN CANCER SOCIETY (Nov. 5, 2003), available at http://www5.cancer.org/docroot/NWS/content/NWS_2_1x_Study_86_Million_Americans_Sick_With_Tobacco-related_Illnesses.asp.

⁷² Eric Lindblom, *Toll of Tobacco in the United States of America*, CAMPAIGN FOR TOBACCO-FREE KIDS (Oct. 8, 2010), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf>.

⁷³ *Id.*

⁷⁴ James A. Inciardi, *Against Legalization of Drugs*, in *LEGALIZE IT?: DEBATING AMERICAN DRUG POLICY* 139, 160 (Arnold S. Trebach & James A. Inciardi, 1994) [hereinafter Inciardi].

⁷⁵ In a 2008 survey, the National Highway Traffic Safety Administration (NHTSA) "estimates that 8% of all drivers, or 17.2 million people, have driven at least once over the course of a year, even though they thought they were drunk." *U.S. Estimates Millions Drive Drunk*, THE BOSTON GLOBE, Aug. 26, 2010, available at http://www.boston.com/news/nation/washington/articles/2010/08/26/us_estimates_millions_drive_drunk.

⁷⁶ Inciardi, *supra* note 74, at 160. Puerto Rico is among the ten highest U.S. jurisdictions in traffic fatalities due to the consumption of alcohol. *Justice: Youth Alcohol Consumption*

the total number of alcohol-linked deaths, which totaled more than 100,000 in 1991.⁷⁷ The total annual cost of alcohol abuse in the United States for 1998, including both direct governmental spending and private spending, as well as lost productivity, was estimated at over \$184.6 billion.⁷⁸ In 1998, public and private entities spent \$9.8 billion on healthcare and disabilities related to alcohol abuse.⁷⁹ An additional monetary and human cost to American society related to alcohol abuse is the fact that two-fifths of all crimes leading to state prison sentences are committed under the influence of alcohol (and, of course, in many cases in combination with the use of illegal drugs). In fact, the 2008 ADAM II Report prepared by the Arrestee Drug Abuse Monitoring Program of the Office of National Control Drug Policy, which surveys drug use among male arrestees in 10 major metropolitan areas across the country, found that as many as a high of 87% (Chicago) to a low of 49% (Washington, D.C.) of those arrested for any crime tested positive for an illegal drug.⁸⁰

In 2008, slightly more than half of Americans aged 12 or older reported using alcohol, which is 130.6 million persons, or 51.9% of our population.⁸¹

Costs P.R. Hundreds of Millions a Year, P.R. DAILY SUN, Oct. 28, 2009, at 6 (projecting youth alcohol consumption is costing the local economy between \$250 million and \$1 billion a year). Of the 430 people who died in traffic accidents in Puerto Rico in 2007, 40% of those killed were 29 years old or younger. *Id.*

⁷⁷ SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL EXPENDITURES FOR MENTAL HEALTH SERVICES AND SUBSTANCE ABUSE TREATMENT 1991-2001, CH. 5: SUBSTANCE ABUSE TREATMENT EXPENDITURES (Feb. 12, 2009), available at <http://www.samhsa.gov/spendingestimates/chapter5.aspx> [hereinafter SAMHSA, NATIONAL EXPENDITURES].

⁷⁸ Inciardi, *supra* note 74, at 160.

⁷⁹ SAMHSA, NATIONAL EXPENDITURES, *supra* note 77. In 1994, the federal government alone spent \$12 billion on health care and disability related to alcohol abuse. STATISTICAL ABSTRACT, *supra* note 41. Of a total of \$66 billion spent annually by the federal government on health care and disability costs associated with alcohol, tobacco, and illegal drug use, 18% (\$11.8 billion) were destined for alcohol programs, 16% (\$10.56 billion) for drug abuse agendas, and 66% (\$43.56 billion) for tobacco related care and disability programs. *Id.* A study by the National Center on Addiction and Substance Abuse at Columbia University found that in 2005 government spending related to smoking, alcohol abuse, and illegal drugs reached \$468 billion, accounting for one-tenth of combined federal, state, and local expenditures for all purposes, of which expenditures only 2% went to prevention, treatment, and addiction. Erik Eckholm, *Governments' Drug-Abuse Costs Hit \$468 Billion, Study Says*, N.Y. TIMES, May 28, 2009, available at <http://www.nytimes.com/2009/05/28/us/28addiction.html?scp=66&sq=&st=nyt>.

⁸⁰ Press Release, Office of Nat'l Drug Control Policy, New Study Reveals Scope of Drug and Crime Connections: As Many As 87 Percent of People Arrested for Any Crime Test Positive for Drug Use (May 28, 2009), available at <http://www.whitehousedrugpolicy.gov/news/press09/052809.html>.

⁸¹ See 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 62, at 3.

Today, alcohol-related deaths are calculated at about 75,000,⁸² with the life expectancy of alcohol abusers being reduced by an average of 30 years.⁸³ In fact, alcoholism is the third highest cause of death in the United States, after tobacco-related causes and illnesses related to bad eating habits.⁸⁴ Traffic accident fatalities in which alcohol played a factor reached approximately 14,000 in 2008.⁸⁵ The federal government alone spent \$45.5 billion in 2007 on health-care and disability costs associated with alcohol abuse.⁸⁶

(3) *Illegal drugs*⁸⁷ were used by 11.7 million Americans in 1993, a decrease from 24.8 million in 1979.⁸⁸ In 1996, there were approximately 5,000 deaths directly attributed to the use of illegal drugs by reason of overdoses. A significant decline in illicit drug use was noted throughout the 1980s, with illegal drug use for all persons over 12 decreasing from 13.7% in that age group in 1979, to 5.6% by 1993.⁸⁹ In fact, there was a general decrease in the use of all illegal drugs of about 59.1% during that period.⁹⁰

⁸² *Alcohol-Attributable Deaths and Years of Potential Life Lost-United States, 2001*, 53 MMWR 866 (2004), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5337a2.htm>.

⁸³ *Id.*

⁸⁴ *Id.*; see also Mokdad et al., *supra* note 67, at 1238.

⁸⁵ *2008 Drunk Driving Statistics*, ALCOHOL ALERT, available at <http://www.alcoholalert.com/drun-driving-statistics.html> (last visited Feb. 17, 2011).

⁸⁶ *The Alcohol Cost Calculator*, GEO. WASH. U. MED. CENTER, available at <http://www.alcoholcostcalculator.org/business/about/?page=note> (last visited Feb. 17, 2011).

⁸⁷ This term includes "marijuana, cocaine, amphetamine, hallucinogens, inhalants . . . heroine, or nonmedical use of sedatives, tranquilizers, stimulants or analgesics." OFFICE OF NAT'L DRUG CONTROL STRATEGY, EXEC. OFFICE OF THE PRESIDENT, THE NAT'L DRUG CONTROL STRATEGY: 1996 (1996), at 79 tbl.5-4, available at www.ncjrs.gov/pdffiles/strat96.pdf.

⁸⁸ *Id.* at 77 fig.5-1.

⁸⁹ DRUG USE TRENDS, *supra* note 61, at 1 tbl.1 (referencing "Past 30 days" use). For more evidence of that decline, see *id.* at 2 fig.2, 5 fig.1 regarding drops in marijuana and cocaine use for the same age group.

⁹⁰ *Id.* at 1 tbl.1 (referencing "Past 30 days" use, calculated as $(13.7 - 5.6)/13.7 = 59.1\%$). *Marijuana* use went from 18.5% in 1974 for those in ages 12-17, to 10.1% by 1993, after a peak of over 20% during the 1977-1982 period. *Id.* at 2 fig.2, 5 fig.2. For ages 18-25, this figure decreased from 34.2% in 1974 to 22.9% in 1993, with peaks of over 40% in the years 1979-1982 period. *Id.* In the over 26 age group, there was an increase from 3.8% in 1974 to 6.3% in 1993, with increases in 1981-1985 up to about 10%. *Id.* *Cocaine* usage declined from 2.7% for the 12-17 age group in 1974 to 0.8% in 1993, after a peak in the 1979-1982 period of over 4%. *Id.* at 2 fig.1, 5 fig.1. For ages 18-25, there was an overall decline from 8.1% in 1974 to 5.0% in 1993 to a peak of close to 20% in the 1979-1982 period. *Id.* The over 26 age group generally increased from 0.6% in 1974 to 1.9% in 1993, reaching a peak of around 4% in the 1982-1985 period. *Id.* *Heroin* usage generally declined in its usage by all age groups in the period from 1974 to 1993, with the 12 to 17 year group going from 1.0% in 1974 to only 0.2% in 1993, *id.*, at 142 tbl.2, those in the 18-25 years bracket going from 4.5% to 0.7% in the same period, and those 26 years and older going from 0.5% to a base too small to be statistically significant. *Id.*

This situation has turned upwards since the 1990s. In 2009, it was reported that 21.8 million Americans over 12 years of age were using illegal drugs, which represents 8.7% of the U.S. population in that age group.⁹¹ This is almost twice the percentage of illegal drug usage rate that is estimated by the U.N. surveys as the world's population of illegal drug users.⁹² The 2008 AD-AM II Report indicated that as many as 87% of all arrestees for all crimes, tested positive for illegal drug use.⁹³ In the year 2000, approximately 17,000 Americans died of drug-induced causes, over 90% of which were from overdoses, a figure that rose to 39,000 by 2006.⁹⁴

Marijuana is the illegal drug of preference, with reportedly approximately 16.7 million Americans users at present.⁹⁵ The potency of marijuana has increased in recent years, with marijuana grown and imported from Canada reportedly being the most potent in the underground market.⁹⁶ Marijuana is also

⁹¹ See 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 62, at 13. By comparison, Puerto Rico has approximately 60,000 persons who are addicted to illegal drugs, which is approximately 2.34% of its population. ADMINISTRACIÓN DE SERVICIOS DE SALUD MENTAL Y CONTRA LA ADICCIÓN, TRASTORNOS DE SUSTANCIAS Y USO DE SERVICIOS: ENCUESTA DE HOGARES (2008). It is estimated that they consume approximately \$3 million worth of illegal drugs *each day*. *Id.* Puerto Rico has the fourth highest rate in both drug arrests and incarceration in the world. See WORLD BANK, 2000.

⁹² 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 62, at 73 (reducing the 22.5 million users number by 15.4 million of alcohol only users, leaving 7.1 million illicit drug users aged 12 and older).

⁹³ *New Study Reveals Scope of Drug and Crime Connection: As Many as 87% of People Arrested for Any Crime Test Positive for Drug Use*, OFFICE OF NAT'L DRUG CONTROL POLICY (May 28, 2009), available at <http://www.ondcp.gov/news/press09/052809.html>. Marijuana was the most commonly detected drug, with cocaine second, and heroin a distant third. *Id.*

⁹⁴ According to investigators for the Center for Prevention and Control of Disease, in 2006 the deaths attributed to the consumption of drugs reached 39,000 persons in the United States. Phillip Smith, *Overdose and Other Drug-Related Deaths Now Closing In on Car Wrecks as Leading Accidental Killer in US*, STOPTHEDRUGWAR.ORG (Sep. 30, 2009), available at http://stopthedrugwar.org/speakeasy/2009/sep/30/overdose_and_other_drugrelated_d. They also claim that the mortality rate for analgesic opiates, such as methadone, sedatives, and medicines taken to ease pain, such as Vicodin, caused seven times more fatalities in 2006 than in 1999. *Id.*; Margaret Warner, Li Hui Chen, & Diane M. Makic, *Increase in Fatal Poisonings Involving Opioid Analgesics in the United States, 1999-2006*, NAT'L CTR. FOR HEALTH STATISTICS DATA BRIEF 2 (2009), available at <http://www.cdc.gov/nchs/data/databriefs/db22.pdf>.

⁹⁵ 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 62, at 14. A recent phenomenon was revealed by a government survey which shows an increase in marijuana users in the age group of 50-59 from 5.1% in 2002 to almost 10% in 2007. Steve Hendrix, *Baby Boomers Find Growing Acceptance of Marijuana Use*, BOSTON GLOBE, Nov. 22, 2009, at A9; see also Jennifer Mann, *Baby Boomers Going to Pot*, PATRIOT LEDGER, Aug. 23, 2010, at 1.

⁹⁶ According to Mahmoud A. Elsohly of the University of Mississippi's Potency Project,

reportedly the biggest cash crop in the United States and is being grown in every state and territory of the nation.⁹⁷ The consumption of *cocaine* by Americans remained stable between 1997 and 2006 at about 2.4 million persons, or 1% of the population over 12, and then decreased in 2008-2009 to 1.6 million or 0.7% of that age group.⁹⁸ The same flat user curve was reported for this period and age group, at 0.1% of the population, in the case of *heroin*.⁹⁹ In 2008, 1.9 million persons aged 12 and older were current users of cocaine, comprising 0.7 % of the population.¹⁰⁰

One major change in the illegal drug scenario since I last wrote on the subject has been the appearance of so-called “designer drugs” such as *methamphetamine* (“meth”).¹⁰¹ They are referred to as “designer drugs”¹⁰² because they can be produced through a series of fairly simple chemical procedures in home labs or more sophisticated mass production clandestine facilities.¹⁰³ Although meth has been around for many years, and its popularity has waxed and waned over this period, it seems to be on the rise among several

the average THC content of marijuana samples has gone from an average of under 4% in 1983, to 4.8% in 2003, to 7.3% in 2007, to 10.1% in 2008. Jeanne Meserve & Mike M. Ahlers, *Marijuana Potency Surpasses 10 Percent, U.S. Says*, CNNHEALTH, May 14, 2009, available at http://articles.cnn.com/2009-05-14/health/marijuana.potency_1_average-thc-potent-marijuana-marijuana-users?_s=PM:HEALTH.

⁹⁷ See Katherine Bishop, *New Front in Marijuana War: Business Records*, N.Y. TIMES, May 24, 1991, at B6.

⁹⁸ 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 62, at 15.

⁹⁹ *Id.* at 20.

¹⁰⁰ *Id.* at 15.

¹⁰¹ “Methamphetamine is a central nervous system stimulant categorized by the U.S. Food and Drug Administration as a Schedule II amphetamine, which means it has a high potential for abuse and for psychological or physical dependence.” CTR. FOR DISEASE CONTROL AND PREVENTION, METHAMPHETAMINE USE AND RISK FOR HIV/AIDS 1 (2007), available at <http://www.cdc.gov/hiv/resources/factsheets/meth.htm>. Meth, as it is popularly known, “is smoked, injected, snorted, swallowed, or injected into the anus.” *Id.*

¹⁰² Also included are LSD and ecstasy (MDMA). A pound of methamphetamine worth \$20-30,000 can easily be produced with \$500 worth of chemicals, laboratory glassware, and minimal knowledge of chemistry. HOWARD ABADINSKY, DRUGS: AN INTRODUCTION 127 (5th ed. 2004). See also *Smoke Shop Rebuffs Police Request to Pull Hallucinogenic Incense*, PATRIOT LEDGER, Sept. 11, 2010, at 1 (explaining damiana, an active ingredient in some incense that produces a hallucinogenic effect).

¹⁰³ See ABADINSKY, *supra* note 102, at 127. Although most of the meth consumed in the United States is manufactured outside the United States, roughly one-third of U.S. consumption is from domestic sources. See *Interim Report from the Interagency Working Grp. on Synthetic Drugs to the Dir. of Nat'l Drug Control Policy Attorney Gen. Sec'y for Health and Human Serv.*, May 23, 2005, at 3, available at http://www.ncjrs.gov/ondcpublications/pdf/interim_rpt.pdf.

population subgroups.¹⁰⁴ The current increase (since the early 1990's) of meth use began in the western United States, however by the mid-2000's the use had become of nationwide concern, with clandestine lab seizures increasing in almost all states during the 2000-2005 period.¹⁰⁵ The Substance Abuse and Mental Health Services Administration ("SAMHSA") estimated that from 1993 through 2003 the rate of admissions for treatment of methamphetamine or amphetamine abuse increased from 13 to 56 admissions per 100,000 for people aged 12 or older, which is a rough indicator of the general increase of use in the population at large.¹⁰⁶ In 2004, SAMHSA further estimated that 600,000 persons (or 0.2% of the U.S. population) had used meth in the month immediately prior to it being reported to those conducting the study.¹⁰⁷ Also in that year, an estimated 12 million persons aged 12 and older (4.9% of this age group) had used meth at least once in their lifetime, and 1.4 million 12 and older (0.6% of the age group) had used this illegal drug during the year prior to the study.¹⁰⁸ The 2009 National Survey on Drug Use and Health ("NSDUH") reported an increase to 731,000, or 0.3% of the U.S. population.¹⁰⁹ Although there is no typical meth user, the trend is that many are young (the average age of first use was 18.9 in 2002, 20.4 in 2003, and 22.2 in 2006),¹¹⁰ because it is cheaper and longer lasting than cocaine, with the highest rate of use during 2006 being among young adults aged 18 to 25, followed by youth aged 12 to 17, with the lowest use for those over 26.

Of special interest is SAMHSA's latest National Survey on Drug Use and Health for 2009, released September 16, 2010, which indicates that illicit drug use in the United States rose from 8% of the population over aged 12 in 2008, to 8.7% in 2009,¹¹¹ an increase driven in large part by increases in marijuana use.¹¹² Of particular relevance is the finding that 21.2% of young adults (those 18-25), experimented with illegal drugs in 2009, an increase from 19.6% in 2008.¹¹³

WHAT HAVE BEEN THE INSTITUTIONAL COSTS OF THE "WAR ON DRUGS"?

As happens with all wars, the first casualties of this war have been objectivity, truth, and ultimately, the law itself. As stated long ago by Cicero: *Inter*

¹⁰⁴ See OFFICE OF NAT'L DRUG CONTROL POLICY, FACT SHEET: 2008 ADAM II REPORT 4 (2008), available at www.whitehousedrugpolicy.gov/pdf/adamii_fact_sheet_2008.pdf.

¹⁰⁵ *Id.* at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 62, at 15.

¹¹⁰ *Id.* at 58 fig.5.6.

¹¹¹ *Id.* at 1.

¹¹² *Id.* at 2.

¹¹³ *Id.*

FIGURE 1: THE ILLEGAL DRUG LANDSCAPE IN THE U.S.

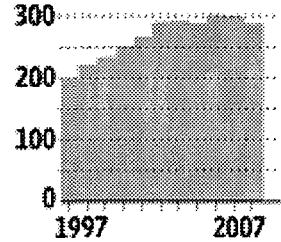
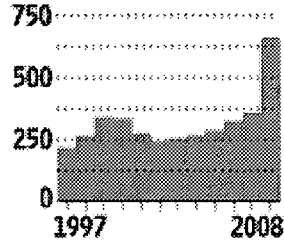
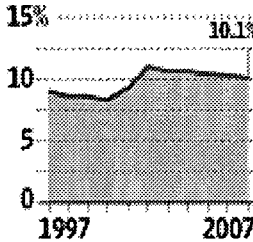
America's Illicit-Drug Landscape

Pct. who say they used in the past 12 months

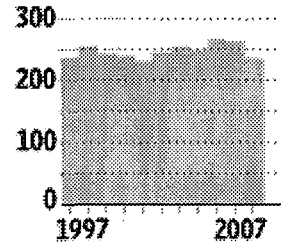
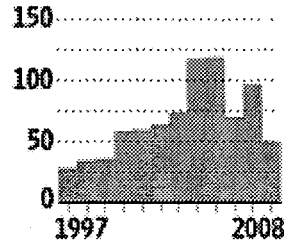
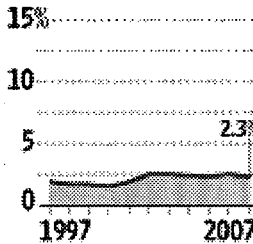
Federal drug seizures (thousands of kilograms)

Treatment-center admissions (thousands)

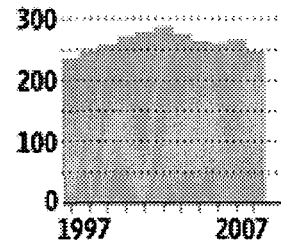
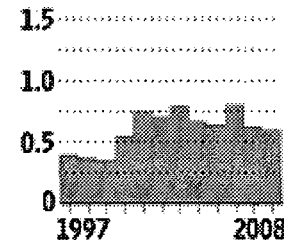
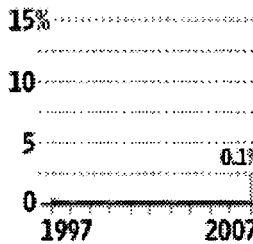
MARIJUANA



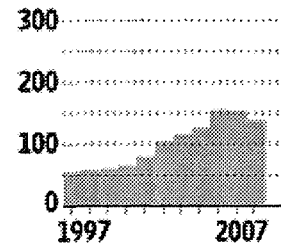
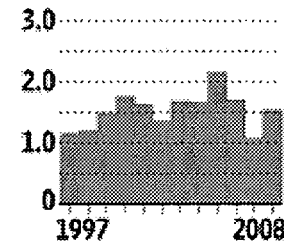
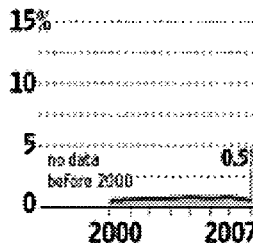
COCAINE



HEROIN



METHAMPHETAMINE



Sources: Department of Health and Human Services (drug use, treatment); Drug Enforcement Administration (seizures)

arma enim silent leges (“In time of war the laws are silent”). Such has been the case with this conflict. The rule of law, as relates to our civil and constitutional rights,¹¹⁴ has been mangled at the hands of an Executive branch that has pushed enforcement to the limits on what amounts to a theory that the ends justify the means, a Congress that has stretched the borders of its legislative powers under Article I of the Constitution¹¹⁵ in an attempt to do what it believes is politically expedient, and a judiciary which has generally been compliant and has stretched even those limits to the breaking point failing to contain the other branches within the fence that is established by the Constitution. As sardonically stated by Justice Stevens in a case involving warrantless searches, “no impartial observer could criticize [the] Court for hindering the war on drugs.”¹¹⁶ Rather, the “Court ha[d] become a loyal foot soldier in the Executive’s fight against crime.”¹¹⁷

Although there is no legal basis for carving out a “drug exception”¹¹⁸ to the application of the Constitution, and its existence has been rejected at the highest levels,¹¹⁹ *de facto* and *sub silencio*, it is honored by the actions of all three branches of government.¹²⁰ Law enforcement activities, government policies, drug-related legislation, and court decisions have all subtly, and sometimes not

¹¹⁴ See generally Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593 (1994) (reviewing STEVEN B. DUKE & ALBERT GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993)); Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11 (2009); Robert W. Sweet, *Will Money Talk?: The Case for Comprehensive Cost-Benefit Analysis of the War on Drugs*, 20 STAN. L. & POL’Y REV. 229 (2009); Jaime Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257 (2009); Gabriel J. Chin, *Race, The War On Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2004).

¹¹⁵ See Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1196 (2009).

¹¹⁶ *California v. Acevedo*, 500 U.S. 565, 599 (1991) (Stevens, J., dissenting).

¹¹⁷ *Id.* In *Gonzalez v. Raich*, 545 U.S. 1, 1 (2005), the provisions of the Controlled Substances Act criminalizing the *intrastate* growing, possession, and use of marijuana for medical purposes were upheld against a challenge under the Interstate Commerce clause.

¹¹⁸ A term first used by Judge James Lawrence King in *United States v. Miranda*, 442 F.Supp. 786, 795 (S.D. Fla. 1977).

¹¹⁹ “[T]he impairment of individual liberties cannot be the means of making a point; [and] symbolism, even symbolism for so worthy a cause as abolition of unlawful drugs, cannot validate an otherwise unreasonable search.” *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting); “There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest.” *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting).

¹²⁰ See Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987).

so subtly, coalesced to diminish and undermine the philosophy and text of the Bill of Rights.

The embattled Fourth Amendment¹²¹ is probably the leading example of a “War on Drugs” casualty.¹²² As has been erstwhile noted in an apropos reference to George Orwell’s *1984*, a date that we have passed in more than one sense, the “War on Drugs” has led to “[a] gradual but perceptive rise in Big Brotherism against the public at large in the form of eavesdropping, surveillance, monitoring, informing, and other intrusive enforcement methods.”¹²³ Among the inroads that have been sanctioned are those that have permitted intrusions into our homes by the use of aerial surveillance,¹²⁴ a practice that has led to the practical abandonment in other drug-related contexts of the privacy test announced in *Katz v. United States*.¹²⁵ These relaxations of the restrictions of the Fourth Amendment have allowed the expansion of police authority to carry out warrantless searches for drugs on persons and automobiles under circumstances beyond the original intention of *Terry*’s rationale,¹²⁶ which was

¹²¹ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

¹²² See generally Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986); *United States v. Pineda-Moreno*, 617 F.3d 1120 (9th Cir. 2010) (Kozinski, J., dissenting from denial of en banc regarding unwarranted entry into curtilage to attach GPS device to car); Dugald McConnell, *Court Allows Agents to Secretly Put GPS Trackers on Cars*, CNNJUSTICE, Aug. 27, 2010, available at <http://www.com/2010/CRIME/08/23oregon.gps.surveillance/iden.html?hpt=71>.

¹²³ STEVE WISOTSKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* 117 (1986). See also Justice Brennan’s dissent in *Florida v. Riley*, 488 U.S. 445, 466 (1989) (Brennan, J., dissenting).

¹²⁴ *California v. Ciraolo*, 474 U.S. 207, 209 (1986) (using information as basis for search warrant received through overflight, not a search, despite the fact that the marijuana observed was growing inside the curtilage, which was surrounded by six-foot and ten-foot high fences blocking the view from the street); *Florida v. Riley*, 488 U.S. 445, 448 (1989) (allowing helicopter overflight with use of telephoto lens in camera to photograph through open skylight in greenhouse).

¹²⁵ *Katz v. United States*, 389 U.S. 347, 349 (1947); see also *Harmelin v. Michigan*, 501 U.S. 957 (1991) (expanding a search beyond weapons to drugs for which defendant, a first time offender, was sentenced to life in prison).

¹²⁶ *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (determining that a brief stop for questioning and a pat-down for weapons on a public street, based on a reasonable fear of imminent violence, is permitted without a warrant); cf. *United States v. Fornin-Castillo*, 408 F.3d 52, 64 (1st Cir. 2005) (determining that interrogation of defendant by police with drawn weapons while defendant was handcuffed does not convert “*Terry* stop into a de facto arrest” and is not coercive).

based on police officer safety not as a subterfuge search for criminal evidence without meeting the requirements of the Fourth Amendment. The creation of the so-called “good faith” exception to the Fourth Amendment requirement of probable cause established in *United States v. León*,¹²⁷ which in practice we see stretched beyond “good faith,” is another example of the courts’ permissive attitude towards the government in drug cases. Equally troubling is the upholding of the validity of a warrant issued on the basis of a partially uncorroborated anonymous tip,¹²⁸ which led to cases in which the court allowed the government to corroborate the anonymous tip by the *post facto* discovery of illegal evidence.¹²⁹

The U.S. Court of Appeals for the Sixth Circuit stated it well in a drug-related case involving the Fourth Amendment:

Presently, our nation is plagued with the destructive effects of the illegal importation and distribution of drugs. At this critical time, our Constitution remains a lodestar for the protections that shall endure the most pernicious affronts to our society. The warrant requirement of the fourth amendment governs zealous law enforcement. *The drug crisis does not license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the “War on Drugs.”*¹³⁰

The use of “drug-courier” profiling, a technique tacitly sanctioned by the Supreme Court in *United States v. Sokolow*,¹³¹ and which is often based on racial characteristics, is a common police practice that has further led to the impingement of citizen rights under the Constitution.¹³² In *Sokolow*, the Supreme Court majority decision, which effectively white washed the dubious actions of the police, led Justice Marshall to state in his dissent that the Court had shown “its willingness, when drug crimes or anti-drug policies are at issue, to give short shrift to constitutional rights.”¹³³

Credible complaints have been filed in New York and New Jersey regarding the police targeting African-Americans and Hispanics with the use of stop and frisk tactics that are not justified except by the use of preconceived drug-courier profiles, which include being of color, driving a fancy car, or being in a particular neighborhood, characteristics which could very well fit a larger percentage of the population in minority neighborhoods. This police technique has led to

¹²⁷ *United States v. León*, 468 U.S. 897 (1984).

¹²⁸ *See Illinois v. Gates*, 462 U.S. 213, 230 (1983).

¹²⁹ *United States v. Johnson*, 64 F.3d 1120, 1125 (8th Cir. 1995).

¹³⁰ *United States v. Radka*, 904 F.2d 357, 361 (6th Cir. 1990) (emphasis added).

¹³¹ *United States v. Sokolow*, 490 U.S. 1 (1988).

¹³² *See Sheryl McCarthy, Off-Target Targets of Drug War*, N.Y. *NEWSDAY*, Oct. 22, 1990, at 6.

¹³³ *Sokolow*, 490 U.S. at 17 (Marshall, J., dissenting).

considerable harassment and civil rights violations of minorities. Statistical evidence suggests, for example, that on the New Jersey Turnpike, African-Americans are stopped by the state police at a rate that is considerably higher than that of whites.¹³⁴ This police bias is widespread; with similar claims made throughout the country in such geographically disperse locations as Washington,¹³⁵ Los Angeles,¹³⁶ and Boston,¹³⁷ to say nothing of the jurisdictions bordering Mexico. Of course, the use and abuse of the drug-courier profiles affects not only citizens of color, but also the citizenship in general.¹³⁸

As we continue down the Bill of Rights we come upon legislation and court decisions that directly impact the Fifth¹³⁹ and Sixth Amendments' due process and right to counsel provisions.¹⁴⁰ The cases show a definite trend towards the lowering of the bar in allowing the government to establish guilt by proof beyond a reasonable doubt in drug-related cases with unusual laxity, in many cases by the piling of inference upon inference,¹⁴¹ as well as in overlooking what would otherwise be considered outrageous government conduct in the

¹³⁴ Joseph F. Sullivan, *New Jersey Police Are Accused of Minority Arrests Campaign*, N.Y. TIMES, Feb. 19, 1990, at B3; Frances Ann Burns, *Officials Drop Off Panel on Alleged Harassment of Black Drivers*, UNITED PRESS INT'L., Jan. 16, 1990, available at Lexis Nexis Library, UPI File.

¹³⁵ Susan Beck et al., *The Cocaine War in America's Fruitbowl*, AM. LAW., Mar. 1990, at 82, 83 (reporting that Hispanics in central Washington state are being targeted by drug enforcement authorities).

¹³⁶ Victor Merina, *Joe Morgan's Suit Protests Drug 'Profile'*, L.A. TIMES, Aug. 7, 1990, at B1. Former professional baseball player, Joe Morgan, sued O'Searle and the city of Los Angeles in federal court, claiming that he was unfairly targeted [for arrest] because he is black and fits a certain "profile" that narcotics officers think a drug courier should look like." *Id.*

¹³⁷ See McCarthy, *supra* note 132, at 6.

¹³⁸ See *United States v. Miller*, 821 F.2d 546, 550 (11th Cir. 1987) ("Common sense suggests that th[e] numbers [of innocent travelers harassed by profiling law enforcement officers] may be significant."); *United States v. Smith*, 799 F. 2d 704 (11th Cir. 1986); *United States v. Montilla*, 733 F. Supp. 579, 581, 583 (W.D.N.Y. 1990) (stating that the decision to stop the two defendants "was based upon" their "nervous reactions, the use of the express bus from New York City [to Buffalo], and their pace through the terminal," and the fact that the male and female defendants were carrying duffle bags, talking to each other in a "confidential tone" and that they "turned abruptly away" from one of the arresting agents); *Florida v. Johnson*, 561 So. 2d 1139 (Fla. 1990).

¹³⁹ The Fifth Amendment provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend V.

¹⁴⁰ The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence [sic]." U.S. CONST. amend VI.

¹⁴¹ *Cf. United States v. Azubike*, 564 F.3d 59 (*Azubike II*) (1st Cir. 2009) and *United States v. Mangual-Corchado*, 139 F.3d 34 (1st Cir. 1998)

prosecution of drug-related charges.¹⁴² In *Calero-Toledo v. Pearson Yachts*, no lesser defender of civil rights than Justice Brennan allowed the confiscation of Pearson Yacht's chartered vessel pursuant to Puerto Rico's controlled substance statute, notwithstanding that Pearson was not only innocent of wrong doing, but had in fact included a clause in the charter agreement prohibiting the presence of drugs aboard the boat.¹⁴³ The Fifth Amendment's guarantee against deprivation of property without due process was held to be no bar to depriving the innocent property owner of his property.

When we come to the Sixth Amendment, the enactment of the Comprehensive Forfeiture Act of 1984¹⁴⁴ and the rulings of the Supreme Court in the cases of *Caplin & Drysdale v. U.S.*,¹⁴⁵ and *U.S. v. Monsanto*¹⁴⁶ sustaining the validity of this statute as applied to attorneys' fees of defendants charged in drug cases, represent a truly alarming degradation of the right to counsel of one accused of a crime.¹⁴⁷ This statute and these two cases combine to tip the scales of justice against criminal defendants in drug cases clearly in favor of the government, and seriously affect the fair play that we take for granted exists in American courts, both against the accused and those that represent them in those courts. Thus, the government is allowed to engage in pre-trial freezing of assets of drug defendants, as well as post-trial seizures of defendant's property, preventing the payment of the accused's attorneys from these assets.¹⁴⁸

It is hard to argue against the contention that the Forfeiture statute undermines the presumption of innocence and the Sixth Amendment right to counsel, for this statute allows the sequestration of private property solely on the basis of suspicion (even if called "probable cause") or the issuance of an indict-

¹⁴² See *United States v. Alvarez Machin*, 504 U.S. 653 (1992) (the abduction of a Mexican citizen in Mexico by D.E.A. agents for the purpose of bringing him to U.S. territory for prosecution for the murder of a D.E.A. agent in Mexico, does not violate the Constitution or laws of the United States).

¹⁴³ *Calero-Toledo v. Pearson Yachts*, 416 U.S. 663 (1974).

¹⁴⁴ Comprehensive Forfeiture Act, Pub. L. 98-473, 98 Stat. 2040 (1984) (codified in scattered sections of U.S.C. titles 18, 19, 21 & 28).

¹⁴⁵ *Caplin & Drysdale v. United States*, 491 U.S. 617 (1988).

¹⁴⁶ *United States v. Monsanto*, 491 U.S. 600 (1988) (sustaining the validity of this statute as applied to attorneys' fees of defendants charged in drug cases).

¹⁴⁷ See Danton Asher Berube, *Drug Proceeds Forfeiture and the Right to Counsel of Choice*, 43 VAND. L. REV. 1377 (1990); John Dombink et al., *Fighting For Fees: Drug Trafficking and the Forfeiture of Attorney's Fees*, 18 J. DRUG ISSUES 421 (1988); Melinda Hardy, *Sixth Amendment—Applicability of Right to Counsel of Choice to Forfeiture of Attorneys' Fees*, 80 J. CRIM. L. & CRIMINOLOGY 1154 (1990); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673 (1989); Roderick D. Vereen, *Attorneys' Rights to Fees Under the Comprehensive Forfeiture Act of 1984: The "Bona Fide Purchaser,"* 16 S.U. L. REV. 407 (1989); Kevin B. Zeese, *Supreme Court Upholds Forfeiture of Legal Fees*, 2 DRUG L. REP. 109 (1989).

¹⁴⁸ Comprehensive Forfeiture Act, Pub. L. 98-473, 98 Stat. 2040 (1984) (codified in scattered sections of U.S.C. titles 18, 19, 21 & 28).

ment.¹⁴⁹ Before trial, a defendant is deprived of access to the funds and property necessary for bail, living expenses, and of course, the seizure of his assets severely impinges his/her ability to defend him/herself from the merits of the accusations against him/her.¹⁵⁰ The accused can literally be ejected from his/her home with nothing more than the clothes on his/her back, not even a toothbrush!¹⁵¹ This type of draconian legislation seems excessive, to say the least, even if marginally constitutional, in a democratic country.

Along these grounds, some of the most egregious actions by the government are exemplified by its actions against defense lawyers, in which the government has received the support of the courts. The government has thus sought attorney's fees information from a lawyer regarding his representation of a client in drug cases, with the court rejecting an argument that this information was privileged and violated the client's right to counsel.¹⁵² The courts have also allowed the deposition of counsel by the government requiring the production of documents in his possession for the purpose of determining the amount, form, and source of payments made to counsel in connection with that lawyer's legal representation of a client in a drug case.¹⁵³

The inherent conflict of interest created by this draconian statute, and by the courts' support of the government's actions allowing this one-sided power to be placed in the hands of the defense's adversary, promotes even further abuse. Justice Blackmun cogently stated this in his dissent in *Caplin & Drysdale*:

Perhaps [the] most troubling [aspect of the case] is the fact that forfeiture statutes place the Government in the position to exercise an intolerable degree of power over any private attorney who takes on the task of representing a defendant in a forfeiture case. The decision whether to seek a restraining order [on the property of a defendant] rests with the prosecution, as does the decision whether to waive forfeiture upon a plea of guilty or a conviction at trial. The Government will be ever tempted to use the forfeiture weapon against a defense attorney who is particularly talented or aggressive on the client's behalf—the attorney who is better than what, in the Government's view, the defendant deserves. The specter of the Government's selectively excluding only the most talented defense counsel is a very serious threat to the equality of forces necessary for the adversarial system to perform at its best. An attorney whose fees are potentially subject to forfeiture will be forced to operate in an environment in which the Government is not only the defendant's adversary, but also his own.¹⁵⁴

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *In re Grand Jury Subpoena*, 906 F.2d 1485, 1498 (10th Cir. 1990).

¹⁵³ *United States v. Saccoccia*, 898 F. Supp 53, 62 (R.I. 1995).

¹⁵⁴ *Caplin & Drysdale*, 491 U.S. at 650-51 (Blackmun, J., dissenting) (internal citations omitted).

Refuting the government's contention that this law was not enacted to raise revenue for the government, Justice Blackmun further pointed to an additional potential for abuse by the prosecution:

The mentality of police officials and district attorneys suggests otherwise. Many such officers, particularly at the local level, are funding an increasing amount of their operations from the proceeds of drug seizures and constantly bragging to the public that various programs are not funded from tax dollars. Such programs of course create an enormous incentive for police and prosecutors to seek forfeitures in questionable circumstances or even to manufacture crimes that will lead to the forfeiture of valuable property.¹⁵⁵

RACE AND THE "WAR ON DRUGS"

One of the most problematic, even if probably unintended, consequences of the "War on Drugs" has been its disparate impact on minorities in this country.¹⁵⁶ A statistic that speaks legions in support of this point is the fact that in 2008, although African-Americans and Hispanics constituted only 12.7% and 11.1%, respectively, of the general population in the United States, they made up 48.2% and 18.6 %, respectively, of those imprisoned in this country.¹⁵⁷ These results are undoubtedly intertwined with drug-related law enforcement, which in turn is greatly influenced by public perceptions and responses to the drug problem.¹⁵⁸

¹⁵⁵ *Id.* at 640 n.6 (Blackmun, J., dissenting).

¹⁵⁶ These are problems that raise equal protection issues under both the Fifth (federal government) and Fourteenth (state action) Amendments. *See generally* David Sklansky, *Cocaine, Race, and Equal Protection*, 47 *STAN. L. REV.* 1283 (1995). However, the courts have not been receptive to equal protection challenges because the typical drug-related statute is race neutral on its face, and disparate impact challenges based on discriminatory intent are difficult to prove in this area. *See, e.g.*, *United States v. Watts*, 553 F.3d 603 (8th Cir. 2009); *United States v. Ayala*, 290 Fed. App. 366 (1st Cir. 2008); *but cf.*, *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) ("A facially neutral statute receives heightened scrutiny only if it was enacted or maintained . . . because of an anticipated racially discriminatory effect."). In 2006, 48.2 % of the prison population was black, versus 12.7% of blacks in the general population.

¹⁵⁷ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES 2008* tbl.6 (2008).

¹⁵⁸ *See generally* Jaime Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 *STAN. L. & POL'Y REV.* 257 (2009); *see also* Katherine Beckett, Kris Nyrop, & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 *CRIMINOLOGY* 105 (2006); Katherine Beckett, Defender Ass'n's Racial Disparity Project, *Race and Drug Law Enforcement in Seattle* (2004), available at <http://www.defender.org/files/Race%20and%20Drug%20Law%20Enforcement%20in%20Seattle%20%282004%29.pdf>. For example, the latter study (conducted in Seattle) revealed that although 70% of its population is white, 64.8% of those arrested for drug-related crimes were black, a result that

Although, as previously intimated,¹⁵⁹ this is in part due to biased law enforcement, this skewed outcome is not totally attributable to out and out prejudice. In fact, supporters of the “War on Drugs” argue that, if anything, drug law enforcement protects minority communities from addiction, harassment, and violence by the predatory tactics of drug lords and their gangs. Be that as it may, good intentions are irrelevant because the irrefutable facts establish the overwhelming negative impact of the “War on Drugs” on minorities. The adage, “the road to hell is paved with good intentions” is clearly applicable to this situation.

Moreover such an outcome, irrespective of the lack of discriminatory intent, is a violation of our international commitments under the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), which the United States ratified in 1994,¹⁶⁰ and is therefore the Law of Our Land.¹⁶¹ Under ICERD, prohibited discrimination occurs where there is an unjustifiable disparate impact on a racial or ethnic group, regardless of whether there is any intent to discriminate against that group.¹⁶² Furthermore, where official policies or practices are racially discriminatory, the State party to ICERD must act affirmatively to prevent or end the situation.¹⁶³ There is little, if any, evidence that the United States has acted to meet these obligations.

In the public’s mind, race shapes the public perception of the drug problem and, ultimately, the response to the drug problem because the law enforcement community and the courts try to meet the public’s concerns irrespective of their factual basis.¹⁶⁴ The clearest example of this chain of thought and reaction

is driven by the fact that the police’s emphasis is on crack cocaine enforcement, which predominates in the black community. *Id.* at 110. It was estimated that only one-third of the city’s drug transactions involved crack cocaine, as compared to powder cocaine, estimated at 22%. *Id.* at 110 fig.13. However, transactions involving powder cocaine accounted for only 3.83% arrests, methamphetamine for 10.7% of the transactions and only 1.1% arrests, and heroin for 33% of illegal drug sales but 16.4 % arrests record, most of these involving white offenders, while 79% of those arrested for crack cocaine were black. *Id.* at 118.

¹⁵⁹ *Id.* at 20-21.

¹⁶⁰ International Convention on Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by the United States on November 20, 1994).

¹⁶¹ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹⁶² International Convention on Elimination of All Forms of Racial Discrimination, *supra* note 160.

¹⁶³ *Id.*

¹⁶⁴ Kenneth B. Nunn, *Crime and the Pool of Surplus Criminality: Or Why the ‘War On Drugs’ Was a ‘War on Blacks’*, 6 J. GENDER RACE & JUST. 381, 382-83 (2002) (“In the minds of the criminal justice system’s managers, planners and workers, drugs are frequently

occurs in the situation with cocaine and crack cocaine.¹⁶⁵

The federal drug war initiatives significantly increasing the penalties for drug offenses¹⁶⁶ (resulting in the huge incarceration increase in America, previously alluded to), reflected the popular perception that “getting tough” on crime with harsh punishments was the way to “win” the “War on Drugs.” The use of cocaine in America, primarily in its powder form, had substantially increased in the United States in the 1970’s and early 1980’s, particularly among white middle-class Americans. However, smokeable crack cocaine appeared in the mid-1980’s, which the public, *ergo*, law enforcement entities, associated with black Americans, and for that reason this drug became the prime target of the “War on Drugs.”¹⁶⁷ These biases were grounded on two major erroneous underpinnings.

First, although crack cocaine became the prime target of law enforcement efforts,¹⁶⁸ this was a misdirection of priorities for powder cocaine has always been a far more prevalent illicit drug among American drug users. For example, the 1993 federal National Household Survey on Drug Abuse (“NHSDA”)

associated with African American citizens and their communities. The criminal justice system shapes its policies and practices according to this perception.”).

¹⁶⁵ See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002) [hereinafter U.S. SENT’G COMM’N REPORT (2002)], available at http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/index.htm. All forms of cocaine (*e.g.*, powder, freebase, crack) are powerful stimulants. *Id.* at 17. Powder cocaine is the most commonly used form, and is usually snorted, injected, or ingested. *Id.* at 18. Crack cocaine is made by dissolving powder cocaine in a solution of sodium bicarbonate and water, and is smoked. *Id.* at 19. Crack cocaine is potentially more addictive to the typical user and produces a quicker onset of shorter-lasting, more intense effects than snorting powder cocaine making it more likely that the user will administer the drug more frequently and develop an addiction. *Id.* Crack can be sold in single dose “rocks,” which makes it more accessible to lower income people, while powder cocaine is sold in larger, more expensive quantities and is thus more commonly used among the middle class and professionals. *Id.* at 17. In 2006, 44.4% of all federal cases involved cocaine (crack and powder). U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), available at http://www.uscc.gov/r_congress/cocaine2007.pdf.

¹⁶⁶ See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in scattered sections of U.S.C. titles 18 & 28) (effective Nov. 1, 1987) (establishing the sentencing straight jacket known as the “Sentencing Guidelines”); Kate Stith & José Cabranes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 11 FED. SENT’G. REP. 187 (1999); Kate Stith & José Cabranes, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

¹⁶⁷ MARC MAUER, *THE SENTENCING PROJECT: RACE TO INCARCERATE* (2006).

¹⁶⁸ U.S. SENT’G. COMM’N., 2006 ANNUAL REPORT SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.K (2006), http://www.uscc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2006/SBTOC06.htm (reporting that in 2006, 44.4% of all federal drug cases involved cocaine).

found that although 11.3% of the U.S. population had used cocaine in their lifetime, only 1.8% had used crack cocaine.¹⁶⁹ The 2008 national survey found that while an estimated 8,554,000 persons over the age of 12 had used crack cocaine at least once in their lifetime, as many as 35,298,000 in this category had used powder cocaine.¹⁷⁰ Second, and more on point with the issue of racial bias, although the public perception associates crack use with blacks, the number of whites using this drug far exceeds people of color, with those reporting its use being 62% white, 26% black, and 9% Hispanic.¹⁷¹ In fact, in 2006, 5,553,000 whites reported using crack in their lifetime, compared to 1,537,000 blacks.¹⁷²

Another related misconception deals with the racial composition of the drug user population. The statistics clearly show a higher rate of illegal drug use by white youths than by black youths. The proportion of white youths who reported using powder cocaine the year prior to the survey (5.4%) was five times higher than that of blacks (1.0%); and for crack cocaine, the white proportion (2.2%) was nearly double that of blacks (1.2%). For marijuana (37.9% for whites), it was also significantly higher than for blacks (26.3%).¹⁷³

Notwithstanding these hard facts, with politicians and the sensationalist media focusing on the effects of crack in the inner-city communities, particularly public housing projects in which there are traditionally large proportions of African-American residents,¹⁷⁴ crack cocaine and these areas became the principal focus of law enforcement efforts, thus resulting in a large proportion of blacks being the target of arrests, convictions, and imprisonment for drug of-

¹⁶⁹ NAT'L. INST. ON DRUG ABUSE, DRUG ABUSE AMONG RACIAL/ETHNIC MINORITIES 13-14 (1995), <http://archives.drugabuse.gov/pdf/minorities03.pdf>.

¹⁷⁰ SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2006 NATIONAL DRUG SURVEY ON USE AND ABUSE ON DRUG AND HEALTH: NATIONAL RESULTS tbl.G.1 (2007), available at <http://www.oas.samhsa.gov/NSDUH/2k6NSDUH/AppG.htm>. [hereinafter SAMHSA, 2006 National Survey].

¹⁷¹ U.S. SENT'G COMM'N REPORT (2002), *supra* note 165, at 35.

¹⁷² SAMHSA, 2006 National Survey, *supra* note 170, at tbls.1.34A, B.

¹⁷³ HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (2006), <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/nr2006.pdf>.

¹⁷⁴ 51.5 % of blacks in the United States live in metropolitan areas, as compared to 21.1% of whites. U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002 2 fig.2 (2003), <http://www.census.gov/prod/2003pubs/p20-541.pdf>. Cities, of course, have more law enforcement resources per capita, and higher arrests rates, which increases the likelihood of arrests for drug offending behavior. In 2007, 77% of drug arrests occurred in cities. See FBI, CRIME IN THE UNITED STATES 2007: ARREST BY RACE tbls.43, 47 (2008), available at http://www.fbi.gov/ucr/cius2007/data/table_43.html and [table_47.html](http://www.fbi.gov/ucr/cius2007/data/table_47.html). This emphasis on urban drug enforcement is reflected in the fact that although urban blacks represent only 6% of the national population, they constituted 29.8% of all those arrested for drugs in the United States in 2007. *Id.*

fenses as compared to the total population of crack cocaine users.¹⁷⁵

The Congressional response to these misconceptions was to provide additional ammunition for sending more people to jail, and for longer periods of time. The Controlled Substances Import and Export Act Penalties Enhancement Act of 1986¹⁷⁶ and the Anti-Drug Abuse Act of 1988¹⁷⁷ imposed even higher penalties for possession and sale of crack cocaine than existed up to then. Crack became the only drug in which a five-year mandatory sentence was imposed for simple possession. Possession of only 5 grams of crack garnered a sentence equivalent to that where the accused had possession of 500 grams of powder cocaine.¹⁷⁸ On a similar note, it took 5,000 grams (5 kilograms) of powder cocaine to equal the sentence imposed for only 50 grams of crack, a 10-year mandatory sentence.¹⁷⁹

Because, as previously outlined, blacks are disproportionately arrested and convicted on crack charges, as compared to white drug users, and crack cocaine sentences are on average 43.4% longer than those imposed for equivalent amounts of powder cocaine,¹⁸⁰ the population of incarcerated African-Americans outdistances that of whites by 48.2% (blacks) to 33.2% (white). This is so notwithstanding they are a fairly small minority in the general population as compared to whites, with only 12.9% (blacks)¹⁸¹ of the population as compared to 77.1% (white).¹⁸² Moreover, the rate at which blacks were incarcerated by the states in 2003 was ten times greater (256.2 per 100,000 black adults versus 25.3 per 100,000 white adults), than for whites.¹⁸³ That year African-Americans constituted 33.2% of those entering federal prisons for drug offenses.¹⁸⁴

A sequel to the previous dismal statistics is the fact that after much harm was caused, mostly to minority drug users by the present drug scheme, the Sentencing Commission in 2007 eliminated the 100:1 ratio in powder to crack cocaine,

¹⁷⁵ See Beckett et al., *Race and Drug Law Enforcement in Seattle*, *supra* note 158.

¹⁷⁶ 21 U.S.C. § 960 (2006).

¹⁷⁷ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 1002-9310, 102 Stat. 4312 (1988) (codified as amended at 21 U.S.C. § 801).

¹⁷⁸ U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig.J (2006), http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2006/figj.pdf.

¹⁷⁹ 21 U.S.C. § 841(b)(1)(A) (2006).

¹⁸⁰ See U.S. SENT'G COMM'N, *supra* note 166, at fig.J.

¹⁸¹ U.S. CENSUS BUREAU, THE BLACK POPULATION: 2000 1 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

¹⁸² U.S. CENSUS BUREAU, THE WHITE POPULATION: 2000 1 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-4.pdf>.

¹⁸³ HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 16 (2008), available at <http://www.hrw.org/en/reports/2008/05/04/targeting-blacks-0>.

¹⁸⁴ See BUREAU OF JUSTICE STATISTICS, FEDERAL STATISTICS PROGRAM, <http://fjrc.urban.org>. (last visited Sept. 11, 2011).

except in the mandatory minimum cases, and recommended reform in this area to Congress. It took three years for Congress to act on this recommendation. It finally recently legislated to relieve the situation by enacting the Fair Sentencing Act of 2010,¹⁸⁵ which President Obama signed into law on August 3, 2010. Pursuant to this statute the five-year mandatory minimum sentence for simple possession is eliminated, and the amounts that trigger the five and ten-year minimums for crack cocaine, are increased to 28 grams of crack and 280 grams of crack cocaine.¹⁸⁶ In the meantime, the Supreme Court's *Booker*¹⁸⁷ and *Kimbrough*¹⁸⁸ opinions had signaled an official softening of the stance on sentencing, rendering the once-mandatory Sentencing Commission's Guidelines merely advisory and allowing federal trial judges to exercise the discretion contemplated by the Constitution to impose sentences for crack cocaine below the range recommended by the Guidelines.

TO BE OR NOT TO BE

We can continue to cite expert opinions, statistics and cases *ad infinitum*, but sooner or later we have to take a stand on what we, as a nation, will do about this intractable multi-faceted social, penal, medical, and cultural problem. One thing I do know is that I have spent the last thirty-six years of my life incarcerating people for violating the illicit drug laws of the United States, yet I see *nothing* that would lead me to conclude, even remotely, that anything that I, or for that matter, the entire "War on Drugs" machinery of the United States, have done in this interim has had any perceptible import in curbing Americans' insatiable appetite for drugs,¹⁸⁹ illegal or otherwise.

Putting people in jail is not a pleasant endeavor, as it is not meant to be even when dealing with people that are "not nice." But I have done it without hesitation, at first, because it was my duty as a federal judge to enforce our laws, and further, because I thought I was contributing to making our nation a better place. Since those halcyon days, however, although I have continued to do my duty and have continued to incarcerate people in considerable numbers for violations of our drug laws, I do so because I have taken an oath to enforce the laws in question irrespective of my personal views about them, *not* because I believe that what I am doing is making our country one iota a better place. In

¹⁸⁵ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended at 21 U.S.C. § 801).

¹⁸⁶ *Id.*

¹⁸⁷ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁸⁸ *Kimbrough v. United States*, 552 U.S. 85 (2007).

¹⁸⁹ Matthew Lee, *Acepta el Vicio "Insaciable" de E.E.U.U*, EL NUEVO DÍA, Mar. 26, 2009, at 48 (Secretary of State Hillary Clinton states in Mexico, "Our [e.g., U.S.'s] insatiable demand for illegal drugs feeds drug trafficking . . . Clearly, what we have been doing does not work . . .").

fact, I am now certain that is not the case, but rather that it is creating a considerable amount of private and public havoc to our society.

First, the massive incarceration of our population for drug law violations has not stemmed the tide of drug use in this country. Just to remind you, between 1991 and 1993, approximately 13.9 million Americans (5.8% of our population over 12 years of age), were using illicit drugs, a figure which *increased* to 20.1 million (8.3%) by 2006. This increase took place in the face of an expenditure of almost *one trillion dollars* as part of our government's goal of having a "drug-free America" by 2008, and after the incarceration of more than 500,000 men and women for drug-related offenses during just the period of 2002 to 2006.

Our present approach, "the War on Drugs," makes no sense. Without question, the facts demonstrate that it is a bankrupt way of dealing with the drug problem. As stated by David Dimston, "[t]hat the War on Drugs has been a complete failure is not even a question anymore."¹⁹⁰ What we have managed to do with this "War on Drugs" is exactly what we did with Prohibition in the 1920's: we have created a powerful criminal subculture with economic power of incredible proportions, allowing it to subvert our economic, social and political systems, while failing to control, much less "prohibit," the use and abuse of the proscribed drug(s). The Mafia then, and the drug cartels and the Mafia now, have been allowed to infiltrate our entire social structure, even unto our smallest towns,¹⁹¹ engaging in their extremely profitable nefarious business, without any effective governmental control, and tax free to boot. As far back as 1989, the Office of National Drug Control Strategy Policy stated that "here in the United States—in every state, in our cities, in our suburbs, in our rural communities— . . . drugs are available to almost anyone who wants them."¹⁹² Yet, we continue to blindly throw our tax dollars down this black hole called the "War on Drugs."

LEGALIZATION: "THE LEAST BAD SOLUTION"

Like most complex social issues there is no absolute or perfect answer or solution to the problem. The course of conduct to be followed depends on an objective balancing of many competing interests and factors, with the answer being the least harmful of the several available alternatives. Such is the case with the drug conundrum.

¹⁹⁰ Gary Fields, *Whitehouse Czar Calls for End to 'War on Drugs'*, WALL ST. J., May 14, 2009, available at <http://online.wsj.com/article/SB124225891527617397.html>.

¹⁹¹ Constance Linder, *Abington Arrest Nets \$1m in Marijuana*, BOSTON GLOBE, Aug. 18, 2010, at B5. The population of Abington, Massachusetts is approximately 14,605. U.S. CENSUS BUREAU, 2000 DATA FOR THE STATE OF MASSACHUSETTS, <http://www.census.gov/census2000/states/ma.html>.

¹⁹² OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 8 (1989).

The only realistic alternative to the present policy is to experiment with the legalization of at least some of these substances, beginning with marijuana. Whatever the moral arguments against legalization, which have recognizable merit, are in my opinion overcome by the social and economic costs that the irrefutable facts have demonstrated the present policy has imposed upon our nation.

The most important component of the moral argument against the legalization of drugs seems to me to be the potential harm that a drug may cause the public. In 2007, a report was issued in Great Britain entitled, "Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse."¹⁹³ This study was prepared by the government's Advisory Council on the Misuse of Drugs at the request of the House of Commons's Select Committee on Science and Technology. It was conducted by a committee chaired by Dr. David Nutt, a professor of psychopharmacology at London's Imperial College, together with Dr. Leslie A. King, of the Forensic Science Service, William Salisbury, M.A., of the Police Foundation, and Professor Colin Blakemore F.R.S., of the Medical Research Council and the Department of Physiology, Anatomy, and Genetics at Oxford University.¹⁹⁴

Drugs were ranked by two separate groups of experts in order of potential harm by reason of misuse and evaluated against a nine-category matrix of harm caused, within the general parameters of physical harm, dependence, and social harm.¹⁹⁵ Twenty drugs, including the five legal ones (alcohol, tobacco, khat, solvents, and andalkyl nitrates), were included in the study,¹⁹⁶ as well as the usual illegal ones.

The results of the study are not startling, but confirm the general knowledge and experience of anyone with some degree of objective expertise in this field.¹⁹⁷ Ranked first and second in terms of harmfulness, were heroin and

¹⁹³ David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 LANCET 1047, 1047 (2007). I would not be so pretentious as to think that my suggestions from 1996 somehow crossed the Gulf Stream, but I am happy to see that more knowledgeable persons reached a similar approach as I did, even if 3,000 miles distant. I cannot say my views have experienced equivalent success in this country.

¹⁹⁴ Nutt, *supra* note 193, at 1047.

¹⁹⁵ *Id.* at 1049 tbl.1.

¹⁹⁶ *Id.* at 1049 tbl.2.

¹⁹⁷ In fact, the conclusions regarding marijuana by this 2007 study are not greatly different from the seven-volume (3,281 page) report of the Indian Hemp Commission of 1894, also commissioned by the British Parliament, in which the physical, mental, and moral effects of marijuana were inventoried with the conclusions being that: (1) moderate use of cannabis drugs had no appreciable effects on the body; (2) moderate use of cannabis had no adverse effects on the brain; and, (3) moderate use of cannabis had no adverse effects on morality. See GOVERNMENT CENTRAL PRINTING OFFICE OF INDIAN, REPORT OF THE INDIAN HEMP DRUGS COMMISSION (1893-1894) (1894). A summary of this report can be found in an article by Dr. Tod H. Mikuriya entitled *Physical, Mental, and Moral Effects of Marijuana*

cocaine respectively, with alcohol fifth and tobacco ninth, both of which were ranked as substantially more damaging than marijuana, which was ranked eleventh on the list.¹⁹⁸ To anyone at all familiar with this subject, and as substantiated by the statistics and data in the present article which we need not reproduce, there is nothing new about these conclusions except that they come from knowledgeable experts in their fields of expertise: (1) we know that both heroin and cocaine can be highly addictive; (2) the annual deaths attributed to heroin and cocaine, caused principally by overdose are 39,000, as compared to 400,000 deaths caused by tobacco and 75,000 by alcohol; and, (3) there are no known reported deaths attributed to marijuana overdose. There are, of course, several other reports and studies that confirm the conclusions of the British Advisory report.¹⁹⁹

At best, it seems anomalous that legalizing the use of marijuana is so persistently rejected, considering that the controlled use of alcohol and tobacco is already an accepted practice in the United States, notwithstanding their highly deleterious health and social costs. If we accept a harm minimization approach, which I believe is the sensible way to proceed, in which we take into account the dangers of each drug, both legal and illegal, in order to determine the correct drug policy for America to follow, it makes little sense to prohibit the use of marijuana when its prejudicial effects on our health are minimal when compared to those unquestionably caused by alcohol and tobacco.

There are various additional factors that support the legalization of marijuana use at present. Marijuana is already semi-legal in fifteen U.S. jurisdictions under the label of medicalization,²⁰⁰ which as previously stated, the Federal government is allowing.²⁰¹ There is thus some experience within the United States with decriminalizing marijuana possession, without any substantiated social drawbacks or increases in its use, although this is not a totally reliable observation considering that the general use of marijuana is still illegal. It is also likely that if there is full legalization of marijuana usage, there will be an increase in its general usage, as happened with alcohol consumption after Pro-

na: *The Indian Hemp Drugs Commission Report*, <http://www.druglibrary.org/schaffer/library/effects.htm>.

¹⁹⁸ Nutt, *supra* note 193, at 1050 fig.1; *see also* Mark Pothier, *You Can't Handle The Truth*, BOSTON GLOBE, Dec. 13, 2009, at K2.

¹⁹⁹ *See, e.g.*, Phillip J. Hilts, *Is Nicotine Addictive? It Depends on Whose Criteria You Use*, N.Y. TIMES, Aug. 2, 1994, at C3, *available at* <http://www.nytimes.com/1994/08/02/science/is-nicotine-addictive-it-depends-on-whose-criteria-you-use.html>.

²⁰⁰ *See supra* note 33.

²⁰¹ *See* Jesse McKineley, *Push to Legalize Marijuana Gains Ground in California*, N.Y. TIMES, Oct. 28, 2009, <http://www.nytimes.com/2009/10/28/us/28pot.html> (referencing the "newly relaxed approach of the federal government toward medical marijuana"); José Varela, *Medicalización: La Alternativa*, EL NUEVO DÍA, Oct. 21, 2010, at 67; *see also* Fields, *supra* note 190.

hibition was repealed.²⁰² This will happen because people who have not used marijuana to present because of its illegality will not be so inhibited, and thus there will be a tendency for more people to use it. Furthermore, once marijuana can be freely cultivated, particularly in the United States, there will be a lowering of the production costs and an increase in the supply, there will be a reduction of the retail cost of the product with a consequential increase in its accessibility to the public, particularly the younger groups.²⁰³ Increased youth access to marijuana is an obvious downside to legalization which will have to be addressed in a similar fashion as has been done with alcohol and tobacco.

As is well-known, the legalization of drugs, generally, for personal consumption is already an irreversible trend world-wide.²⁰⁴ A comparison of the statis-

²⁰² Alcohol consumption during Prohibition was 0.9 gallons per capita as compared to 2.58 gallons per capita by 1986. ARNOLD S. TREBACH & JAMES A. INCIARDI, *LEGALIZE IT? DEBATING AMERICAN DRUG POLICY*, 109–10 (1993).

²⁰³ See *Study Shows Cannabis Popular with Teens*, BOSTON GLOBE, Dec. 15, 2009, available at http://www.boston.com/news/nation/articles/2009/12/15/study_shows_cannabis_popular_with_teens (arguing that a current “increase of teens smoking pot is partly because the national debate over medical use of marijuana can make the drug seem safer” A study by the University of Michigan’s National Institute for Drug Abuse of 47,097 12th grade students showed that 20.6% said they used marijuana in the past month, as compared to 19.4% in 2008 and 18.3% in 2007).

²⁰⁴ See generally Susana Ferreira, *At 10, Portugal’s Drug Law Draws New Scrutiny*, WALL ST. J., July 20, 2010, at A13 (“In July 2000, Portugal moved beyond previous liberalization regimes in places like the Netherlands by passing a law that transformed drug possession from a matter for the courts to one of public and community health. Trafficking remained a criminal offense, but the government did away with arrests, courts, and jail time for people carrying a personal supply of anything from marijuana to cocaine to heroin.”); Brian Vestag, *5 Years After: Portugal’s Drug Decriminalization Policy Shows Positive Results*, SCIENTIFIC AMERICAN, Apr. 7, 2009, available at <http://www.scientificamerican.com/article.cfm?id=portugal-drug-decriminalization> (overdose deaths dropped from 400 annually in 2000 to 290 in 2006, and HIV incidence dropped from 1400 to 400 annually during that same period); Maia Szalavitz, *Drugs in Portugal: Did Decriminalization Work?*, TIME, Apr. 26, 2009, <http://www.time.com/time/printout/0,8816,1893946,00.html> (Portugal has the lowest rate of lifetime marijuana use in the European Union in people over 15 years of age, at 10%, as compared to the United States at 39.8% for those over 12); *Mexico Legalizes Drug Possession*, N.Y. TIMES, Aug. 21, 2009, <http://www.nytimes.com/2009/08/21/world/americas/21mexico.html> (Mexico has decriminalized possession of small amounts of marijuana, cocaine, heroin, LSD, and methamphetamine); Stephen Kinzer, *German Court Allows Possession of Small Amounts of Marijuana*, N.Y. TIMES, May 3, 1994, at A12 (Germany’s highest court has held that 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 marijuana and hashish); Christian Moraff, *Latin America’s Legalization Push*, AMERICAN PROSPECT, July 6, 2009, http://www.prospect.org/cs/articles?article=latin_americas_legalization_push (“[T]he multidisciplinary Latin American Commission on Drugs and Democracy (co-chaired by former Presidents Fernando Enrique Cordero of Brazil, Cesar Gaviria of Colombia, and Ernesto Zedillo of Mexico), called the drug war a ‘failure’ and

tics for marijuana use between the United States, where the prohibitionist model is still generally the law, and the Netherlands, where the decriminalization of personal marijuana use has been in effect since its Opium Act of 1976, is instructive and self-explanatory.²⁰⁵

<u>Consumption</u> ²⁰⁶	<u>Year</u>	<u>U.S.</u>	<u>Netherlands</u>
Marijuana used during lifetime (12 yrs. or older)	2001	36.9%	17.0%
Marijuana used during past month (12 yrs. or older)	2001	5.4%	3.0%
Rate of incarceration per 100,000 inhabitants	2002	701	100
Rate of homicides per 100,000 inhabitants	Averaged for 1999–2001	5.56	1.51

Apart from the obvious health benefits to its population resulting from its enlightened drug policies, the Dutch approach is most cost-effective and places its resources where they do the most good: education, prevention, and rehabilitation.²⁰⁷ The Netherlands spends relatively more money on these public health items than the United States, which has twelve times more population and spends a relatively higher part of its drug-related budget on drug-enforcement. The above-chart spells out the results of these divergent strategies.

The three most important benefits to society of a progressive change in our drug strategy, apart from allowing for a scientific, gradual approach to the possibility of general legalization of drug usage in the United States, would be the fact that legalization would permit the government to better supervise quality control for the consumer and allow the government to fund most, if not all, of the drug-related expenses by taxation of producers and consumers, as in the case of the alcohol and tobacco industries.²⁰⁸

Perhaps the most important benefit, in terms of the mayhem that our present

issued a groundbreaking report urging other governments in the region—including the United States—to rethink prohibition policy.”).

²⁰⁵ DRUGWARFACTS.ORG, *The Netherlands Compared with the United States*, <http://drugwarfacts.org/cms/?q=node/67> (These data are reproduced from the table entitled, “Comparing Important Drug and Violence Indicators”).

²⁰⁶ *Id.*

²⁰⁷ See Henk Rigter, *What Drug Policies Cost: Drug Policy Spending in the Netherlands in 2003*, 101 ADDICTION 323, 325 tbl.2, 326 tbl.3 (2006).

²⁰⁸ In 1994, \$6.8 billion were collected in alcohol taxes and approximately \$5.8 billion in tobacco taxes. Postal Serv. & General Gov’t Appropriations, Hearing Before the U.S. Senate Subcomm. on Treasury, 104th Cong. 218-19 (1995) (statement of John W. Magaw, Director of the Bureau of Alcohol, Tobacco and Firearms). The Alcohol and Tobacco Tax and Trade Bureau collects nearly \$15 billion in annual tax revenue from alcohol, tobacco, and ammunition sales. U.S. DEPT. OF TREASURY, *THE BUDGET IN BRIEF: FISCAL YEAR 2009 41* (2009), available at <http://www.treasury.gov/about/budget-performance/budget-in-brief/>

strategy is causing, is that legalization will eliminate the criminal element from the production and distribution of marijuana and its attendant underground acquisition of wealth with its accompanying violence. As far back as 1991, Nobel Laureate Milton Friedman, an advocate of drug legalization, estimated that in the United States alone as many as 10,000 homicides per year, unrelated to overdosing issues, were plausibly attributed to the drug market wars between the cartels.²⁰⁹ This, of course, does not even begin to account for the blood baths in Colombia and Mexico for which, at a minimum, we are morally responsible for causing with our massive consumption of illegal drugs.

A fourth point, although difficult to establish with exactitude, is the savings that would result in public funds by decriminalizing marijuana consumption. This is a valid consideration when submitting this issue to an appropriate balancing test, particularly at a crucial time in our history when our national deficit is sky rocketing beyond control. Not only will the direct costs of law enforcement and incarcerations be substantially reduced,²¹⁰ but also those resources can be shifted to where they are needed, not only in focusing on the drug problem as the public health issue that it is, but in freeing our law enforcement community to engage in the prevention and apprehension of “normal” criminal activities. Additionally, our over-loaded court systems would be relieved of their enormous drug-related case loads and allowed to go back to handling a more socially productive case load of criminal and civil cases.

The government’s response to the undeniable failure of the “War on Drugs” has been stonewalling²¹¹ and more slogans, and of course, the spending of more

Pages/index_09.aspx (follow “FY 2009 Budget-in-Brief” hyperlink). In 2007, alcohol and tobacco tax revenues accounted for 98% of taxes collected. *Id.*

²⁰⁹ Milton Friedman, *The War We Are Losing*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES 53, 67 (Melvyn B. Krause & Edward P. Lazear eds., 1991).

²¹⁰ Arrest for simple possession of marijuana is the fourth largest ground for arrest in the United States. Lester Grinspoon & James B. Bakalar, *The War on Drugs—A Peace Proposal*, 330 NEW ENG. J. MED. 357, 357 (1994).

²¹¹ As masterfully argued by Professor David M. Helfeld in his article, *Narcotics, Puerto Rico, Public Policy: In Search of Truth and Wisdom*, 75 REV. JUR. U.P.R. 1029 (2006), there has been a misuse of federal power in the debate over the legalization of drugs, particularly regarding marijuana and its use for medical purposes. *Id.* at 1059-67. The Drug Enforcement Administration (DEA) thus issued a report in 2006 entitled, *Exposing the Myth of Smoked Medical Marijuana*, lambasting the idea that marijuana could be used for medicinal purposes. U.S. DRUG ENFORCEMENT ADMINISTRATION, EXPOSING THE MYTH OF SMOKED MEDICAL MARIJUANA, <http://www.justice.gov/dea/ongoing/marijuana.html> (last visited Feb. 18, 2011). The DEA report was followed a few weeks later by one issued by the National Institute on Drug Abuse (NIDA), which is part of the Department of Health and Human Services, providing more detailed data and supporting sources on the harms caused by smoking marijuana. NAT’L INST. ON DRUG ABUSE, INFOFACTS: MARIJUANA, <http://www.drugabuse.gov/infofacts/marijuana.html> (last visited Feb. 18, 2011). On the same day that the NIDA report was issued, the Director of the Office of National Drug Control Policy

taxpayers' money on a mainly useless endeavor. Although there seemed to be grounds for optimism for a fresh approach being adopted when the new White House Drug Czar, Gil Karlikwske, signaled his "openness to rethinking the government's approach to fighting drug use,"²¹² there are signs that this may not be a path supported at the highest levels of the Administration.

This is yet another wasted opportunity for there are signs that a change in our present policy is wanted by the public.²¹³ National support for the legalization of marijuana use has jumped to the highest level in forty years, with a Gallup poll reporting an increase of from 31% in 2000 to 44% in 2009.²¹⁴ In a recent reversal, the American Medical Association has called for a review of marijuana as a Schedule I hard drug alongside LSD and PCP.²¹⁵

As stated in *The Economist*, "[b]y any sensible measure, this 100-year struggle [since the International Opium Commission was established in 1909] has been illiberal, murderous and pointless . . . [Legalization is] the least bad

(ONDCP) issued a release entitled, *New Study: Bladder Cancer Tied to Marijuana Use*. See Press Release, Office of Nat'l Drug Control Policy, *New Study: Bladder Cancer Tied to Marijuana Use*, <http://www.pushingback.com/archives/032406> (last visited Feb. 11, 2011). This conclusion was based on an extrapolation of the fact that *cigarette smoking* is a major risk factor for bladder cancer. As if this sequence of articles were not enough, the Food and Drug Administration (FDA) followed three weeks later with a statement supporting the same position. Press Release, U.S. Food and Drug Administration, *Inter-Agency Advisory Regarding Claims That Smoked Marijuana Is a Medicine* (Apr. 20, 2006), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108643.htm>. These reports and asseverations border on scientific obscurantism by totally ignoring, if not outright suppressing, the abundant credible scientific evidence worldwide, which is contrary to these reports and statements. For criticisms of the FDA's statement, see *The Politics of Pot*, N.Y. TIMES, Apr. 22, 2006, http://www.nytimes.com/2006/04/22/opinion/22sat3.html?_r=1. For a list of contrary scientific reports and opinions, see Helfeld, *supra* note 211, at 1064 n.68-69, 1065 n.79. This governmental propaganda is, to say the least, ironic, considering that under the Marijuana Tax Act of 1937, doctors and dentists were allowed to prescribe marijuana for medicinal purposes provided they paid a \$1 annual tax. See *supra* text accompanying note 32.

²¹² Fields, *supra* note 190.

²¹³ See Eric Etheridge, *The War on the War on Drugs*, N.Y. TIMES, Apr. 2, 2009, <http://opinionator.blogs.nytimes.com/2009/04/02/the-war-on-the-war-on-drugs/?pagemode=> (summarizing the change in public and official views on legalization and commenting on support for Senator Webb's proposed bill); Keila Lopez Alicea, *Iglesia Metodista Defiende la Medicación*, EL NUEVO DÍA, Dec. 29, 2009, http://www.elnuevodia.com/iglesiametodistadefiendelamedicalizacio_653866.html; Alba Y. Muñoz Gracia, *Busca Medica Drogas en la Isla*, EL NUEVO DÍA, Oct. 21, 2009, at 58.

²¹⁴ Hendrix, *supra* note 95.

²¹⁵ Kevin B. O'Reilly, *AMA Meeting: Delegates Support Review of Marijuana's Schedule I Status*, AMERICAN MEDICAL NEWS, Nov. 23, 2009, <http://www.ama-assn.org/amednews/2009/11/23/prse1123.htm>.

policy.”²¹⁶ Of course, “[l]east bad’ does not mean good.”²¹⁷ It means that among the various alternatives available, it will cause the least harm to the greatest number of people, which is after all, how democracy is supposed to work. Legalizing marijuana, as a first step, will not solve drug abuse problems, but “after a century of manifest failures [with the prohibitive model, it] argues for trying it.”²¹⁸

²¹⁶ *How to Stop the Drug Wars*, ECONOMIST, Mar. 9, 2009, <http://www.economist.com/node/13237193>.

²¹⁷ *Id.*

²¹⁸ *Id.*