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## Our Vietnam: The Prohibition Apocalypse

Erik Grant Luna

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# OUR VIETNAM: THE PROHIBITION APOCALYPSE

*Erik Grant Luna\**

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\* Member of the California Bar; J.D., Stanford Law School; B.S., University of Southern California. This article is dedicated to Dr. Gaye Luna. You have always provided strength when I was weak, guidance when I was lost, and compassion when I was in pain. I love you mom.

## INTRODUCTION

America is at war. Every day, millions of men and women walk the front lines, hoping that their next step will not be their last. Entire neighborhoods lie in ruin, riddled with bullet holes and smelling of decay. The sounds are deafening: the bellow of hovering helicopters; the shrill wail of approaching sirens; the thunderous crack of sporadic gunfire. Fleeting moments of peace are abruptly shattered by the chaos of warfare.

Even blameless inhabitants of the ravaged neighborhoods must hide in broad daylight. They do not easily forget the lesson of innocent victims caught in the cross fire: *Stray bullets do not ask whose side you are on.* Youngsters are too frightened to play outside. The elderly become prisoners in their own homes. Parents who have given up all hope for themselves can only pray that a better life awaits their children. Most, however, realize that their sons and daughters are condemned to a life little different from their own. Hope is in short supply; despair is not.

The war measures days by body count. Lifeless corpses steadily flow into the morgues, yet more keep coming. The colored faces are different than mine, but they were no less human. Most were barely old enough to vote; some were too young to drive. Behind each face is a story—undoubtedly a tragedy. However, the war does not stop to recount these stories. The war cares only for morbid statistics and not the lives behind the faces. *Would things be different if they looked more like me? Would it have mattered if I was the one lying on the cold slab? Would anybody have cared?*

The “War on Drugs” divides our country. The battlegrounds are our inner cities. The victims are a generation of minorities slaughtered on our streets and imprisoned in our jails. The spoils are billions of dollars in black-market profits. The enemies are ourselves.

Every generation has its defining moment. For our grandparents, it was the Great Depression and World War II; for our parents, it was Vietnam. After a decade of disenchantment and apathy, our generation (pejoratively known as “Generation X”) is slowly accumulating political power and searching for its place in history.

The drug war, however, is championed by the gentry of a previous generation. They are unmoved by empirical data and pragmatic suggestions; anything short of absolute prohibition is deemed “morally scandalous.”<sup>1</sup> Rhetoric replaces reason, while lurid claims drown out

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1. Donald Baer, *A Judge Who Took the Stand*, U.S. NEWS & WORLD REP., Apr. 9, 1990, at 26 (quoting William Bennett).

scientific evidence. Former "drug czar" William Bennett would behead drug dealers.<sup>2</sup> Nancy Reagan branded casual users "accomplice[s] to murder,"<sup>3</sup> and the erstwhile police chief of Los Angeles, Daryl Gates, opined that even occasional drug users should be "taken out and shot."<sup>4</sup>

All hope is not lost. Moral and intellectual unanimity has slowly begun to dissipate. A few influential leaders and scholars have rebelled against conventional prohibitionist dogma, including former Secretary of State George Schultz;<sup>5</sup> Nobel laureates Milton Friedman and Gary Becker;<sup>6</sup> commentator William F. Buckley;<sup>7</sup> Baltimore mayor Kurt Schmoke;<sup>8</sup> sociopolitical author Thomas Sowell;<sup>9</sup> scientist Carl Sagan;<sup>10</sup> and federal judges Richard Posner, Jack Weinstein, Whitman Knapp, William Schwarzer, Robert Sweet, Harold Greene, and James Paine.<sup>11</sup> These individuals are among the courageous vanguard of drug peace, setting the stage for armistice in our day.

Ending the drug war, this author believes, is the challenge of our generation. The analysis that follows demonstrates how this conclusion was reached.

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2. *Crackmire*, NEW REPUBLIC, Sept. 11, 1989, at 7 (quoting from an interview with William Bennett on *The Larry King Show*, June 15, 1989).

3. Stephen Chapman, *Nancy Reagan and the Real Villains in the Drug War*, CHI. TRIB., Mar. 6, 1988, § 4, at 3.

4. *The War on Drugs Is Lost*, NAT'L REV., Feb. 12, 1996, at 34, 43 (editorial of Joseph D. McNamara).

5. See Robert Scheer, *The Drugs War's a Bust*, Feb. 1994, at 49 (on file with author).

6. See Hugh Sidey, *The Struggle with Ourselves*, TIME, Sept. 18, 1989, at 32.

7. See *The War on Drugs Is Lost*, *supra* note 4, at 35.

8. See *id.* at 40.

9. See Joshua W. Shenk, *Why You Can Hate Drugs and Still Want To Legalize Them*, WASH. MONTHLY, Oct. 1995, at 32, 38.

10. See *Converts to Curiosity*, ECONOMIST, Nov. 18, 1989, at 33.

11. Baer, *supra* note 1, at 26 (Sweet); Rebecca Carr & Phillip J. O'Connor, *Teens Say Pot Is Drug of Choice*, CHI. SUN TIMES, Sept. 17, 1995, at 18 (Posner); Rae Corelli et al., *A New War of Words: Drug Legalization Is Winning Converts*, MACLEAN'S, Jan. 22, 1990, at 39 (Sweet); *The Enemy Within*, ECONOMIST, May 15, 1993, at 31 (Greene, Knapp, and Weinstein); Ted Gest, *The Growing Movement to Legalize Drugs*, U.S. NEWS & WORLD REP., Jan. 22, 1990, at 22, 22 (Sweet); Michael Ruby, *Should Drugs Be Legalized?*, U.S. NEWS & WORLD REP., Dec. 20, 1993, at 80 (Sweet); *Sniffing Victory*, ECONOMIST, Dec. 1991, at A31 (Paine); *The War on Drugs Is Lost*, *supra* note 4, at 44 (Knapp, Sweet, and Weinstein); Stephen Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, U.S.A. TODAY, July 1993 (magazine), at 17 (Greene and Schwarzer); *Wrong on Drugs, Jurist Urges Marijuana Legalization*, SAN DIEGO UNION-TRIB., Sept. 18, 1995, at B6 (Paine, Posner, and Sweet).

## I. HISTORY

*Those who cannot remember the past are condemned to repeat it.*

—George Santayana<sup>12</sup>

A. *Before the War*

Until our own century, drug consumption was largely unfettered by government regulation.<sup>13</sup> The pursuit of intoxication was viewed as a mild vice, not the scourge of man.<sup>14</sup> "For most of human history," remarked historian Stanton Peele, "even under conditions of ready access to the most potent of drugs, people and societies have regulated their drug use without requiring massive education, legal and interdiction campaigns."<sup>15</sup> Drug criminalization was an infrequent endeavor, marked by both barbarous enforcement and unequivocal failure.<sup>16</sup>

The drugs legally available at the turn of the century mirror the current selection on the streets. Opium, man's first narcotic, was widely used in eighteenth-century America for medicinal purposes.<sup>17</sup> Opiates<sup>18</sup> were used for nearly every possible ailment: dysentery, in-

12. GEORGE SANTAYANA, *THE LIFE OF REASON ON THE PHASES OF HUMAN PROGRESS* 284 (1905).

13. James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 612 (1990).

14. Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 571-72 (1995).

15. Loren Siegel, *Decriminalize Drugs Now: Even Some Conservatives Agree That It's Not as Dumb an Idea as It Sounds*, Jan. 1989, at 57 (on file with author).

16. See, e.g., David Boaz, *A Drug-Free America—or a Free America?*, 24 U.C. DAVIS L. REV. 617, 617 (1991) ("In the sixteenth century the Egyptian government banned coffee. In the seventeenth century the Czar of Russia and the Sultan of the Ottoman Empire executed tobacco smokers. In the eighteenth century England tried to halt gin consumption and China penalized opium sellers with strangulation.") (citations omitted).

17. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 1 (Expanded ed. 1987); see also *Prohibiting the Importation of Crude Opium for the Purpose of Manufacturing Heroin*, H.R. 7079, 68th Cong. (1924) ("Opium has been recognized from time immemorial as a narcotic. Its value or the value of its derivatives, in medication, has been recognized for centuries; in fact, it has often been said that the practice of medicine without the aid of opium or its derivatives would be a very unhappy calling indeed.")

18. According to one commentator:

The most important opiates are opium, morphine, heroin, and codeine. . . . *Opium* is a raw natural product—the dried juice of the unripe capsule of the opium poppy (*papaver somniferum*). *Morphine* is the chief active ingredient in opium. . . . *Heroin* (*diacetylmorphine*) is produced by heating morphine in the presence of acetic acid. . . . *Codeine* is also found in small quantity in opium. . . .

EDWARD M. BRECHER ET AL., *LICIT AND ILICIT DRUGS: THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA—INCLUDING CAFFEINE, NICOTINE, AND ALCOHOL* 1 (1972). It should be noted that opium, morphine, heroin, cocaine and marijuana are legally classified as narcotics. However, cocaine and marijuana medically are not narcotics.

flammation, rheumatism, cholera, food poisoning, parasites, lockjaw and delirium tremens.<sup>19</sup> Doctors prescribed opium casually and without concern for potential addiction, calling it "God's Own Medicine,"<sup>20</sup> "which the Creator himself seems to prescribe."<sup>21</sup> Morphine was first derived from opium in 1803 and was widely and liberally used as an anesthetic.<sup>22</sup> Named after the Greek god of dreams, this narcotic was stronger and more predictable than opium, with fewer immediate side effects.<sup>23</sup>

Eventually, the medical profession had two other powerful narcotics at their disposal. By 1885, cocaine had been hailed by medical experts as a potent anesthetic and stimulant.<sup>24</sup> It was used to treat depression, anxiety, sexual disorders, hayfever, sinus problems, headaches, and even to cure opiate addiction.<sup>25</sup> Heroin, originally compounded by a British scientist in 1874, was officially "discovered" in 1898 by a Bayer Company chemist in Germany.<sup>26</sup> Named for its "heroic" properties, it allegedly provided nonaddictive relief for coughs, congestion, asthma, bronchitis and catarrh.<sup>27</sup>

Despite unrestricted availability, narcotics addiction was a negligible phenomenon in the eighteenth and nineteenth centuries. Several factors, however, amplified the *perception* of addiction. The genesis of American drug anxiety traditionally has been seen as an ancillary effect of the Civil War, in which morphine was extensively used in the treatment of injured soldiers.<sup>28</sup> Although its effects progressed slowly, the most detrimental repercussions came after the war, when soldiers came home with the so-called "army disease."<sup>29</sup>

[F]ollowing the civil war the abuse of medicinal opium and its chief derivative, morphi[ne], set in and spread thickly, or thinly, but over almost the entire country. There are few families some member of which has not become an addict. . . . Opium and morphine habits contracted at that time [during the Civil War] by those who had

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19. H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800-1980* 3-4 (1981); MUSTO, *supra* note 17, at 1.

20. MORGAN, *supra* note 19, at 1.

21. MUSTO, *supra* note 17, at 1.

22. ARNOLD S. TREBACH, *THE HEROIN SOLUTION* 38 (1982).

23. See TREBACH, *supra* note 22, at 16.

24. *Id.*

25. Stephen R. Kandall & Wendy Chavkin, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 HASTINGS L.J. 615, 619 (1992).

26. TREBACH, *supra* note 22, at 39.

27. *Id.*

28. *Id.* at 38.

29. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME* 190 (1986) [hereinafter *AMERICA'S HABIT*].

some real use for the drugs too often extended as an unnecessary and pernicious habit to younger members of families or associates.<sup>30</sup>

The addiction process, both before and after the war, was facilitated by a new medical invention—the hypodermic needle.<sup>31</sup>

The Civil War theory of addiction provides only a partial explanation. “Careless prescribing of physicians” in the Reconstruction Era was commonplace.<sup>32</sup> Medical practitioners believed that opiates were “cure-alls,” providing immediate relief from disease and injury.<sup>33</sup> It was not until the late-1870’s that addiction from medical administration was considered, and only toward the end of the nineteenth century had the medical world concluded that opiates were in fact addictive.<sup>34</sup>

Physicians, however, were not the only source of narcotics. Drug-stores, as well as grocery and general stores, sold narcotics over-the-counter without a doctor’s prescription.<sup>35</sup> Habit-forming drugs could be ordered from manufacturers by mail, also without a prescription.<sup>36</sup> In addition, hundreds of patent medicines contained opium, morphine or cocaine.<sup>37</sup> Opiate-laced tonics, syrups, and elixirs made implausible curative claims,<sup>38</sup> and popular beverages contained significant quantities of cocaine.<sup>39</sup>

30. HAMILTON WRIGHT, REPORT ON THE INTERNATIONAL OPIUM COMMISSION AND ON THE OPIUM PROBLEM AS SEEN WITHIN THE UNITED STATES AND ITS POSSESSIONS, S. DOC. NO. 61-377, at 47 (1910) [hereinafter REP. ON INT’L OPIUM COMM’N].

31. As the U.S. Public Health Service reported:

[T]he advent of the hypodermic method of administration of drugs, which came into general use about the time of the Civil War . . . was at first said to be a method of administering morphine without danger of causing addiction. In so far as addiction is concerned, this discovery proved to be a curse rather than a blessing.

U.S. PUBLIC HEALTH SERVICE, 39 PUB. HEALTH REP. NO. 20, THE PREVALENCE AND TREND OF DRUG ADDICTION IN THE UNITED STATES AND FACTORS INFLUENCING IT 1179, 1198 (1924).

32. REP. ON INT’L OPIUM COMM’N, *supra* note 30, at 47.

33. DAVID T. COURTWRIGHT, DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940 47 (1982).

34. MORGAN, *supra* note 19, at 27.

35. BRECHER, *supra* note 18, at 3.

36. *Id.*

37. *Id.*

38. *See id.*

39. COURTWRIGHT, *supra* note 33, at 56; DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENTAL CONTROL 9, 12 (Ronald Hamowy ed. 1987) [hereinafter DEALING WITH DRUGS]. Notably, Coca-Cola contained cocaine from 1886 until 1903, when caffeine replaced the narcotic. BRECHER, *supra* note 18, at 270-71. Sadly, many of the habitués were infants, addicted to opiate syrups administered by their mothers. *Id.* at 5. The practice of “dosing children with opiates” to induce calmness was commonplace and was criticized by, among others, Karl Marx. *Id.* (citations omitted).

In modern times, the principal sources of nineteenth-century narcotic addiction no longer exist.<sup>40</sup> The logarithmic advancement of medicine has eliminated doctor-induced addiction.<sup>41</sup> Moreover, with the passage of the first Pure Food & Drugs Act in 1906,<sup>42</sup> full disclosure of psychoactive ingredients became federally mandated. Americans began to avoid narcotic-laced patent medicines due to the required disclosure of addictive ingredients.<sup>43</sup>

### 1. *Morality*

The final two factors influencing the perception of narcotics were unaffected by scientific enlightenment and linger to this very day. Although legal, the use of narcotics was looked upon with disdain—an immoral vice that any strong-willed person could avoid.<sup>44</sup> National publications detailed the “[l]ate hours, dance halls, and unwholesome cabarets” of the drug culture.<sup>45</sup> The public viewed the addict as a burden on society, as well as an impediment to the political and economic advancement of the nation:

[T]he confirmed victim of the narcotic habit is a pitiable object. . . . An outcast, an Ishmaelite, often depraved, always deplorable . . . he is a disgrace to his family and friends, a nuisance to his medical adviser, and sometimes a menace to the community. A mental, moral, and physical wreck, obsessed with his desire for his “dope,” full of deceit, intrigue, and trickery, which have enabled him to get it . . . .<sup>46</sup>

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40. Ethan Nadelmann, *Should We Legalize Drugs? History Answers: Yes*, AM. HERITAGE, Feb.-Mar. 1993, at 41, 45 [hereinafter Nadelmann, *Should We Legalize Drugs?*].

41. *Id.* at 45-46.

42. Pure Food & Drugs Act, Pub. L. No. 384, 34 Stat. 175 (1906), amended Pub. L. No. 307, 37 Stat. 416 (1912).

43. See Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 46 (“Sales of patent medicines containing opiates and cocaine decreased significantly thereafter—in good part because fewer Americans were interested in purchasing products that they knew to contain these drugs.”).

44. As one commentator articulated:

The gentleman who would not be seen in a bar-room, however respectable, or who would not purchase liquor and use it at home, lest the odor might be detected upon his person, procures his supply of morphi[ne] and has it in his pocket ready for instantaneous use. It is odorless and occupies but little space. . . . He zealously guards his secret from his nearest friend—for popular wisdom has branded as a disgrace that which he regards as a misfortune.

BRECHER, *supra* note 18, at 6-7 (citation omitted).

45. TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT* 11 (1970).

46. U.S. PUBLIC HEALTH SERVICE, 30 PUB. HEALTH REP. NO. 14, *THE HARRISON ANTINARCOTIC LAW: THE EFFECT OF ITS ENFORCEMENT ON THE DRUG ADDICT* 979, 980 (1915).



This perceived moral bankruptcy was exacerbated by the addict's association with violent crime: "The man who uses heroin is a potential murderer, the same as the cocaine user; he loses all consciousness of moral responsibility, also fear of consequences."<sup>47</sup> Congressional hearings abound with testimony on nefarious thugs and gangsters. When "members of the gang [prepare] to commit murder or robbery they see that they are well charged [i.e., on narcotics] before they go."<sup>48</sup> The United States Secretary of State opined in 1910 that narcotics have:

proved to be a creator of criminals and of unusual forms of violence and ha[ve] been a potent incentive in driving the primitive classes of the community all over the country to abnormal crimes. Thoughtful persons . . . have reached the conclusion that the time has arrived for a strict federal control of the traffic.<sup>49</sup>

The vision of the deplorable narcotics addict, whether criminal or merely depraved, was antithetical to the brash American individualist. The drug user was unproductive—or socially counterproductive—and thus defied the fabled Protestant work ethic and competitive drive. This, to the true capitalist, was the greatest sin of the habitué.<sup>50</sup>

## 2. *Racism*

Moral totalitarianism worked parallel to and in combination with another infamous American philosophy—functional racism. Chinese laborers, pejoratively known as "Coolies," had been brought to the western United States for railroad construction.<sup>51</sup> The harsh conditions and intense work lured the Chinese workers into "opium dens" to escape local abuse and suppress their longings for home.<sup>52</sup> Antagonistic Caucasian leaders, however, vilified Chinese laborers as the cause of high unemployment and ascribed all social and economic ills

47. *Prohibiting the Importation of Crude Opium for the Purpose of Manufacturing Heroin*, H.R. 7079, 68th Cong., at 49 (1924).

48. *Id.*

49. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 2.

50. Drug use, however, was only one of the depravities condemned by the nineteenth-century equivalent of the Moral Majority:

[A] variety of new laws prohibit[ed] all sorts of "unhealthy" conduct, including sexual conduct. . . . [S]tatutes in both Indiana (enacted in 1881) and Wyoming (enacted in 1890) . . . included the following language in their criminal codes: "Whosoever entices, allures, instigates or aids any person under the age of twenty-one years to commit masturbation or self-pollution shall be deemed guilty of sodomy."

Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2606-07 (1994) (citation omitted).

51. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 37.

52. See COURTWRIGHT, *supra* note 33, at 64.

to Asians and their culture.<sup>53</sup> Hate-mongers used political muscle to force legislators to pass ignoble regulations aimed directly at the Chinese immigrants.<sup>54</sup> For example, in 1875, San Francisco banned the operation of opium dens, allegedly to prevent the spread of opium smoking to the Caucasian population and the debauchery that took place in these drug lairs.<sup>55</sup> Some scholars, such as the late Professor John Kaplan of Stanford Law School, maintained that the ulterior motive was even more base—to strip Chinese workers of all solace and drive them from the continent.<sup>56</sup>

A similar regulation was passed a year later in Virginia City, Nevada, prohibiting the keeping of an opium den.<sup>57</sup> Neither of these municipal ordinances was effective in eliminating the Chinese opium smoker or the illegal sanctuaries they frequented.<sup>58</sup> Five years after the Virginia City ordinance was enacted, Nevada passed a state-wide ban on not only opium dens, but on all opium smoking within its borders.<sup>59</sup> Within a decade, eighteen other states had passed similar legislation, based on racism or moral altruism.<sup>60</sup> In Idaho, for example,

53. See BRECHER, *supra* note 18, at 42.

54. AMERICA'S HABIT, *supra* note 29, at 188 n.3. Infamous legislation included a health and safety code which effectively banned Chinese laundries and a statute which essentially allowed the Commissioner of Immigration to extort money from Chinese Immigrants. See *Yick Wo v. Hopkins*, 118 U.S. 356, 357 (1886); *Chy Lung v. Freeman*, 92 U.S. 275, 277 (1875).

55. AMERICA'S HABIT, *supra* note 29, at 188; BRECHER, *supra* note 18, at 42. "The intent of physicians, legislators, and other social reformers who lobbied for these laws was to protect whites from what was commonly regarded as a loathsome Oriental vice." DEALING WITH DRUGS, *supra* note 39, at 12-13.

56. John Kaplan, *A Primer on Heroin*, 27 STAN. L. REV. 801, 804 (1975). Kaplan writes:

It was thought that prohibition of opium smoking would . . . deprive the Chinese of this drug in the United States and so cause their return to China. A parallel hope was that insofar as opium provided the Chinese with their energy and ability to tolerate hardship . . . its prohibition would deprive the aliens of an unfair advantage over American workmen.

*Id.*

57. BRECHER, *supra* note 18, at 43.

58. *Id.*

59. The statute read:

From and after the last day of March, eighteen hundred and eighty-one, it shall be unlawful for any person or persons, as principals or agents, to have in his, her or their possession any opium pipe, or part thereof, or to smoke opium, or to sell or give away for such purpose, or otherwise dispose of any opium in this state, except druggists and apothecaries; and druggists and apothecaries shall sell it only on the prescription of legally practicing physicians.

U.S. PUBLIC HEALTH SERVICE, PUB. HEALTH BULL. NO. 56, DIGEST OF LAWS AND REGULATIONS IN FORCE IN THE UNITED STATES RELATING TO THE POSSESSION, USE, SALE, AND MANUFACTURE OF POISONS AND HABIT-FORMING DRUGS 160 (1912) (citing Nevada State Laws, Sale and Use of Cocaine and Narcotics, § 4811 (1899)).

60. See DEALING WITH DRUGS, *supra* note 39, at 12-13.

segregationist legislators made it a crime for "any white person" to maintain or frequent an opium den.<sup>61</sup>

Nineteenth-century narrators and politicians claimed that the Chinese opium smoking habit was spreading both geographically and demographically.<sup>62</sup> Addiction allegedly disseminated from the despised Chinese indentured servants to the African-American caste and eventually into privileged society.<sup>63</sup> Whether among Boston Brahmins or the elite of San Francisco, haphazard panic swept through the Caucasian upper class.<sup>64</sup> The non-Chinese opium smoker was identified with the "criminal underworld"—the prostitute, pimp, gambler, and petty criminal.<sup>65</sup> As a result, Chinese immigrants became the scapegoat for increased crime, squalor and uncleanness. A report to the governor of California, for example, bordered on the genocidal: "[A] marked decrease has been noted in the number of Asiatic immigrants . . . because of their inability to secure the opium necessary to satisfy their cravings. Hence we are in this manner instrumental in ridding the community of this class of undesirable citizens."<sup>66</sup>

African-Americans were the brunt of similar racial propaganda. Addiction among African-Americans during the nineteenth century was rare and led one southern doctor to declare that "the colored man is not as susceptible to the habit as the white."<sup>67</sup> However, as antidrug evangelism spread, so did the myths of rampant addiction among African-Americans. For example, a 1903 report by the American Pharmaceutical Association stated that "[t]he negroes, the lower and immoral classes, are naturally most readily influenced, and therefore among them we have the greater number [of addicts]."<sup>68</sup>

Of particular concern to the early twentieth-century bigot was the effect of cocaine on African-Americans. Testimony before the House of Representatives in 1910 epitomized their view: "[African-Americans on cocaine] have an exaggerated ego. They imagine they can lift this building, if they want to, or can do anything they want to. They

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61. *Id.* at 13.

62. *See id.* at 12-13.

63. *See* COURTWRIGHT, *supra* note 33, at 64.

64. *See id.*; DEALING WITH DRUGS, *supra* note 39, at 12-13.

65. COURTWRIGHT, *supra* note 33, at 64.

66. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 57 (citations omitted). A quarter of a century later prejudicial juxtaposition would again be invoked—cannabis and Mexicans—resulting in the Marihuana Tax Act of 1937, Pub. L. No. 238 (1937).

67. MORGAN, *supra* note 19, at 34.

68. *Id.* at 92.

have no regard for right or wrong.”<sup>69</sup> One racist delusion held that African-Americans on cocaine were impervious to .32 caliber bullets.<sup>70</sup> The malevolently gullible police departments of the South responded by switching to .38 caliber firearms and redoubling efforts to subdue African-American society.<sup>71</sup> Southern racists may not have been moved by logic, but the image of African-Americans becoming “oblivious of their prescribed bounds and attack[ing] white society” was sufficiently inflammatory.<sup>72</sup>

Although distinct in locale and invectiveness, racist drug propaganda shared two common traits. First, each narcotic was invidiously associated with a particular race. African-Americans were “cocaine-crazed Negroes,” Asians were “opium-addled Coolies,” and, in the 1930’s, Hispanics were “reefer-mad Mexicans.”<sup>73</sup> Second, racists believed that narcotics would instigate sexual aggression, or at least sexual interest, by “colored” men against sheltered Caucasian damsels.<sup>74</sup> Tales of Asians doping, seducing, and abducting innocent Caucasian females were sensationalized by cowardly demagogues.<sup>75</sup> San Francisco law enforcement allegedly “found white women and Chinamen side by side under the effects of this drug—a humiliating sight to anyone with anything left of manhood.”<sup>76</sup>

The racist myth of African-American men lusting for Caucasian women—a favored theory of southern slave-owners—was rekindled by images of “cocaine-crazed Negro rapists.”<sup>77</sup> These asinine beliefs

69. *Importation and Use of Opium: Hearings Before the House Comm. on Ways and Means*, 61st Cong. 12 (1911) (statement of Dr. Christopher Koch) [hereinafter *Importation & Use Hearings*].

70. See Musto, *supra* note 17, at 7.

71. In the words of one commentator:

One of the most terrifying beliefs about cocaine was that it . . . made blacks almost unaffected by mere .32 caliber bullets, [and] is said to have caused southern police departments to switch to .38 caliber revolvers. These fantasies characterized white fear, not the reality of cocaine’s effects, and gave one more reason for the repression of blacks.

*Id.*

72. *Id.* at 6.

73. See MORGAN, *supra* note 19, at 93-94 (“The Near Easterner had symbolized apprehensions about the adverse personal and social effects of cannabis use. Stereotypes of the Chinese had summarized fears about the social dangers of opium smoking. In decades to come the Mexican and marihuana, and the African-American or Puerto Rican and heroin would figure in the debate. This imagery revealed apprehensions about these ethnic groups and a desire to control their behavior or isolate them.”).

74. STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* 10 (1993).

75. Joseph L. Galiber, *A Bill to Repeal Criminal Drug Laws: Replacing Prohibition with Regulation*, 18 HOFSTRA L. REV. 831, 851 n.96 (1990).

76. DUKE & GROSS, *supra* note 74, at 83.

77. See *id.* at 93-94.

conformed to the prejudices of a significant portion of Caucasian America and gave credence to their desire to segregate and suppress ethnic and racial minorities. The converse was also true—drug abuse by the “inferior races” gave added credibility to any irrational fear of narcotics. As Professor David Courtwright asserted in his treatise on early American drug addiction, “[W]hat we think about addiction very much depends on who is addicted.”<sup>78</sup>

The typical narcotic user was, in fact, not a social, racial or economic outcast.<sup>79</sup> Caucasians were overrepresented and African-Americans were underrepresented in the addict population.<sup>80</sup> Most habitués were native born (with the exception of Chinese workers), concentrated in the upper and middle classes.<sup>81</sup> Male drug users were typically professionals and female users were socialites; both became addicted between the ages of twenty-five and forty-five.<sup>82</sup> Women, however, comprised between sixty and seventy-five percent of the user population.<sup>83</sup> Historically, it was considered inappropriate for cultured women to drink alcohol.<sup>84</sup> Opium, therefore, served as an acceptable “euphoric agent”—a way for “embittered and disillusioned women [to] drown[ ] their sorrows.”<sup>85</sup>

The number of addicts in the United States prior to 1914 is disputed. Estimates range from 100,000 to 1 million habitués nationwide.<sup>86</sup> The most cited, and possibly the most accurate, survey was conducted by Lawrence Kolb and A.G. Du Mez of the U.S. Public Health Service.<sup>87</sup> Using a compilation of the best estimates by various state and federal agencies, Kolb and Du Mez placed the peak addict

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78. COURTWRIGHT, *supra* note 33, at 3.

79. *Id.* at 36-42.

80. *Id.*

81. *Id.*

82. *Id.*

83. BRECHER, *supra* note 18, at 17.

84. COURTWRIGHT, *supra* note 33, at 60-61.

85. *Id.* at 60. Somewhat appropriately, the racist was joined by the chauvinist in characterizing drug addiction. A nineteenth-century theorist pronounced that a “[w]oman is more nervous, has a finer organization than man, [and] is accordingly more susceptible to most of the stimulants.” MORGAN, *supra* note 19, at 39 (citation omitted). The 1902 Committee on the Acquisition of the Drug Habit reiterated this notion in concluding that women, as well as African-Americans, easily yield to drug abuse. MUSTO, *supra* note 17, at 17. This presumption came as no surprise to the sexist, male-dominated gentry, who thought the female sex frail and inferior. It was never considered that a large percentage of drug addiction among women was caused by the over-prescribing, exclusively-male medical profession.

86. MUSTO, *supra* note 17, at 17.

87. U.S. PUBLIC HEALTH SERVICE, 39 PUB. HEALTH REP. NO. 20, THE PREVALENCE AND TREND OF DRUG ADDICTION IN THE UNITED STATES AND FACTORS INFLUENCING IT 1179, 1179 (1924).

population at 264,000 at the turn of the century.<sup>88</sup> Sheer numbers, however, did not instigate change; narcotics were not social or economic menaces, and drug prohibition was not at issue.<sup>89</sup> Only through a unique sequence of events, a wave of popular morality, and the rise of dynamic government officials did the "abolition of the opium evil" make the public agenda.

### B. Federal Involvement

Federal regulation of opium importation and sale was first attempted in areas of clear and complete federal jurisdiction, the territories and possessions of the United States.<sup>90</sup> In 1899, a congressional act made it unlawful to sell opium without a medical prescription and to frequent an opium den in the Alaskan Territory.<sup>91</sup> Similar federal legislation was passed with respect to the Panama Canal Zone and Guam.<sup>92</sup> In 1898, the United States acquired the Philippines as a result of the Spanish-American War and inherited the island-state's *perceived* opium crisis.<sup>93</sup> Governor (and future U.S. President) Taft appointed an Opium Investigation Committee to study and recommend appropriate solutions.<sup>94</sup> After considering the recommendations of the committee, Congress enacted a stringent opium statute for America's latest territorial acquisition.<sup>95</sup>

Two significant federal laws were enacted in 1906. In May of that year, Congress passed the District of Columbia Pharmacy Regulation.<sup>96</sup> This legislation permitted the sale of narcotics only by registered pharmacists pursuant to a prescription.<sup>97</sup> Further, the legislation barred physicians in our nation's capital from prescribing narcotics to habitués unless attempting to cure the addiction or to treat a medical

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88. *Id.*

89. BRECHER, *supra* note 18, at 7.

90. The first mention of a narcotic in federal legislation was in the tariff act of July 14, 1832, which declared that opium was free from duty. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 29. Ten years later, opium was placed on the tariff list with a duty of \$.75 per pound. *Id.* at 81. The tariff on crude opium fluctuated between \$1.00 and \$2.50, while the duty on smoking opium reached \$12.00 per pound at the close of the nineteenth century. *Id.* at 81-82. Morphine duties never surpassed \$2.50 per pound, and cocaine was taxed at twenty-five percent *ad valorem*. *Id.* at 81-83 (all statistics compiled by Hamilton Wright, U.S. Opium Commissioner, 1909).

91. *Id.* at 25.

92. *Id.*

93. *See id.* at 62-63.

94. DEALING WITH DRUGS, *supra* note 39, at 48.

95. The Act of March 3, 1905, immediately banned nonmedicinal opium use for all native Filipinos and allowed a three-year safe-harbor for all non-Filipinos. Philippine Tariff Revision Law, ch. 1408, No. 80, 33 Stat. 928, 944 (1905).

96. District of Columbia Pharmacy Regulation, ch. 2084, 34 Stat. 175 (1906).

97. *Id.* § 11.

ailment.<sup>98</sup> Records of drug prescriptions were required to be kept for three years and were subject to inspection at all times.<sup>99</sup>

In June, Congress enacted the Pure Food & Drugs Act of 1906, which required that all medicines containing narcotics be labeled as such and criminalized the sale of adulterated and misbranded drugs.<sup>100</sup> Although the Pure Food & Drugs Act did not prohibit the sale of nonmedicinal drugs, it diminished the use of narcotic-laced patent medicines by informing the public of habit-forming ingredients and preventing inadvertent addiction.<sup>101</sup>

Internationally, the United States had negotiated treaties regarding opium trade with Siam, Korea, and China<sup>102</sup>—with the latter country providing the most interesting and catalytic relationship. An 1858 Sino-American treaty removed opium from the contraband list, allowing American merchants to export opium directly into China.<sup>103</sup> Twenty-two years later, China and the United States rescinded this pact and agreed to a reciprocal prohibition of drug trafficking.<sup>104</sup> The necessary legislation was not passed by Congress until 1887<sup>105</sup> and was subsequently contravened by American citizens importing opium into the United States and immediately selling it to Chinese immigrants.<sup>106</sup> A later treaty attempted to address the prevailing morphine issue, stipulating that the United States would prohibit the export of morphine and hypodermic syringes to China, while the Chinese government would agree to prevent the manufacture of this narcotic and injection devices within its borders.<sup>107</sup>

Within China, opium addiction had become a national epidemic.<sup>108</sup> Opium was blamed for the Empire's decline in education, science, technology, and military strength and was viewed as a symbol of foreign domination by way of narcotics trade.<sup>109</sup> The Emperor's edict of 1906 abated opium use in China through inhumane enforcement.<sup>110</sup> Despite its draconian methods, the Chinese anti-opium movement

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98. *Id.* § 12.

99. *Id.* § 11.

100. Pure Food & Drugs Act, Pub. L. No. 384, § 2, 34 Stat. 768 (1906), *amended by* Pub. L. No. 301, 37 Stat. 416 (1912).

101. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 19.

102. *Id.* at 13-15.

103. *Id.* at 13-14.

104. *Id.*

105. *Id.* at 14.

106. *Id.* at 16.

107. *Id.* at 15.

108. MUSTO, *supra* note 17, at 29.

109. *Id.*

110. *Id.*

was supported by American missionaries in the Far East, including the Right Reverend Charles Brent, Bishop of the Philippine Islands.<sup>111</sup> Bishop Brent had served on the Taft Opium Investigation Committee and was convinced that the United States was morally obliged to come to China's aid.<sup>112</sup> In a July 24, 1906, letter to President Roosevelt, Brent first suggested an international meeting on opium:

From the earliest days of diplomatic relations with the East, the course of the United States of America has been so manifestly high in relation to the traffic in opium that it seems to me almost the duty of our Government, now that we have the responsibility of actually handling the matter in our possessions, to promote some movement that would gather in its embrace representatives from all countries where the traffic in and use of opium is a matter of moment.<sup>113</sup>

The Roosevelt Administration looked at this proposal with economic pragmatism rather than philanthropic concern. The inferior status and cruel treatment afforded the Chinese immigrants in America destabilized relations between China and the United States.<sup>114</sup> Chinese merchants had proposed an embargo on all American imports in retaliation, causing profound concern among manufacturers, exporters, and government officials in the United States.<sup>115</sup> A United States instigated international conclave to assist China in its battle against opium was viewed by some commentators as an ideal method to quell anti-American sentiment.<sup>116</sup>

Invitations were forwarded to China, France, Germany, Great Britain, Japan, the Netherlands, Portugal, Russia, Siam, Persia, Turkey, Austria-Hungary, and Italy.<sup>117</sup> All but Turkey agreed to send delegates and thirteen nations, including the United States, were represented.<sup>118</sup> The delegates converged on Shanghai on February 1, 1909, with the objective of scrutinizing "the opium problem, in all of its moral, economic, scientific and political aspects, not only as seen in the Far East but also in the home territories of those participating."<sup>119</sup>

The American delegation, however, faced a rather embarrassing dilemma—its government was attempting to enlighten other nations on the evils of opium and the need for tight restrictions, while hypocritically failing to regulate narcotics production and interstate trade

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111. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 64.

112. *Id.*

113. *Id.* (citation omitted).

114. DEALING WITH DRUGS, *supra* note 39, at 50.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 65.



within its own borders. According to one report, "vast amounts of . . . drug[s] have poured in ever-increasing quantities into the United States, while the opium-smoking habit . . . appears to have been encouraged by the tariff and excise laws permitting its importation and manufacture."<sup>120</sup> To save face, Congress enacted legislation banning the importation of smoking opium eight days after the International Opium Commission had convened.<sup>121</sup> Although the legislation was limited in scope and effect, its passing "was an urgent and necessary act if the American Government was to appear . . . with fairly clean hands."<sup>122</sup>

As members of a "commission," the delegates had no power to bind their respective countries to an international agreement.<sup>123</sup> The International Opium Commission did, however, adopt several resolutions relating to international and national opium legislation.<sup>124</sup> Eight months later, the United States proposed an international opium conference in order to conventionalize the propositions upon which the commission agreed.<sup>125</sup> The International Opium Conference assembled at The Hague on December 1, 1911,<sup>126</sup> and after nearly two months of negotiations, the delegates signed an opium convention with the authority of an international treaty.<sup>127</sup> Each participating nation agreed to give the resolutions full legal force within its jurisdiction.<sup>128</sup> For pragmatic reasons, however, the convention was not given immediate effect.<sup>129</sup> It was agreed that the convention would not be-

120. REPORT RELATIVE TO CONTROL THE OPIUM TRAFFIC, S. DOC. NO. 61-736, at 4 (1911) (citation omitted).

121. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 52-53.

122. *Id.* at 54.

123. PRESIDENT WOODROW WILSON, ABOLITION OF THE OPIUM EVIL, H.R. DOC. NO. 63-33, at 2 (1913).

124. The resolution reads:

[T]he International Opium Commission recommends that each delegation move its own Government to take measure for the gradual suppression of the practice of opium smoking in its own territories and possessions. . . . [I]t is also the duty of all countries to adopt reasonable measures to prevent at ports of departure the shipment of opium . . . to any country which prohibits the entry of any opium. . . . [I]t is highly important that drastic measures should be taken by each government in its own territories and possessions to control the manufacture, sale, and distribution of this drug, and [any other drug which is] liable to similar abuse and productive of like ill effects.

REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 65-66.

125. *Id.* at 72.

126. H.R. DOC. NO. 63-33, at 3.

127. SECOND INTERNATIONAL OPIUM CONFERENCE, S. DOC. NO. 63-157, at 12 (1913).

128. H.R. DOC. NO. 62-861, at 1.

129. See H.R. DOC. NO. 63-33, at 3 ("Since it was found that [the issues resolved] affected not only the revenue and economic interests of the 12 powers with oriental relations whose representatives had assembled at The Hague, but also the major part of the other nations of the world,

come effective until thirty-four other nations had added their signatures to the protocol.<sup>130</sup>

Because a few nations were yet to present their approval by 1913, a second international conference was held at The Hague to put into operation the necessary diplomatic machinery for the securing of the remaining signatures and ratifications of the international convention.<sup>131</sup> A third and final conference was held a year later, resulting in a compromise which allowed ratifying governments to enforce the convention even though some obliged nations had yet to sign the protocol.<sup>132</sup>

### C. *Dr. Hamilton Wright and the Campaign for Domestic Narcotics Legislation*

The international meetings created a framework and a point of departure from which federal legislators could forge a comprehensive, domestic, anti-narcotics law—if they so chose. More significantly, the International Opium Commission and its progeny had produced a singular public figure with the necessary talents, political alliances and tenacity to force the issue through Congress: Dr. Hamilton Wright. Born in Cleveland in 1867, Dr. Wright received moderate acclaim for his medical research on the beriberi epidemic among the Straits Settlements.<sup>133</sup>

After he was appointed to the U.S. delegation by President Theodore Roosevelt in 1908, Dr. Wright immediately launched an investigation into American drug use and abuse.<sup>134</sup> The methods of this often cited study have generally been discredited due to the leading nature of the survey questions and the misrepresentation of drug consumption and addiction within the United States.<sup>135</sup> “Wright greatly exaggerated the extent of opium consumption . . . [yet] they provided the conceptual basis for remedial legislation regarding the problem in the first two decades of the twentieth century,” remarked historian Arnold H. Taylor.<sup>136</sup> It is difficult to determine whether Dr. Wright was driving the anti-narcotics movement toward success, or whether

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the conference came to the conclusion that to make its convention effective, it was necessary to secure adherence thereto by the other nations of the world.”).

130. *See id.*

131. S. DOC. NO. 63-157, at 10-12.

132. DEALING WITH DRUGS, *supra* note 39, at 51.

133. MORGAN, *supra* note 19, at 98.

134. *Id.* at 99.

135. *E.g., id.* at 100.

136. COURTWRIGHT, *supra* note 33, at 30.

the movement was propelling "the father of American narcotic laws" to the fame and fortune he desired.<sup>137</sup>

In Dr. Wright's report on the International Opium Commission, he placed emphasis on the United States maintaining its status as a virtuous and moral archetype for the rest of the world.<sup>138</sup> The report pointed to the laws of Italy, Spain, Austria-Hungary and Germany as being effective in averting massive drug addiction: "Owing to efficient government regulation and the good sense of their people they are not confronted with the problem that confronts us today."<sup>139</sup>

The Taft Administration, however, could only urge Congress to pass domestic federal laws regarding narcotics.<sup>140</sup> As noted above, the Opium Commission was only authorized to make recommendations on potential legislation.<sup>141</sup> In his annual message to Congress on December 7, 1909, President Taft stated that "[c]ollateral investigations of the opium question in this country lead me to recommend that the manufacture, sale, and use of opium and its derivatives in the United States should be, so far as possible, more rigorously controlled by legislation."<sup>142</sup>

After the Opium Commission's recommendations had been conventionalized in 1910, the Executive Branch was in a stronger position to press Congress to enact domestic legislation. Article 9 of the International Opium Convention required that signatory nations "shall use their best efforts" to limit or abolish the manufacture of narcotics,<sup>143</sup> and Article 11 stated:

The contracting powers shall take measures to prohibit in their internal commerce all transfer of narcotics. The convention had all the makings of an Article VI treaty under the United States Constitution and therefore, the Administration reasoned, Congress had the procedural as well as the moral responsibility to initiate enabling legislation.<sup>144</sup>

137. DEALING WITH DRUGS, *supra* note 39, at 14; MORGAN, *supra* note 19, at 98.

138. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 51 ("[I]t became apparent . . . that there was a large misuse of opium in the continental United States. When this had been sufficiently demonstrated by the opium commission, it became the bounden duty of our Government to take some steps to clear up the home problem. . . . Otherwise the American people stood to be accused of living in a glass house that no doubt would have been shattered on their heads.")

139. *Id.*

140. *See id.* at 1.

141. *See supra* notes 123-24 and accompanying text (discussing the power of the Opium Commission).

142. REPORT RELATIVE TO CONTROL THE OPIUM TRAFFIC, S. DOC. NO. 61-736, at 1 (1911).

143. International Opium Convention, Jan. 23, 1912, art. 9, 38 Stat. 1912, T.S. No. 612: L.N.T.S. 187.

144. APPROPRIATION FOR ERADICATION OF OPIUM EVIL, H.R. DOC. NO. 62-861, at 39-40 (1912).

More than a year later, Secretary of State P.C. Knox sent a tactful message to the Speaker of the House, reminding Congress that legislation was “necessary to enable the United States to redeem pledges entered into by virtue of the international opium convention.”<sup>145</sup> Dr. Wright, in his report on the 1910 International Opium Conference, was somewhat more blunt in assessing Congress’ efforts:

[I]n spite of repeated urging by the Executive, the Congress so far has failed favorably to consider carefully drafted measures aimed to bring the continental United States into line and in accord with the principles now embraced by the International Opium Convention. . . . Congress should speedily consider and pass the legislation so urgently needed to redeem the position of this Government, and to place it in the advanced line achieved in domestic legislation by a majority of the interested nations.<sup>146</sup>

In 1913, the White House renewed the previous administration’s call for “the enactment of the requisite antidrug legislation to which this Government is pledged internationally.”<sup>147</sup>

Perceived international obligation was not the only force behind the movement for domestic narcotics legislation. The aforementioned moral totalitarianism coalesced in the last decade of the nineteenth century, forming what is now known as the “Progressive Movement.”<sup>148</sup> Its core ideal was that the nation’s morals could and should be shaped by federal legislation.<sup>149</sup> The Movement’s leaders—a broad-based league of mainstream reformers and ministers—attempted to abate the evils of the Industrial Revolution and the avowed concomitant vices.<sup>150</sup> The progressive agenda included excessive child labor, impure food and medications, wage and hour exploitation, prostitution, gambling, and alcohol.<sup>151</sup> The reformers successfully lobbied Congress, culminating in, *inter alia*, the Mann Act,<sup>152</sup> the Anti-Lottery Act,<sup>153</sup> and the Volstead Act.<sup>154</sup>

As the leading anti-narcotics reformer, Dr. Wright drew upon the rhetoric of the Progressive Movement, initially characterizing drug abuse as a moral evil and arguing that nothing short of complete abo-

145. *Id.* at 2.

146. *Id.* at 33-34, 36.

147. PRESIDENT WOODROW WILSON, ABOLITION OF THE OPIUM EVIL, H.R. DOC. NO. 63-33, at 1 (1913).

148. DEALING WITH DRUGS, *supra* note 39, at 46.

149. *Id.*

150. STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 179 (1990).

151. *Id.*

152. *See id.* (discussing the Mann Act).

153. *Id.* (discussing the Anti-Lottery Act).

154. *Id.* (discussing the Volstead Act).

lition would suffice.<sup>155</sup> While this plea had resonance with some national politicians, it was insufficient to garner the necessary support. Ever the political chameleon, Dr. Wright recognized that national legislators were relatively apathetic toward narcotics criminalization.<sup>156</sup> His testimony before Congress, therefore, was blatantly formulated to secure the votes of southern legislators:<sup>157</sup>

It has been stated on very high authority that the use of cocaine by the negroes of the South is one of the most elusive and troublesome questions which confront the enforcement of the law in most of the Southern States. . . . In the South the drug is commonly sold in whisky dives. . . . The combination of low-grade spirits and cocaine makes a maddening compound. . . . It has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the negroes of the South and other sections of the country.<sup>158</sup>

Negrophobic representatives fervently opposed any federal intrusion on state powers, believing that this would eventually lead to enforcement of the African-Americans' civil rights against the will of their state.<sup>159</sup> However, when expressed in terms of African-American uprisings and the rape of Caucasian women, all states' rights concerns were abandoned.<sup>160</sup> Dr. Wright also included tales of "Oriental vice" intended to arouse the anti-Chinese sentiment in western congressmen: "One of the most unfortunate phases of the habit of opium smoking in this country is the large number of women who have become involved and were living as common-law wives of or cohabiting with Chinese in the Chinatowns of our various cities."<sup>161</sup> In a later appearance before the House Committee on Ways and Means, Dr. Wright repeated his racially charged admonitions.<sup>162</sup> Emphasis was placed upon the corrupting influence of Chinese immigrants, the danger of the cocaine-crazed African-Americans, and the criminality of the minority addict—"thereby creat[ing] a public opinion against the use" of narcotics.<sup>163</sup>

Notwithstanding the perceived international obligation and Dr. Wright's moral and racial appeals, proposed legislation stalled in com-

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155. See DEALING WITH DRUGS, *supra* note 39, at 55.

156. See *id.* at 57.

157. COURTWRIGHT, *supra* note 33, at 82-83.

158. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 49-50.

159. DEALING WITH DRUGS, *supra* note 39, at 55.

160. *Id.*

161. REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 45.

162. *Importation & Use Hearings*, *supra* note 69, at 23 *passim*.

163. *Id.* at 503; see also MORGAN, *supra* note 19, at 106-07 (discussing the testimony before the Ways and Means Committee).

mittee.<sup>164</sup> Drug manufacturers, physicians, and pharmacists were divided on the issue of domestic narcotics regulation,<sup>165</sup> despite claims to the contrary by Dr. Wright.<sup>166</sup> Moreover, legitimate constitutional questions were raised. The prescribing, dispensing, and consumption of narcotics was considered to be solely within the jurisdiction of the states.<sup>167</sup> Federal legislation which placed the pharmaceutical company, the pharmacist, and the physician under federal policing powers was considered by many to be outside the scope of congressional authority.<sup>168</sup>

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164. See *Importation & Use Hearings*, *supra* note 69, at 501-10.

165. The medical profession was severely fragmented on the issue of domestic drug legislation. Those who backed the Progressive Movement and the anti-narcotics cause supported strict laws and complete abolition. MORGAN, *supra* note 19, at 109. Others believed in medical autonomy and that the best judges of medical issues are physicians, not legislators and federal agencies. Jim Stipanuk, *The High Priesthood: Room Under the E Pluribus Umbrella*, 22 ARIZ. ST. L.J. 703, 704 (1990). Still others preferred a middle ground, with "grandfathered" legislation and benevolent treatment of those already addicted. Testimony before the House Committee on Ways and Means was indicative of this highly divisive issue in the medical community. *Importation & Use Hearings*, *supra* note 69, at 37 *passim*. Medical representatives from both sides of the debate, from private and government positions, with varying degrees of expertise, praised or condemned the proposed legislation. *Id.* Legislators were left with enough evidence to medically support the passage or defeat of an anti-narcotics law, leaving only a purely political decision to be made.

166. See, e.g., REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 35, 46, 59 (arguing that importers and manufacturers supported domestic legislation); 50 CONG. REC. 2187, 2202 (1913) (naming the individuals, organizations, and companies supporting domestic legislation).

167. See MUSTO, *supra* note 17, at 9.

168. *Id.* Supreme Court cases, however, had recently upheld federal legislation prohibiting the interstate transportation of foreign lottery tickets, *Champion v. Ames*, 188 U.S. 321 (1903), contaminated eggs, *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911), and women for immoral purposes, *Hoke v. United States*, 227 U.S. 308 (1913). Further support was offered by the passage and subsequent successful defense of the 1906 Pure Food & Drugs Act, ch. 3915, 34 Stat. 768 (1906) (codified at 21 U.S.C. §§ 1-15 (1906), *repealed by* Federal Food, Drug, and Cosmetic Act, ch. 675, § 902(a), 52 Stat. 1040, 1059 (1938)). With these decisions in mind, the Progressive leadership turned to the issue of Congress' constitutional powers. Secretary of State P.C. Knox suggested that "restrictions upon illicit traffic in opium and other habit-forming drugs" could be permitted "through the power over interstate commerce and the power of taxation." REP. ON INT'L OPIUM COMM'N, *supra* note 30, at 4. Dr. Wright suggested that legislation based on Congress' power to tax was more likely to survive judicial challenge, thus "placing the interstate traffic in such drugs under the control of the Bureau of Internal Revenue of the Treasury Department." *Id.* at 60. He understood that Congress would not favor a bill based on strict prohibition, or one that created new federal powers or vastly extended their current jurisdiction. MORGAN, *supra* note 19, at 106. The best bet was U.S. CONST., art. I, § 8, cl. 1 which states that: "The Congress shall have Power to lay and collect Taxes." The key proponents of anti-narcotics legislation would later accept this advice.

D. *The Harrison Anti-Narcotics Act*<sup>169</sup>

The political climate changed nearly overnight—and with it, the prospects for domestic narcotics legislation. Democrats took control of the House of Representatives for the first time in nearly two decades,<sup>170</sup> and Woodrow Wilson was inaugurated as President of the United States. In referring to the stalled legislation, President Wilson expressed complete support for domestic narcotics regulation in his first message to Congress:

At this vital period of the movement, to fail to take the few final steps necessary definitively and successfully to conclude the work would be unthinkable, and I therefore trust that there may be no delay in the enactment of the desired legislation, and the consequent mitigation if not suppression of the vice which has caused such world-wide misery and degradation.<sup>171</sup>

The primary patron of the pending legislation was the legendary William Jennings Bryan, President Wilson's Secretary of State. As "a man of deep prohibitionist and missionary . . . sympathies,"<sup>172</sup> Bryan pressed for the bill's passage, "thus placing this Government on a rightful position before the world."<sup>173</sup>

Against claims that it was schematically tortuous and inconsistent in key portions,<sup>174</sup> the Harrison Anti-Narcotics Act<sup>175</sup> was enacted without much fanfare on December 14, 1914,<sup>176</sup> and took effect on

169. Harrison Act, 38 Stat. 785, §§ 1-12 (1914), amended by 40 Stat. 1130, § 1006 (1919) (repealed 1939).

170. DEALING WITH DRUGS, *supra* note 39, at 54; MUSTO, *supra* note 17, at 44.

171. PRESIDENT WOODROW WILSON, ABOLITION OF THE OPIUM EVIL, H.R. DOC. NO. 63-33, at 1 (1913).

172. BRECHER, *supra* note 18, at 49.

173. H.R. DOC. NO. 63-33, at 5.

174. MUSTO, *supra* note 17, at 55.

175. Representative Francis Burton Harrison of New York, a cultured Tammany Hall Democrat, was the initial sponsor and namesake of the "cornerstone of narcotic law and policy in America." *Id.* at 54; TREBACH, *supra* note 22, at 118. Representative Harrison succinctly described the short history of the Act as it first entered congressional debate:

The bill H.R. 6282 [the Harrison Act] is the outcome of a long series of conferences between members of the Committee on Ways and Means and officials of the State and Treasury Departments and representatives of the various trades which will be affected by the enforcement of the provisions of this bill.

The legislation, as I recollect it, was first proposed to the House by bills introduced, respectively, by the gentleman from Illinois [Mr. Mann,] and the gentleman from Vermont, Mr. Foster, now deceased. . . . Upon the decease of the gentleman from Vermont, who was one of the most useful and most admired and one of the finest Members of this House, I was asked by the representatives of the State Department, who had kept in touch with the legislation in all its phases, to introduce the same bill, and I did so in the last Congress.

50 CONG. REC. 2187, 2201 (1913).

176. See MORGAN, *supra* note 19, at 107.

March 1, 1915, with almost no public or journalistic scrutiny.<sup>177</sup> Contemporary commentators on the Harrison Act agree that its debate and passage—after years of delay and tremendous exertion—was anticlimactic.<sup>178</sup> Discussion focused on international commitment, not domestic virtues.<sup>179</sup> Even though special interest groups exerted customary political pressure, Congress did not consider addiction, medicinal, and prohibition-versus-taxation issues.<sup>180</sup>

Contrary to contemporary beliefs, the Harrison Act<sup>181</sup> did not insti-

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177. *See id.* at 109.

178. *See id.* at 107.

179. BRECHER, *supra* note 18, at 48.

180. MORGAN, *supra* note 19, at 107.

181. The Harrison Act, in its final ratified form, was comprised of twelve sections and was entitled "An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes." Ch. 1, 38 Stat. 785, 785 (1914), *revised* by ch. 18, 40 Stat. 1130 (1919) (repealed 1939). Section 1 required the registration and annual special tax payment of all individuals in the narcotics chain of distribution. Further, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was empowered to create and enforce "needful rules and regulations for carrying the provisions of this Act into effect." *Id.* at 785-86. Section 2 made it unlawful for anyone to sell narcotics without a legal order blank, and a copy of this prescription had to be saved and open to official inspection for two years. These blanks were to be sold and recorded by the I.R.S. to registered individuals, and it was illegal for anyone else to attain or use the forms. The most notable clause stated "[n]othing contained in this section shall apply . . . [to the] dispensing or distribution of any of the aforesaid drugs to a patient by a physician . . . registered under this Act *in the course of his professional practice only.*" *Id.* at 786-87 (emphasis added). The significance of this sentence will be discussed below.

Section 3 declared that an I.R.S. collector can, at any time, demand an inventory of drugs received by a registered individual within the previous three months, as well as the names of each purchaser/patient and the quantities of narcotics received. *Id.* at 787-88. Section 4 made any interstate drug transfer by an unregistered individual illegal. *Id.* Section 5 allowed drug enforcement agents to inspect the records required by Sections 2 and 3. *Id.* at 788. Section 6 exempts patent medicines with less than two grains of opium, one-fourth of a grain of morphine, one-eighth of a grain of heroin, and one grain of codeine. *Id.* at 789. Section 7 stated that previous tax laws are not altered or rescinded by this Act. *Id.* Section 8 made possession of illicit narcotics presumptive evidence of criminal liability, with the burden of proof on the defendant. *Id.* Section 9 provided that a violation of the Act can be punished with a fine of up to \$2,000 and/or imprisonment for up to five years. *Id.* Section 10 authorized the appointment of necessary employees by the Commissioner of Internal Revenue. *Id.* Section 11 appropriated \$150,000 to execute the Act. *Id.* Finally, Section 12 stated that the Act did not impair, alter, amend, or repeal either the Pure Drug and Food Act of 1906 or the Opium Exclusion Act of 1909. *Id.* at 790.

The Harrison Act was amended in 1919. The assessment of the special tax was increased, and a new, one cent per ounce commodity tax on opium and coca transported in the United States was added. Further, an official stamp was required to be affixed to all legal packages of narcotics, and lack of the stamp was presumptive evidence of a criminal violation. Ch. 18, 40 Stat. 1130, 1131 § 1006 (1919) (repealed 1939).



tute drug prohibition.<sup>182</sup> Rather, the Harrison Act had three discrete nonpunitive goals. First, it sought to regulate the marketing of drugs:

[T]he Harrison Narcotic Act on its face was merely a law for the orderly marketing of opium, morphine, heroin, and other drugs—in small quantities over the counter, and in larger quantities on a physician's prescription. . . . It is unlikely that a single legislator realized in 1914 that the law Congress was passing would later be deemed a prohibition law.<sup>183</sup>

Second, the Harrison Act provided revenue for the federal government.<sup>184</sup> In 1914, the U.S. Public Health Service opined that the Harrison Act was “not in any way designed to be a regulatory measure but is intended primarily as a revenue measure.”<sup>185</sup> Author Richard Ashley reiterated this belief in 1972: “[The Harrison Act was] a classic example of an uninformed Congress and an uninformed public being manipulated by a bureaucracy for its own ends. . . . The act was passed as a revenue and record-keeping measure and nothing more.”<sup>186</sup>

Third, the Harrison Act was enacted to meet American treaty commitments from the aforementioned international narcotics commissions, conferences, and conventions.<sup>187</sup> Rather than addict prevention or moral interdiction, the Harrison Act was “on its face no more than an economic regulation, and was never intended to prohibit the use or sale of narcotics.”<sup>188</sup>

### *E. Judicial Challenges, Mutating Goals, and Beyond*

Enforcement of the Harrison Act was entrusted to the Internal Revenue Service of the Treasury Department.<sup>189</sup> The I.R.S. was well-

182. See DUKE & GROSS, *supra* note 74, at 84 (“[T]he Harrison Act fell far short of outright prohibition of cocaine and opiate distribution. First, it exempted potions and patent medicines sold over-the-counter and by mail order if the concentrations were below specific limits. Second, pharmacists could sell the drugs on prescription by a physician, and physicians could prescribe them. Physicians could also distribute the drugs themselves, and were not even required to keep records of their distributions on house calls. Drug distribution had become medicalized in America.”).

183. BRECHER, *supra* note 18, at 49.

184. *See id.*

185. U.S. PUBLIC HEALTH SERVICE, 29 PUB. HEALTH REP., SALE AND USE OF COCAINE AND NARCOTICS 3180, 3181 (1914).

186. TREBACH, *supra* note 22, at 119 (citation omitted). Attorney Rufus King and Professor Troy Duster agree that the Harrison Act was not prohibitory on paper and was not intended to be a comprehensive regulation. *Id.* at 119-20.

187. Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 508 (1990); *see also supra* notes 90-168 and accompanying text (discussing historical purposes for drug legalization).

188. Schmoke, *supra* note 187, at 508 (citation omitted).

189. Harrison Act, ch. 1, 38 Stat. 785 §§ 1-3, 10 (1914).

equipped for the task of investigating and prosecuting violators of the Act—smuggling, tax evasion, and courtroom challenges were its forte.<sup>190</sup> Considering the colossal burden of annual income tax filings, Congress determined that the I.R.S. was capable of handling the registration of nearly 220,000 physicians, dentists, veterinarians, and retail druggists and over 1,500 manufacturers, importers, and wholesalers.<sup>191</sup>

Only months after becoming operative, slight deviations from the legislative intent began to contort the Harrison Act's purpose. The Commissioner of Internal Revenue promulgated regulations for enforcing the domestic anti-narcotics law.<sup>192</sup> These rules, however, were prohibitory and bore little relation to the Harrison Act's original goals.<sup>193</sup> Rather than "orderly marketing" or taxation regulations, the Act *as interpreted* began to take on the semblance of a criminal statute.<sup>194</sup>

These gradual mutations did not go unnoticed. Within weeks of initial enforcement, the Department of Justice faced direct challenges to the propriety of the administrative dictates and the constitutionality of the Harrison Act itself.<sup>195</sup> On May 12, 1915, a Pennsylvania district court questioned the legality of federal narcotics control.<sup>196</sup> "This is a revenue act; and unless it is such, . . . it would perhaps violate the provisions of the Constitution of the United States."<sup>197</sup> The court

190. MUSTO, *supra* note 17, at 121.

191. *Id.*

192. See COMMISSIONER OF INTERNAL REVENUE, U.S. INTERNAL REVENUE REGULATIONS NO. 35. RELATING TO THE IMPORTATION, MANUFACTURE, PRODUCTION, COMPOUNDING, SALE, DISPENSING, AND GIVING AWAY OF OPIUM OR COCA LEAVES THEIR SALTS, DERIVATIVES, OR PREPARATIONS THEREOF (1915).

193. The first set of rules stated:

- (1) "In personal attendance" meant that a physician must be away from his primary place of business.
- (2) A consumer cannot register under the law, and therefore can only procure illicit narcotics from a physician.
- (3) Possession of narcotics without proof of acquirement through legal distribution channels is *prima facie* evidence of a violation.
- (4) Only a "normal" dosage of narcotics would be considered a valid prescription.

See MUSTO, *supra* note 17, at 122 (summarizing the contents of the Internal Revenue Regulation). The most controversial regulation attempted to define *in the course of his professional practice only*: "In cases of treatment of addicts these prescriptions should show the good faith of the physician in the legitimate practice of his profession by a decreasing dosage or reduction of the quantity prescribed from time to time." *Id.* at 123 (citation omitted).

194. See *id.* at 128.

195. See *id.* at 123-28.

196. See *id.* at 125.

197. *United States v. Jin Fuey Moy*, 225 F. 1003, 1004 (W.D. Pa. 1915).

held that prosecution of a consumer for mere possession was not consistent with the legislation.<sup>198</sup>

Less than a month later, a district court in Tennessee held that the sheer quantity of narcotics otherwise legitimately prescribed was not enough to sustain an indictment against a physician.<sup>199</sup> Similarly, only four months after its effective date, a Montana district court judge brazenly called for the repeal of the Harrison Act, using language usually reserved for "cruel and unusual punishment" challenges under the Eighth Amendment.<sup>200</sup>

The Harrison Act's journey from presidential pen to the United States Supreme Court steps took less than a year. In *United States v. Jin Fuey Moy*, the defendant, a Pittsburgh physician, had prescribed a dram of morphine sulphate to Willie Martin, an opium addict.<sup>201</sup> The indictment charged a conspiracy to issue narcotics neither in good faith nor for medicinal purposes, but solely to satisfy a drug addict's appetite.<sup>202</sup> The government argued that the Harrison Act was ratified to fulfill a treaty obligation under the International Opium Convention and, as such, was well within the limits of congressional power and was part of "the supreme Law of the Land" under Article IV of the United States Constitution.<sup>203</sup> The Court, however, rebuked this proposition: "The statute does not purport to be in execution of a treaty, but calls itself a registration and taxation act. The provision

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198. *Id.* at 1005. The court stated:

The unlawful act . . . charged against the defendant . . . [consists of] having in the possession and under the control of [the defendant] certain drugs. The indictment, therefore, cannot be sustained, unless the having in the possession . . . certain drugs is an unlawful thing and a violation of the act of Congress.

. . . I think that the word "person" should be held to refer to the persons with whom the act of Congress is dealing; that is, the persons who are required to register and pay the special tax in order to import, produce, manufacture, deal in, dispense, sell, or distribute [and not the consumers of drugs].

*Id.*

199. See *United States v. Friedman*, 224 F. 276, 278 (W.D. Tenn. 1915) ("[T]here is no limit fixed to the amount of said drugs that a physician may prescribe, nor is there any duty imposed upon him, other than to keep a record of all such drugs dispensed by him, and the name and address of the patient, except those to whom he may personally administer, and that he must preserve the records for a period of two years.").

200. See *United States v. Woods*, 224 F. 278, 279-80 (D. Mont. 1915) ("[Violation of the Act is] a mere legal infraction, and not a true crime, [the punishment] is a consequence shockingly disproportionate to the offense, is antagonistic to sound criminal economics, and is abhorrent to justice. . . . [T]he inevitable result being resentment and prejudice against courts and government, law and order, and impairment of and danger to the general well-being of society. All these evils could and ought to be avoided by repeal of [the Harrison Act] and its arbitrary stamp of felony and infamy upon so many petty violations of laws of the United States.").

201. *Jin Fuey Moy*, 241 U.S. at 399.

202. *Id.*

203. *Id.* at 401 (referring to U.S. CONST. art. IV, cl. 2).

before us was not required by the opium convention, and [will not be interpreted as being] entitled to the supremacy claimed by the government for treaties . . . .”<sup>204</sup> Without the deference of international treaty, the Court considered the Harrison Act to be nothing more than a revenue statute.<sup>205</sup> Because Congress could not have intended “to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal,” the Court held that mere possession of narcotics was not sufficient to charge conspiracy.<sup>206</sup>

The Court’s decision in *Jin Fuey Moy* was an extreme blow to the Treasury Department’s enforcement of the Harrison Act. The Commissioner of Internal Revenue denounced the Court for making “it practically impossible to control the illicit traffic in narcotic drugs by unregistered persons.”<sup>207</sup> The three years following *Jin Fuey Moy*, however, would so alter public sentiment through social change as to force the Court to reconsider its decision.<sup>208</sup> American leaders became convinced that drug maintenance programs were futile and, in fact, counterproductive; the anti-alcohol crusade had been fulfilled by the Eighteenth Amendment to the Constitution; World War I had created a new brand of nationalism, which had no place for narcotics or addicts; and the Bolshevik Revolution generated a “Red Scare” which engulfed the entire nation.<sup>209</sup> Narcotics were associated with perversion and rebellion; addiction was considered unpatriotic.<sup>210</sup>

The United States Supreme Court was not sequestered from this social upheaval, and the events of the previous three years unavoidably influenced its decisions. On March 3, 1919, the Court decided two cases which “effectively foreclosed any possibility of a more humane policy toward drug addicts.”<sup>211</sup> The first, *United States v. Doremus*,<sup>212</sup> held that neither the use of the taxing power nor the

204. *Id.*

205. *Id.*

206. *Id.* at 402.

207. MUSTO, *supra* note 17, at 130 (citation omitted).

208. *See id.* at 131-32.

209. *See id.* at 133-34.

210. *Id.*; *see also* Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 46 (“In the aftermath of World War I, many Americans, stunned by the triumph of Bolshevism in Russia and fearful of domestic subversion, turned their backs on the liberalizing reforms of the . . . [preceding] era. In such an atmosphere the notion of tolerating drug use or maintaining addicts in the clinics that had arisen after 1914 struck most citizens as both immoral and unpatriotic. [This fear also] was motivated in no small part by [narcotics] association with feared and despised ethnic minorities, especially the masses of Eastern and Southern European immigrants.”).

211. Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 46.

212. 249 U.S. 86 (1919). The case involved a registered physician who sold five hundred one-sixth grain tablets of heroin to a known drug addict, with the sole purpose of “gratifying his

states' concurrent jurisdiction made the Harrison Act unconstitutional.<sup>213</sup> In the second case, *Webb v. United States*,<sup>214</sup> the Court held that a physician could not prescribe narcotics solely to alleviate the discomfort of addiction: "[T]o call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required."<sup>215</sup> As a result, physicians were criminally banned from prescribing narcotics to their drug-addicted patients.<sup>216</sup> This holding was preposterous, however, given approved medical theories and overt congressional intent.<sup>217</sup>

Although the Court continued to hear cases brought under the Harrison Act, its review was wholly cursory.<sup>218</sup> By 1919, narcotics prohibition became a reality—in spite of the sixty-third Congress' true

appetite for the drug as an habitual user thereof." *Id.* at 90. The physician was indicted under Section 2 of the Harrison Act for selling drugs not "in the course of his professional practice." *Id.* at 91-92.

213. *Id.* at 93-95. As the Court articulated:

If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.

... Nor is it sufficient . . . that the same business may be regulated by the police power of the State.

....

... That Congress might levy an excise tax upon [manufacturers, doctors or dealers] cannot be successfully disputed.

... We cannot agree with the contention that [the Harrison Act is] beyond the power of Congress. . .

*Id.* (citations omitted).

214. 249 U.S. 96 (1919). *Webb* involved a physician-defendant prescribing narcotics in large quantities to drug addicts that would be subsequently filled by a pharmacist-defendant. *Id.* at 98. There was no evidence of any medical examination by the doctor nor any inquiry into the size of the prescription by the pharmacist. *Id.* The pharmacist purchased thirty times more morphine than the average retail druggist and he had sold narcotics sixty-five hundred times in less than a year. *Id.* The doctor charged fifty cents for each prescription and had written over four thousand prescriptions during the same period. *Id.*

215. *Id.* at 99-100.

216. DEALING WITH DRUGS, *supra* note 39, at 128.

217. See Schmoke, *supra* note 187, at 509-10 (discussing medical and congressional perspectives).

218. In the next six years, the United States Supreme Court issued decisions upholding the use and extension of the Harrison Act. In *Jin Fuey Moy v. United States*, 254 U.S. 189 (1920), the Court said explicitly what had been implicit in *Doremus* and *Webb*—prescribing and supplying narcotics to an addict for his addiction violated the Act. As the Court articulated:

Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it.

*Id.* at 194 (citing *Webb v. United States*, 294 U.S. 96 (1919)).

intent.<sup>219</sup> Until 1960, the Harrison Act remained the cornerstone of American narcotics regulation, experiencing alterations only in its penalty scheme.<sup>220</sup> The drug user and his supplier, however, were driven completely underground. Organized crime created a black market for narcotics, eventually becoming a billion dollar "industry."<sup>221</sup> Government matched this threat with an ever-expanding enforcement bureaucracy, powered by its own billion dollar budget.<sup>222</sup>

During the 1960's, a schism grew between those who pitied and wished to rehabilitate the addict and those who detested and wished to incarcerate him as a criminal. The latter group dominated the federal government and pushed for further and stronger anti-narcotics legislation. In 1970, a comprehensive statute was enacted, replacing the Harrison Act and creating a sweeping strategy to control drug use and abuse.<sup>223</sup> In 1972, President Nixon declared the first War on Drugs.<sup>224</sup> A decade later, President Reagan *redeclared* the drug war.<sup>225</sup> In 1988, President Bush *re-redeclared* the War on Drugs.<sup>226</sup> It is yet to be seen whether President Clinton will *re-re-redeclare* official hostilities toward narcotics.

The rest is literally history. One only needs to look around to realize the ubiquity of current anti-narcotics laws. However, in spite of escalating law enforcement efforts, fundamental questions remain unchanged and unanswered. In 1926, the Illinois Medical Journal made the following argument:

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In the following term, the Court tackled the issue of federalism and narcotics regulation. *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41 (1921). The defendant had been convicted under a Minnesota state narcotics law for trafficking and selling illicit drugs. *Id.* at 42. The question on appeal was whether the state "statute conflicts with the terms and provisions of the federal Harrison Anti-Narcotics Drug Act . . . , and is therefore beyond the power of the State to enact." *Id.* at 45. The Court held that, even though "the State has no power to enact laws which will render nugatory a law of Congress enacted to collect revenue," Minnesota's law (and implicitly the narcotics laws of other states) was consistent with and merely augmented the Harrison Act. *Id.* From this point on, the federalism and states rights concerns were nullified and conflicting jurisdiction claims were moot.

219. See DUKE & GROSS, *supra* note 74, at 85-86. In 1937, the Marijuana Tax Act added marijuana to the Harrison Act's list of illicit drugs. See *id.* at 90-93 (discussing two popular theories about why marijuana was made illegal).

220. Kaplan, *supra* note 56, at 805.

221. See *infra* notes 229-41 and accompanying text (discussing the mechanics of how a black market for illicit drugs is created).

222. See *infra* notes 294-97 and accompanying text.

223. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended in scattered sections of 18, 19, 21, 26, 31, 40, 42, 46, 48, 49 U.S.C.).

224. See Taylor Branch, *Let Koop Do It: A Prescription for the Drug War*, NEW REPUBLIC, Oct. 24, 1988, at 22.

225. *Id.* at 25.

226. George Church et al., *Thinking the Unthinkable*, TIME, May 30, 1988, at 12, 13.

The Harrison Narcotic law should never have been placed upon the Statute books of the United States. It is to be granted that the well-meaning blunderers who put it there had in mind only the idea of making it impossible for addicts to secure their supply of "dope" and to prevent unprincipled people from making fortunes, and fattening upon the infirmities of their fellow men.

As is the case with most prohibitive laws, however, this one fell far short of the mark. So far in fact, that instead of stopping the traffic, those who deal in dope, now make double their money from the poor unfortunates upon whom they prey. . . . The doctor who needs narcotics used in reason to cure and to allay human misery finds himself in a pit of trouble. The lawbreaker is in clover.

. . . It is costing the United States more to support bootleggers of both narcotics and alcoholics than there is good coming from the farcical laws now on the statute books.

As to the Harrison Narcotic law . . . [p]eople are beginning to ask, "Who did that, anyway?"<sup>227</sup>

Seventy years, thousands of lives, and billions of dollars later, Americans are still asking the same questions. *Is it not time to start getting some answers?*

## II. ECONOMICS

*The harm that is done by drugs is predominantly caused by the fact that they are illegal.*

—Milton Friedman<sup>228</sup>

### A. *The Black Market*

*So how do you create a black market, anyway?* It is actually quite simple, as Baltimore Mayor Kurt Schmoke asserted before a congressional committee: "The black market is a result of the manufacture and sale of [drugs] being criminalized[;] profits from drug sales are enormous because the substances cannot be obtained legally."<sup>229</sup> In general, a successful underground market requires only a few elements. First, a heavily demanded product must be banned by the government—narcotics and their criminalization certainly suffice.<sup>230</sup>

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227. *Stripping the Medical Profession of Its Powers and Giving Them to a Body of Lawmakers: The Proposed Amendment to the Harrison Narcotic Act—Everyone Seems to Know About Doctoring Except Doctors*, 49 ILL. MED. J. 446, 447 (1926).

228. Church et al., *supra* note 226, at 14.

229. SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, 101ST CONG., LEGALIZATION OF ILLICIT DRUGS: IMPACT AND FEASIBILITY (A REVIEW OF RECENT HEARINGS) 11 (Comm. Print 1989) (summary of testimony of Baltimore mayor, Kurt Schmoke) [hereinafter IMPACT AND FEASIBILITY].

230. See Murray E. Jarvik, *The Drug Dilemma: Manipulating the Demand*, SCIENCE, Oct. 19, 1990, at 387 ("When highly addictive drugs are proscribed from use and no alternative is available, a potential illicit market is created.").

Second, there must be an ample supply of the product to meet the consumer's demand. As detailed below, the supply of narcotics is nearly bottomless while statutory prohibition serves as a feckless liturgy.<sup>231</sup>

Third, suppliers must be guaranteed a profit margin commensurate with the "costs" accompanying prohibition. These costs include vast quantities of capital, land, and labor solely compelled by the existence of prohibition, as well as the nonquantifiable risks of violence and incarceration.<sup>232</sup> The income from illicit drug trafficking, however, is more than commensurate with these costs. The profit margins are among the widest in the world, with a few pesos of powder or leaves transformed into hundred-dollar packages on American streets.<sup>233</sup> Similarly, the gross profits are simply astonishing—billions of dollars in untaxed proceeds.<sup>234</sup> In the words of former police chief and current Hoover Institution research fellow Joseph McNamara: "It's the money, stupid."<sup>235</sup>

After 35 years as a police officer in three of the country's largest cities, that is my message to the righteous politicians who obstinately proclaim that a war on drugs will lead to a drug-free America. About \$500 worth of heroin or cocaine in a source country will bring in as much as \$100,000 on the streets of an American city. All the cops, armies, prisons, and executions in the world cannot impede a market with that kind of tax-free profit margin. It is the illegality that permits the obscene markup, enriching drug traffickers, distributors, dealers, crooked cops, lawyers, judges, politicians, bankers, and businessmen.<sup>236</sup>

Put these elements together, let the market simmer for a few decades, and Adam Smith's "invisible hand" will do the rest. The logic is impeccable: where sizeable demand for a product cannot be fulfilled by a legal source, the heretofore dormant black market will boost supply to meet demand.<sup>237</sup> The captains of this illicit industry will be drawn in by extraordinary profits which dwarf any and all potential risks.<sup>238</sup> More importantly, this logic has already been force-

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231. See *infra* notes 242-58 and accompanying text (discussing the startling numbers on just how big the black market has become); see also Church et al., *supra* note 226, at 14 ("Laws to stop supply do not prevent anyone who really wants cocaine or heroin from getting it.")

232. Ostrowski, *supra* note 13, at 656.

233. Shenk, *supra* note 9, at 32-33.

234. See *infra* note 251 and accompanying text (discussing the profits made by the American drug dealer).

235. *The War on Drugs Is Lost*, *supra* note 4, at 42.

236. *Id.*

237. Jarvik, *supra* note 230, at 387.

238. Barnett, *supra* note 50, at 2622.



fully tested. The Eighteenth Amendment to the Constitution<sup>239</sup> (a.k.a., alcohol prohibition) was intended to eradicate liquor production and consumption.<sup>240</sup> Instead, the black market and its concomitant profits rose to meet demand for the liquid vice, utterly frustrating congressional goals.<sup>241</sup>

*So how big is the narcotics black market?* Colossal, gargantuan, and mammoth are all apt descriptors; illicit drug traffic has become the world's most lucrative enterprise.<sup>242</sup> The current value of the international drug trade has been estimated between \$130-150 billion, eclipsing the gross national product of all but a few *nations*.<sup>243</sup> The United States, of course, figures prominently within the international scheme. Harvard political economist (now Labor Secretary) Robert Reich has said "that [the] narcotics [trade] is one of America's major industries, right up there with consumer electronics, automobiles and steel."<sup>244</sup> In fact, domestically grown marijuana is the second largest cash crop in the United States, behind only corn.<sup>245</sup> Some experts even argue that the sheer size of America's drug market substantially affects the United States' trade deficit.<sup>246</sup>

The black market tracks the government, only a few steps behind its every move. Within hours of launching the latest Drug Enforcement Agency anti-narcotics "program," smuggling cartels throughout the western hemisphere will have initiated their own counter-program; every concoction by the United States government has a black-market antidote.<sup>247</sup> In the end, therefore, enforcement efforts are largely fu-

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239. U.S. CONST. amend. XVIII.

240. Barnett, *supra* note 50, at 2608.

241. See Scheer, *supra* note 5, at 50 ("Somebody should have reviewed the lesson of [Alcohol] Prohibition: Suppression of taste defined as vice inexorably drives up profits and increases the supply to meet the demand.").

242. See Laurence Gonzales, *Why Drug Enforcement Doesn't Work: Government Failure in Drug Control*, Dec. 1985, at 104 ("There is more money in illegal drug traffic than in any other business on earth.") (on file with author).

243. IMPACT AND FEASIBILITY, *supra* note 229, at 16 (statement of William Chambliss, Ph.D., Professor, George Washington University); Branch, *supra* note 224, at 22, 26; *The War on Drugs Is Lost*, *supra* note 4, at 44 (editorial of the Honorable Robert W. Sweet).

244. Corelli et al., *supra* note 11, at 39.

245. Gonzales, *supra* note 242, at 105; James Lieber, *Coping with Cocaine*, ATLANTIC MONTHLY, Jan. 1986, at 39, 43.

246. Gonzales, *supra* note 242, at 105.

247. "The war is often painted as a vast chess game with multi-billion dollar consequences. . . . For every law enforcement move there is a smuggling countermove. Smugglers often respond to Customs actions 'by using counter-intelligence, decoy shipments, and such disinformation as false tips.'" D. Brian Boggess, *Exporting United States Drug Law: An Example of the International Legal Ramifications of the "War on Drugs,"* 1992 BYU L. REV. 165, 184 (1992) (citation omitted).

tile, with each United States narco-dollar directly transformed into underworld drug profits.<sup>248</sup>

The biggest winners in the drug war are the organized crime syndicates. Internationally, mass producer-distributors like Columbia's Cali drug cartel turn over \$100 billion per year.<sup>249</sup> Domestically, illegal drugs provide organized crime with more than half of its income.<sup>250</sup> American drug dealers rake in between \$50-60 billion in tax-free profits, with the lower figure being "a safe estimate."<sup>251</sup> Further, because the underground market is viciously capitalistic and Darwinian, individuals within the chain of distribution are the recipients of staggering revenues.<sup>252</sup> Individuals are not receiving the proverbial six-figure salary—they are receiving individual remuneration starting at a comfortable \$100 million per year. Moreover, the top players can pocket this amount in only a couple of months.<sup>253</sup>

Even the small-time drug dealer stands to make exorbitant amounts of money from his illegal trade. More than ninety percent of a narcotic's street value is pocketed by American drug merchants in the post-production chain of distribution.<sup>254</sup> The price of illegal narcotics is typically marked up twelve times after entering the United States

248. See Ostrowski, *supra* note 13, at 645 ("At best, intensified law enforcement simply boosts the black market price of drugs, encouraging more drug suppliers to supply more drugs.").

249. *Sniffing Victory*, *supra* note 11, at A31.

250. Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, SCIENCE, Sept. 1, 1989, at 939, 941 [hereinafter Nadelmann, *Drug Prohibition*].

251. Ellen Benoit, *Drugs: The Case for Legalization*, FIN. WORLD, Oct. 3, 1989, at 32, 33; Peter J. Riga, *The Drug War Is a Crime: Let's Try Decriminalization*, COMMONWEALTH, July 16, 1993, at 6; Shenk, *supra* note 9, at 33.

252. Benoit, *supra* note 251, at 33.

253. Gonzales, *supra* note 242, at 105. Gonzales gave several examples that illustrate the amounts of money involved in drug trafficking:

In one case—the arrest of Paolo LaPorta in Philadelphia—the DEA took \$2,500,000 in cash and assets. Another suspect was photographed using a hand truck to wheel a cardboard carton containing \$4,500,000—a single deposit—into a bank. He was arrested shortly thereafter. In another case, Donald Steinberg grossed \$100,000,000 in 1978—about half the DEA budget for that year. Isaac Kattan, a money launderer, processed more than \$200,000,000 a year. When he was arrested, he had \$383,404 on his person. Kattan had many money-counting machines. Today it is customary for drug traffickers to weigh their money rather than count it.

One of Columbia's top drug barons, Gonzalo Rodriguez, is said to make \$20,000,000 a month. That's \$666,667 a day. . . . Pablo Escobar, the mastermind of a Columbian drug empire[, has a] personal army estimated at more than 2000 men [and his] personal wealth may well exceed two billion dollars. Roberto Suarez Gomez is the ruler of a renegade state high in the forests to the east of the Andean Mountains in Bolivia. The peasants who live there are his serfs. They produce coca. Suarez is thought to earn some \$33,000,000 a month.

*Id.*

254. See Mark A.R. Kleiman, *Snowed In: The Cocaine Blizzard*, NEW REPUBLIC, Apr. 23, 1990, at 14, 15 ("Of the five dollar retail price of a rock of crack cocaine, only about fifty cents

and forty-three times after processing in the producing country.<sup>255</sup> Because the cost of production is a fraction of a percentage of the retail price,<sup>256</sup> the markup on narcotics can range as high as 20,000 percent—leaving ample room for the “entrepreneur” on the streets to profit.<sup>257</sup> The astronomical proceeds distort the risks and eschew lawful employment. Potential incarceration is ignored, while murderous “negotiations” are accepted as just another cost of doing business.<sup>258</sup>

High profits at the local or street level have at least three pernicious, ancillary effects. First, drug dealers and their minions are easily replaced by a seemingly inexhaustible throng of gangsters.<sup>259</sup> The number of potential “pushers” is practically infinite; each incarcerated drug dealer is succeeded by another hoodlum from the odious underworld queue.<sup>260</sup> Even high-level drug racketeers are expendable, making the “celebrated arrests of drug kingpins [mere] Pyrrhic victories.”<sup>261</sup> Ironically, some local kingpins are imprisoned based on tips furnished by the successors to their drug business.<sup>262</sup>

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goes to growers, processors, and importers. The rest—ninety percent of the total—is added after the drug reaches the United States.”).

255. Benoit, *supra* note 251, at 33.

256. See Nadelmann, *Drug Prohibition*, *supra* note 250, at 940 (“The foreign export price of illicit drugs is . . . a tiny fraction of the retail price in the United States[,] (approximately 4% with cocaine, 1% with marijuana, and much less than 1% with heroin). . .”).

257. *The War on Drugs Is Lost*, *supra* note 4, at 44 (editorial of the Honorable Robert W. Sweet).

258. Ostrowski, *supra* note 13, at 678. As Ostrowski noted:

Drug sellers are simply more highly motivated than those who are paid to stop them. This is not a criticism of drug enforcement personnel—it is just a fact. Drug sellers make enormous profits selling drugs—more money than they could make at other illegal activities (otherwise they would already be engaging in those other activities), and much more money than they could make at legal jobs. They are willing to risk death and long prison terms to make this profit. They are professionals, on the job 24 hours a day, and able to pour huge amounts of capital into their enterprises as needed. They are willing to murder competitors, informers and police as needed.

*Id.*

259. Riga, *supra* note 251, at 6; Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 26 n.8, 40 n.39 (1994); Chi Chi Sileo, *Is It Time To Just Say No to the War on Drugs?*, INSIGHT, Feb. 7, 1994, at 6; James Q. Wilson & John J. DiIulio, *Crackdown: Treating the Symptoms of the Drug Problem*, NEW REPUBLIC, July 10, 1989, at 21.

260. See Shenk, *supra* note 9, at 35 (“If sticking a drug dealer in jail meant fewer dealers on the street, perhaps this wave of incarceration would eventually do some good. But it doesn’t work like that: Lock up a murderer, and you have one less murderer on the street. Lock up a dealer, and you create a job opening. It’s like jailing an IBM executive; the pay is good, the job is appealing, so someone will move into the office before long. Clearing dealers from one neighborhood only means they’ll move to another. Busting a drug ring only makes room for a competitor.”).

261. Sileo, *supra* note 259, at 6.

262. Wilson & DiIulio, *supra* note 259, at 23.

Second, the plentiful and immediate nature of drug profits attracts the young from schools, playgrounds, and ballparks into the sordid underbelly of the black market. Instead of being on the fast track to college and a lawful career, these invidiously seduced children are placed on a one-way track to the state penitentiary or local morgue.<sup>263</sup> Drug dealers have become perverted heroes to many youngsters, standing out "as symbols of success to children who see no other options."<sup>264</sup> Historically, children did not become dealers until after they became drug users.<sup>265</sup> Today, the lure of money entices the young before they even use narcotics.<sup>266</sup> "If you sell drugs, you [have] anything you want[ ]," related one young dealer.<sup>267</sup> "Any girl, any friend, money, status. If you [don't], you got no girlfriend, no friends, no money. You're a nothing."<sup>268</sup> Contrary to popular belief, inner-city kids are dropping out of school because of *drug money, not drug addiction*.<sup>269</sup>

Finally, the large amount of money at stake on the streets fosters "drug-related violence."<sup>270</sup> This includes, *inter alia*, random shootings, homicidal "ripoffs" (i.e., a feigned drug deal consummated by murder and theft), "rubbing-out" competitors, and executions of government informants and witnesses.<sup>271</sup> Such "drug-related violence" will be revisited below.<sup>272</sup>

### B. Governmental Approaches to Narcotics Reduction

Economic analysis of narcotics prohibition is not rocket science but a simple matter of supply and demand. If there is a demand for narcotics, a supply will eventually emerge free of serendipity. If the supply is occluded by sheer paramilitary force, a new source will

263. Shenk, *supra* note 9, at 33. According to Baltimore's mayor, Kurt Schmoke, young children:

especially those living in the inner city, are frequently barraged with the message that selling drugs is an easy road to riches—far easier than hard work and good grades. Drug pushers, with their wads of money, become envied role models for young people seduced into joining the illegal trade. In many cities, small children act as lookouts and runners for drug pushers, just as they did for bootleggers during Prohibition.

Schmoke, *supra* note 187, at 516.

264. Nadelmann, *Drug Prohibition, supra* note 250, at 942.

265. *Id.*

266. *Id.*; Ethan A. Nadelmann, *Shooting Up: Crime and the Drug Laws*, NEW REPUBLIC, June 13, 1988, at 16, 17.

267. Shenk, *supra* note 9, at 34.

268. *Id.*

269. *The War on Drugs Is Lost, supra* note 4, at 43 (editorial of Joseph D. McNamara).

270. Ostrowski, *supra* note 13, at 650.

271. *Id.*

272. See *infra* notes 503-38 and accompanying text.

percolate from the drug underworld.<sup>273</sup> Thus, regardless of the amount spent to wage the War on Drugs, the “invisible hand” of supply and demand ensures that the force of this money is neutralized.

In the past quarter-century, two general methods to abate domestic consumption of drugs have been discussed and attempted: supply-side reduction and demand-side reduction.<sup>274</sup>

### 1. *Supply-Side Reduction*

Supply-side tactics have been historically favored by American law enforcement and have received the vast majority of governmental funding.<sup>275</sup> Efforts at supply-side reduction employ military and police forces to (1) eradicate foreign and domestic drug production, (2) seal the borders from narcotics traffic, and (3) apprehend and prosecute drug dealers.<sup>276</sup> In other words, supply-side tactics aim to reduce consumption by limiting the amount of drugs available on the streets.

For example, assume that “*S*” represents the amount of drugs supplied at any given price, “*D*” represents the amount of drugs demanded at any given price, “*Q*” represents the equilibrium quantity (the amount of drugs consumed given *S* and *D*), and “*P*” represents the equilibrium price (the average price of drugs given *S* and *D*). Assume further that supply-side tactics (e.g., United States Customs captures a cocaine flotilla) have reduced the amount of drugs entering the country, “shifting” the supply curve from *S* to *S'*. In theory, the price of narcotics should rise from *P* to *P'* and—here is the important part—the quantity of drugs consumed should drop from *Q* to *Q'*. One need not consult John Maynard Keynes to confirm the appropriate analysis: If there are less drugs on the market, the price should increase. This is not a startling result; Americans have been witness to this phenomenon all too often with other products (e.g., the price of

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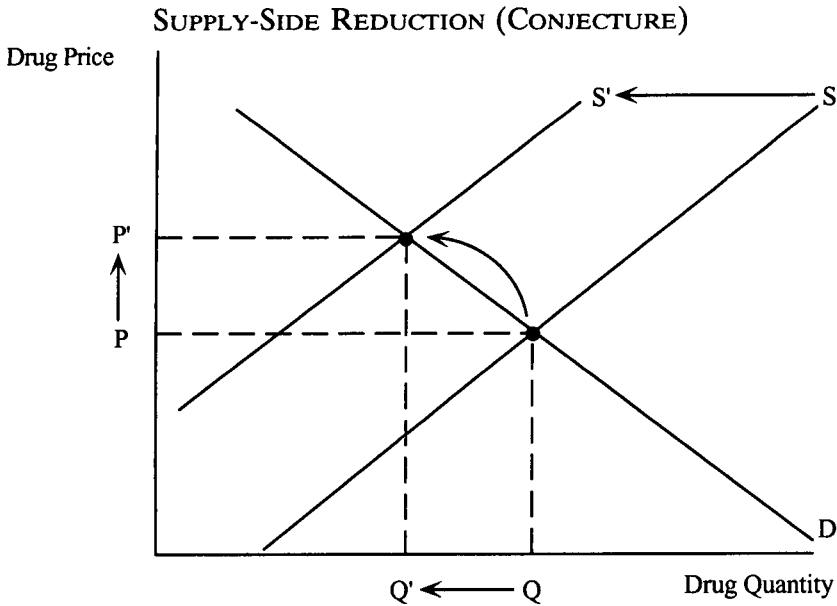
273. According to Professor Arnold Trebach, “[w]henver there is a demand for an illicit [drug,] in time a supply appears, . . . and when one source of supply is cut off, another soon replaces it in sufficient volume to satisfy the demand.” Andrew Hacker, *Is the War on Drugs a Mistake?*, FORTUNE, Sept. 14, 1987, at 141, 144; see also Church et al., *supra* note 226, at 14 (stating that jailing a kingpin would not make a dent in drug smuggling).

274. See Tonry, *supra* note 259, at 66.

275. Steven Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 HOFSTRA L. REV. 751, 775-76 (1990).

276. See Tonry, *supra* note 259, at 66 (“[S]upply reduction approaches are source-country programs (crop eradication, financial support to other countries’ drug law enforcement agencies, and extraterritorial assignment of American military and law enforcement personnel), interdiction programs (border patrols, air and marine surveillance and apprehension of importers, and baggage inspection at entry points), and law enforcement efforts at local, state, federal, and international levels aimed at arresting and punishing those involved in drug trafficking.”).

gas before and after an OPEC oil embargo). If drug-war efforts increase the possibility or duration of imprisonment, these costs of doing business should accrue to the narcotic consumer in the form of increased drug prices.<sup>277</sup>



Contrary to economic theory, the price of drugs has fallen while the quantity consumed has increased—in spite of concerted and expensive supply-side enforcement efforts.<sup>278</sup> Eleven-figure drug-enforcement budgets have resulted in little, if any, decline in casual drug use, no abatement of addiction rates, and an increase in per capita narcotic consumption.<sup>279</sup> According to the National Institutes of Health, illicit

277. See *id.* at 69 (“If drugs are getting scarcer, simple economic theory tells us they should become more costly. If the risks of arrest and incarceration associated with drug sales are increasing, simple economic theory tells us that those increased costs should be passed along and drugs should become more costly.”).

278. See Galiber, *supra* note 75, at 847; Jonas, *supra* note 275, at 776, 784-85; Ostrowski, *supra* note 13, at 675-77; Schmoke, *supra* note 187, at 575; Edward Barnes, *Drugs: Apocalypse Now*, LIFE, Sept. 1989, at 18, 20; Benoit, *supra* note 251, at 33; *Crack Kills*, NAT’L REV., Feb. 5, 1988, at 20; Jarvik, *supra* note 230, at 387; Kleiman, *supra* note 254, at 14-15; Charles Murray, *How To Win the War on Drugs: The Drug-Free Zone Solution*, NEW REPUBLIC, May 21, 1990, at 19; *Opening Crack*, ECONOMIST, June 11, 1994, at 53, 56; Riga, *supra* note 251, at 6; *Sniffing Victory*, *supra* note 11, at A31; Wisotsky, *supra* note 11, at 17.

279. See Shenk, *supra* note 9, at 33 (“The fact is we have done a very poor job discouraging drug use with the blunt force of law. The hundreds of billions of dollars spent on drug control in the last several decades have yielded only a moderate decline in the casual use of marijuana and cocaine. But there has been no decrease in hard-core addiction. The total amount of cocaine consumed per capita has actually risen. And even casual use is now creeping up.”).

drugs are as available now as they were in 1975.<sup>280</sup> Further, in spite of redoubled drug-enforcement efforts, narcotics have become even more accessible in recent years.<sup>281</sup> The marijuana supply has literally increased by tons; the purity and availability of heroin has skyrocketed; and the D.E.A. has admitted that cocaine remains "readily available in virtually all major U.S. metropolitan areas."<sup>282</sup>

Supply-side efforts have failed and will continue to fail for one simple reason—the supply of narcotics is too overwhelming. Current efforts are akin to dredging Lake Michigan one gallon at a time. According to Ernest Van Den Haag of the Heritage Foundation, drug agents seize less than ten percent of narcotics introduced into the United States.<sup>283</sup> Miami's mayor has argued that the figure is closer to one percent.<sup>284</sup> Further, economist Peter Reuter of the Rand Corporation has opined that even if supply-side efforts were *doubled*, only a 3.4% increase in street price might be expected.<sup>285</sup> Moreover, the demand for narcotics is relatively inelastic—Americans will demand roughly the same amount of narcotics regardless of fluctuations in price.<sup>286</sup>

Although the supply curve is the same as before, the demand curve is vertical—representing the inelasticity of demand. The problem is manifest: The quantity of drugs consumed is unaffected by efforts to reduce the supply (represented by the shift from *S* to *S'*).<sup>287</sup> Accord-

280. *Legalizing Drugs: Just Say Yes*, NAT'L REV., July 10, 1995, at 44, 48 (interview with Michael S. Gazzaniga) [hereinafter *Legalizing Drugs*].

281. *Id.* at 50.

282. *Id.* at 48-49. According to one source:

National Institutes of Health studies show that perceived availability has remained consistently high for marijuana since 1975. As it has for cocaine. Furthermore, from 1988 to 1992 drug availability, by and large, increased—despite the war on drugs. There was a 2.5 metric-ton increase in marijuana, with a peak in 1989-90. Cocaine, according to the Drug Enforcement Administration as of 1993, "remained readily available in virtually all major U.S. metropolitan areas." Heroin is available, and its purity has increased. . . . As far as drug availability is concerned, the drug war has been a total failure. [And although t]he risk of arrest has certainly increased—since 1985 drug arrests have gone up from 718,000 to 1,247,000 a year [sic] the perceived risk of arrest is . . . [still] ignored by drug users.

*Id.*

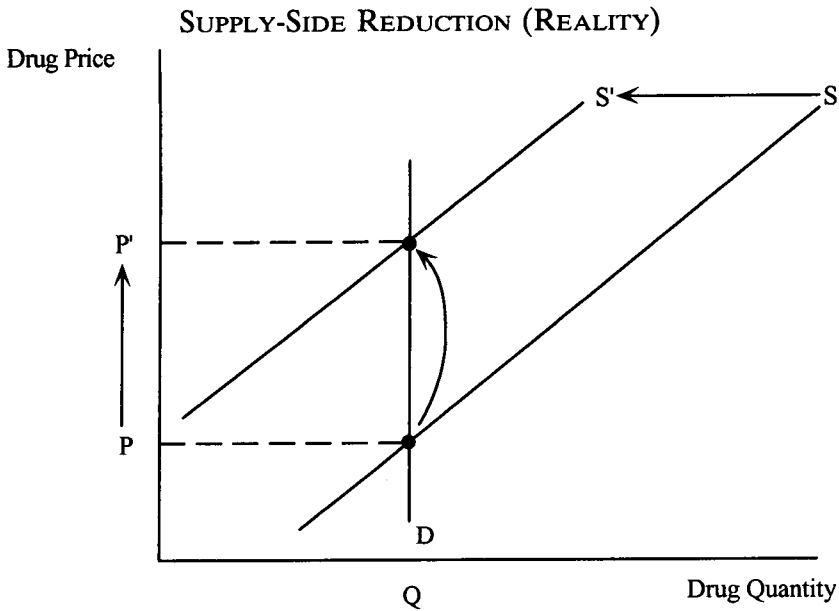
283. Douglas L. Heerema, *Drug Use in the 1990's*, BUS. HORIZONS, Jan.-Feb. 1990, at 127, 129.

284. *Crack Kills*, *supra* note 278, at 20.

285. Lieber, *supra* note 245, at 44.

286. *Id.*; Duke, *supra* note 14, at 576, 600; Galiber, *supra* note 75, at 848; *The Quack Epidemic*, NEW REPUBLIC, Nov. 14, 1988, at 7, 8.

287. More accurately, the demand for narcotics is relatively inelastic for the *operative range of drug prices*. In other words, consumer demand would be relatively unaffected by a fifty percent increase in price (which, by the way, would be a remarkable feat for drug enforcers). If, however, drug prices increased by 100,000 percent, a substantial decrease in drug consumption would certainly follow. However, given the seemingly limitless supply of narcotics flowing across our



ing to one commentator, “[e]lementary economics suggests that a supply of drugs will be available so long as there is a demand.”<sup>288</sup> When demand is unaffected by price, elementary economics becomes an inexorable rule: Supply-side reduction efforts will be futile.

## 2. Demand-Side Reduction

Demand-side strategies seek to persuade drug abstinence rather than dispense draconian punishment. Education and treatment are the means to the drug-reduction ends.<sup>289</sup> While demand-side tactics remain largely untried by drug warriors, education and treatment have had resounding success in reducing alcohol and nicotine use.<sup>290</sup> For example, community- and school-based anti-smoking campaigns, cooperative business-employee health programs, and the steady increase in nonsmoking public forums have helped to reduce adult smoking by twenty-eight percent from 1965 to 1987.<sup>291</sup> One might expect a similar reduction in drug use if demand-side tactics were given priority over supply-side interdiction and criminalization. However, only five percent of current government expenditures goes to drug

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borders, price increases of the latter variety are dubious at best. For the purposes of the drug war, therefore, demand should be considered inelastic.

288. Boggess, *supra* note 247, at 189.

289. Tonry, *supra* note 259, at 66.

290. Jonas, *supra* note 275, at 776-77.

291. *Id.*



education.<sup>292</sup> Congress simply has been unwilling to fund treatment and education programs adequately.<sup>293</sup> As long as the supply-side "money pit" is fully and exclusively embraced by federal officials, sufficient funds will be unavailable to test demand-side reduction programs.

### C. *Costs of Criminalization and Benefits of Legalization*

If nothing else, economic analysis can provide a "bottom line"—an estimate of the costs and benefits of narcotics criminalization. For the professional and amateur economist, these figures provide the most damning evidence against the effectiveness of the drug war.

#### 1. *The Costs of Drug Warfare*

In 1973, Congress allocated \$100 million (not billion) for the fledgling drug war.<sup>294</sup> A decade later in 1983, the national drug enforcement budget had soared to \$1.3 billion.<sup>295</sup> In 1996, the federal government budgeted between \$14-17 billion on direct enforcement efforts.<sup>296</sup> Since the early eighties, the federal bureaucracy has spent well over \$100 billion on anti-drug programs.<sup>297</sup>

Congressional drug enforcement expenditures are just the tip of the proverbial iceberg. In 1990, the Defense Department spent approximately \$1 billion for airplanes, helicopters, boats, and tracking devices in order to intercept foreign narcotics.<sup>298</sup> International drug efforts (e.g., crop eradication or foreign government assistance) also have been estimated to require another \$1 billion per year.<sup>299</sup> Since 1989, drug-related cases have commanded at least half of the criminal court docket,<sup>300</sup> consuming at least \$30 billion in court costs.<sup>301</sup> It is estimated that it takes anywhere from \$20,000 to \$40,000 a year to incarcerate a drug offender, costing the American public at least \$75 billion

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292. See, e.g., *IMPACT AND FEASIBILITY*, *supra* note 229, at 25 (summarizing the testimony of Marvin Miller, which noted that only five percent of the nation's \$10 billion antidrug budget was allotted to education programs and that nothing was allotted to treatment programs).

293. *Id.*

294. Duke, *supra* note 14, at 574.

295. Shenk, *supra* note 9, at 35.

296. *Id.*; *The War on Drugs Is Lost*, *supra* note 4, at 40, 44 (editorial of Kurt Schmoke and Robert W. Sweet, respectively).

297. Riga, *supra* note 251, at 6; *Should Drugs Be Legalized?*, *supra* note 11, at 80.

298. Boaz, *supra* note 16, at 621.

299. *Legalizing Drugs*, *supra* note 280, at 47.

300. *IMPACT AND FEASIBILITY*, *supra* note 229, at 12 (testimony of Mayor Marion Barry, Jr.); Eliot Marshall, *Drug Wars: Legalization Gets a Hearing*, *SCIENCE*, Sept. 2, 1988, at 1157, 1158; *The War on Drugs Is Lost*, *supra* note 4, at 35 (editorial of William F. Buckley).

301. Benoit, *supra* note 251, at 33.

per year.<sup>302</sup> Victims of drug-war violence require at least \$1 billion in medical aid,<sup>303</sup> while victims of drug-related theft suffer \$10 billion in property losses per year.<sup>304</sup>

Experts estimate that the total expenditure of public funds for the drug war, whether federal, state, or local, comes to a whopping \$75 billion per year.<sup>305</sup> This author suspects that the actual number is closer to \$100 billion annually. Then there is the real economic loss from inflated drug prices: Ninety percent of black-market drug prices are directly and solely attributable to drug criminalization.<sup>306</sup> The narcotics consumer, in essence, tosses ninety percent of drug costs into the kiln of prohibition. His money burns not for his own good or the good of the economy but for the sake of the drug war itself.<sup>307</sup>

When the numbers are tallied up, the drug war costs the United States *at least \$150 billion per year*. This figure does not even include some very real but unquantifiable costs, including costs from lost productivity from drug-war deaths, lost productivity from nonviolent drug prisoners, lost business in and "capital flight" away from inner cities, and prohibition-created illnesses (e.g., AIDS from intravenous drug use). The \$150 billion figure, therefore, probably underestimates the true cost of waging the drug war.

## 2. *The Benefits of Drug Peace*

By eliminating the black market, legalization would immediately inject at least \$70 billion into the American economy from drug-price deflation. Organized crime, on the other hand, would take "a big pay cut" of approximately \$80 billion per year.<sup>308</sup> Taxes from legal drug sales would mean that the approximately \$10 billion in yearly drug-enforcement expenditures would be supplanted by a titanic revenue

302. *The War on Drugs Is Lost*, *supra* note 4, at 35 (public money spent on drug-related offenses); Wisotsky, *supra* note 11, at 21.

303. Benoit, *supra* note 251, at 33.

304. *The War on Drugs Is Lost*, *supra* note 4, at 36 (editorial of William F. Buckley).

305. Duke, *supra* note 14, at 582; *The War on Drugs Is Lost*, *supra* note 4, at 35 (editorial of William F. Buckley).

306. Ostrowski, *supra* note 13, at 655-56.

307. *Id.*; see also Duke, *supra* note 14, at 583-84 ("[T]ake a common estimate of annual black market drug sales which in 1980 was \$79 billion. Because the black market price of drugs is inflated at least ten-fold over the probable legal price, 90 percent of this figure, or about \$70 billion, constitutes an economic loss caused by prohibition. The drug user (and his dependents) is deprived of the purchasing power of 90 percent of the money he spends on illegal drugs without any net benefit accruing to the economy as a whole. Current estimates place American drug consumption at about \$100 billion per year.").

308. Ostrowski, *supra* note 13, at 685-86.

influx.<sup>309</sup> A ten-dollar-per-ounce tax on marijuana, for example, would secure \$20 billion in revenues at present consumption.<sup>310</sup>

There are also latent benefits from ending the drug war and refocusing our efforts. Legalization might result in the release of between 75,000 and 300,000 nonviolent prisoners serving narcotics-related sentences.<sup>311</sup> This would mean more otherwise-productive citizens in our workforce, more parents at home instead of in jail, and more cell space for truly violent criminals. Moreover, medical treatment and prevention are much more economically efficient than criminalization; money spent on treatment is seven times more likely to stem drug addiction than imprisonment.<sup>312</sup> Further, while it costs a city about \$160,000 to run a needle-exchange program, one syringe-infected AIDS victim will require upwards of \$120,000 per year in public assistance.<sup>313</sup> By preventing only two drug users from contracting HIV, a needle-exchange program more than covers its costs.<sup>314</sup>

*So what is the bottom line? What would Americans save from drug legalization as compared to the current system? After factoring in expected changes in consumption and the relocation of government expenditures, one expert has argued that "the net social gain of drug peace is \$25.25 billion."<sup>315</sup> Theodore Vallance, former planning chief of the National Institutes of Mental Health, concluded that drug legalization would save the United States \$37 billion per year.<sup>316</sup> Professor James Ostrowski estimates that the net economic gain would be around \$75 billion.<sup>317</sup> This author, on the other hand, believes that the costs of legalization (e.g., increased consumption) roughly cancel out the unquantifiable costs of our current regime; therefore, the entire \$150 billion economic cost of drug warfare would benefit society under drug peace. While experts may differ on the correct figure, they*

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309. See Benoit, *supra* note 251, at 34 ("[I]nstead of having an outflow of \$10 billion from the Treasury, you have an inflow of \$10 billion or more.")

310. Branch, *supra* note 224, at 26.

311. Duke, *supra* note 14, at 590; Ostrowski, *supra* note 13, at 685.

312. See *The War on Drugs Is Lost*, *supra* note 4, at 37 (editorial of William F. Buckley) ("[O]ne dollar spent on the treatment of an addict reduces the probability of continued addiction seven times more than one dollar spent on incarceration.")

313. See *id.* (editorial of Kurt Schmoke).

314. *Id.* ("[T]aking care of just one adult AIDS patient infected through the sharing of a syringe is \$102,000 to \$120,000. In other words, if just two addicts are protected from HIV through the city's needle exchange, the program will have paid for itself.")

315. Richard Dennis, *The Economics of Legalizing Drugs*, ATLANTIC MONTHLY, Nov. 1990, at 126, 130.

316. *Legalizing Drugs*, *supra* note 280, at 50 (reaching the "startling conclusion that legalizing drugs could save society approximately \$37 billion a year").

317. Ostrowski, *supra* note 13, at 670.

all agree that the benefits from legalization far outdistance any conceivable gain from criminalization.<sup>318</sup> In total, our society would economically benefit to the tune of at least \$25 billion and possibly as much as \$150 billion.

### III. MEDICINE

*To be confirmed a drug addict is to be one of the walking dead. . . . The teeth have rotted out; the appetite is lost and the stomach and intestines don't function properly. The gall bladder becomes inflamed; eyes and skin turn a bilious yellow. In some cases membranes of the nose turn a flaming red; the partition separating the nostrils is eaten away—breathing is difficult. Oxygen in the blood decreases; bronchitis and tuberculosis develop. . . . Sex organs become affected. Veins collapse and livid purplish scars remain. Boils and abscesses plague the skin; gnawing pain racks the body. Nerves snap; vicious twitching develops. Imaginary and fantastic fears blight the mind and sometimes complete insanity results. Often times, too, death comes—much too early in life. . . . Such is the torment of being a drug addict; such is the plague of being one of the walking dead.*

—Justice William O. Douglas<sup>319</sup>

Drug abuse looks and sounds like a medical, public-health problem. Addiction behaves like a disease, destroying the habitué's mind and body. Drug abusers and their families seek help from health care experts, not unlike those who are afflicted with grave, yet socially acceptable, maladies. After years of research and treatment, the medical community has unanimously concluded that addiction is a disease requiring medical and psychological treatment.<sup>320</sup> However, the only remedy palatable to national politicians is punishment. "Medicine has been given a back seat in this country's so-called war on drugs[.]" according to one commentator.<sup>321</sup> This is not to suggest that government does not have a legitimate interest in drug regulation. *It does.*<sup>322</sup> Whereas current regulations on, for example, oral

318. *Cf. id.*; Dennis, *supra* note 315, at 130; *Legalizing Drugs*, *supra* note 280, at 50.

319. *Robinson v. California*, 370 U.S. 660, 672 (1962) (Douglas, J., concurring) (citation omitted).

320. *See, e.g.*, Paul Cotton, "Harm Reduction" Approach May Be Middle Ground, 271 JAMA 1641, 1641 (1994) ("Effective therapy is the key to breaking the cycle of hard-core addictive drug use.") (citing Lee Brown, the "White House drug czar").

321. *Id.* ("Dealing with drug addiction was once primarily the purview of physicians. But since the initiation of prohibition in the early part of this century, and especially since the 'war on drugs' was declared in the 1970's, drug use, abuse, and addiction have been treated primarily as crimes and only secondarily as a public health problem.")

322. *See* Avram Goldstein & Harold Kalant, *Drug Policy: Striking the Right Balance*, SCIENCE, Sept. 28, 1990, at 1513 ("[M]ost governments are required, by public consensus and demand, to protect against numerous avoidable hazards and not merely to warn them to possible dangers. The U.S. Pure Food and Drugs Act, enacted in 1906, set up the technical machinery,

birth control or antibiotics, stem from a realization that the medically naive could not appreciate and evaluate the risks inherent in such drugs,<sup>323</sup> narcotics are governed by a blanket prohibition which ignores relative differences and dangers.

A gross and inflexible regime, however, is precisely what could be expected from the nation's capital. Science is summarily disregarded by federal officials when designing and implementing narcotics legislation.<sup>324</sup> America's current drug policy "reflects a battle fought seventy years ago between the medical profession and law enforcement," contends Dr. Rex Greene, a clinical professor of medicine at the University of Southern California.<sup>325</sup> "Medicine lost the challenge to the Treasury Department's use of regulations to control the practice of medicine and prohibit physicians from treating addiction with drugs."<sup>326</sup> This is more than a mere unenlightened historical accident. When drug addiction is viewed as a disease—as science says it must be—the practice of jailing addicts becomes nothing less than barbaric.

#### A. *Pharmacological Effects of Drug Use*

There are currently five major nontherapeutic (i.e., recreational) drugs in the United States: alcohol, tobacco, cocaine, heroin and marijuana.<sup>327</sup> The American "drug problem," however, has been viewed as two "black and white" issues rather than an allied concern with a kaleidoscope of differences.<sup>328</sup> "The 'good,' or at least the 'OK,' drugs are those which are currently legal, while the 'bad' drugs, those which are considered the sole cause of 'The Drug Problem,' are those which are currently illegal[.]" opines Dr. Steven Jonas, professor of preventive medicine at SUNY-Stony Brook.<sup>329</sup> However, as Dr. Jonas concludes, "there are no scientific, epidemiological or medical bases on

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the Food and Drug Administration (FDA), for assessing drug hazards, forbidding over-the-counter sale of the more dangerous drugs, requiring manufacturers to report on unanticipated adverse reactions, and exercising control over drug distribution.").

323. *Id.*

324. See John Horgan, *Ignorance in Action: Politicians Hear but Do Not Heed Scientists' Advice on Drug Abuse*, SCI. AM., Nov. 1988, at 17 ("Politicians view science as irrelevant when it comes to dealing with drug abuse.") (quoting Karst Besteman, former deputy director of the National Institute on Drug Abuse).

325. Rex Greene, *Towards a Policy of Mercy: Addiction in the 1990s*, 3 STAN. L. & POL'Y REV. 227, 234 (1991).

326. *Id.*

327. Jonas, *supra* note 275, at 758-59.

328. Greene, *supra* note 325, at 234.

329. Jonas, *supra* note 275, at 753 (citation omitted).

which the legal distinctions among the various drugs are made—only historical and political ones.”<sup>330</sup>

Disinformation on the proximate effects of drug use, driven by drug-war propaganda, is an unfortunate and erroneous basis for public hysteria. Like their medicinal cousins, recreational drugs produce physical and psychological changes in the user which can be measured and anticipated. Alcohol is a central nervous system depressant that can reduce anxiety, impair concentration, and delay physical reactions.<sup>331</sup> Tobacco’s active ingredient, nicotine, stimulates the nervous system, increases concentration, relieves tension and fatigue, and increases heart rate and blood pressure.<sup>332</sup> Cocaine increases blood pressure, heart rate, breathing, and body temperature; gives the user feelings of euphoria and illusions of increased sensory awareness and mental and physical strength; and decreases hunger, pain, and fatigue.<sup>333</sup> Marijuana creates heightened senses, gives feelings of euphoria and relaxation, and increases the heartbeat.<sup>334</sup> Heroin induces euphoria, relieves pain, and can induce sleep.<sup>335</sup> These descriptions, out of necessity, are gross generalizations. The main point, however, does not require a medical treatise: These drugs, whether legal or illegal, are neither demonic nor saintly—they are merely organic chemicals from rather banal flora.

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330. *Id.*

331. *See id.* at 762 (“The effects of alcohol are well known, but in clinical terms, it: produces dose-related impairment of motor functions, coordination, reflex responses, tracking performance, judgment, and consciousness, as well as divided attention. . . . [T]here is an exaggeration of mood and related behavior that may be manifested by conviviality, depression, or aggression.”) (citation omitted).

332. *See id.* at 761 (“As with all recreational drugs, cigarette tobacco is mood altering. When smoked, it ‘produces arousal . . . and relaxation. . . . [S]moking helps [smokers] concentrate and lifts their mood. . . . Smokers commonly report pleasure and reduced anger, tension, depression, and stress.’”) (citation omitted).

333. *See id.* at 762 (“[Cocaine] produce[s] a neurochemical magnification of the pleasure experienced in most activities . . . alertness and a sense of well-being . . . lower anxiety and social inhibitions, and heighten[ed] energy, self-esteem, sexuality, and the emotions aroused by interpersonal experiences. . . . [H]igher doses intensify the pharmacologic euphoria [and] the user focuses increasingly on intense euphoric internal sensations—withdrawing, over time, from what began as a social experience.”) (citation omitted).

334. *See id.* (“The user [of marijuana] experiences a pleasant heightening of the senses and relaxed passivity. In moderate doses the substance can cause short lapses of attention and slightly impaired memory and motor functioning. Heavy users have been known to become socially withdrawn and depersonalized and have experienced distortions of the senses.”) (citation omitted).

335. *See id.* at 762-63 (“The primary mood-altering effect of heroin is the inducement of euphoria. It can also act as a tranquilizer, a mood elevator, a pain killer, and as the provider of a ‘mainline rush’ following intravenous injection. Addicts have reported feeling both relaxed and relieved of worry after injecting heroin.”) (citations omitted).

This is not to say that these drugs are benign when abused. The effects of cocaine, heroin or marijuana misuse or abuse can be severe and life threatening.<sup>336</sup> With that said, the effects of using these three illicit drugs are relatively innocuous. Based on an extensive and exhaustive study on cocaine use and abuse, Drs. Lester Grinspoon and James Bakalar determined that “[t]he dangers of cocaine are not of the nature or degree that the law now implies and the public now assumes.”<sup>337</sup> Other professionals have made similar findings, concluding that cocaine use is generally benign and nonaddictive.<sup>338</sup> Numerous medical studies have concluded that regular consumption of heroin has few injurious physical or psychological consequences.<sup>339</sup> As for marijuana, there is no evidence that casual use harms the consumer in any medically significant manner.<sup>340</sup> Decades of American use and centuries of worldwide consumption have evinced no deleterious effects on mental and physical health.<sup>341</sup> The search for “reefer-madness” is analogous to Don Quixote’s battle with the windmill-giants—if reality is wanting, delusions will suffice.

Of the five recreational drugs, only alcohol and tobacco are legal. Seventy-five different diseases and conditions have been linked to alcohol use and abuse, including alcoholic cirrhosis of the liver, the

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336. See Shenk, *supra* note 9, at 37 (“Cocaine can cause heart attacks in people prone to irregular heartbeats, such as basketball [player] Len Bias, and seizures in people with mild epilepsy; it’s even more dangerous mixed with alcohol and other drugs. Heroin can lead to intense physical dependence—withdrawal symptoms include nausea, convulsions, and loss of bowel control. Even marijuana can be psychologically addictive; smoking too much dope can lead to respiratory problems or even cancer.”).

337. LESTER GRINSPOON & JAMES B. BAKALAR, *COCAINE: A DRUG AND ITS SOCIAL EVOLUTION* 232 (Revised ed. 1985).

338. See DUKE & GROSS, *supra* note 74, at 70-71 (“Most users of cocaine suffer no serious physical or social problems from it. That is why even people who should have known better trumpeted it during the seventies as a nonaddictive, harmless drug. Before the crack era, only a fraction of cocaine users developed dependence upon cocaine.”).

339. According to renown drug expert Edward Brecher, “[t]here is . . . general agreement throughout the medical and psychiatric literature that the overall effects of opium, morphine, and heroin on the addict’s mind and body under conditions of low price and ready availability are on the whole amazingly bland.” BRECHER, *supra* note 18, at 27.

340. Barnett, *supra* note 50, at 2593.

341. As for marijuana:

Approximately 100 million Americans over the past three decades have smoked (or eaten) marijuana. Millions of these have used marijuana on a regular, almost daily basis for decades. Despite these massive numbers of long-term users, no reliable evidence has appeared that such use has *any* adverse effects on their physical health. . . . Other societies have used marijuana for centuries. Yet in no society has *any* official or respected study found serious adverse physical effects on humans from smoking marijuana. Indeed, in no less than nine official investigations of the problem, in both the United States and elsewhere, none have found any significant adverse effects on human health, even mental health.

DUKE & GROSS, *supra* note 74, at 51.

eighth leading cause of death in the United States.<sup>342</sup> Alcohol is not merely an intoxicant; it is a human poison. Numerous gastrointestinal, cardiovascular, glandular, and neurological disorders stem from alcohol's noxious qualities.<sup>343</sup>

Tobacco (read "nicotine") is often viewed by society as a somewhat less dangerous drug because it is nonintoxicating. It is gravely misleading, however, to equate intoxication with risk. Cigarette smoking is a predominant source of various cancers (bladder, esophageal, kidney, laryngeal, lung, and pancreatic cancers) and diseases (cerebrovascular, coronary artery, peripheral vascular, and pulmonary diseases).<sup>344</sup>

Comparisons between legal and illegal drugs are enlightening. Tobacco is one hundred times more lethal per capita than cocaine, while marijuana has yet to produce a single toxic fatality.<sup>345</sup> Tobacco is at least ten times more addictive than cocaine and is a substantially harder habit to kick than crack.<sup>346</sup> In fact, among the five major recreational drugs, tobacco is both the most addictive and the most pernicious to human health.<sup>347</sup> According to those who have been addicted to both tobacco and heroin, tobacco was demonstrably more onerous to quit.<sup>348</sup> As for alcohol, no drug, legal or illicit, has invoked as much

342. Jonas, *supra* note 275, at 767.

343. DUKE & GROSS, *supra* note 74, at 34. Indeed, the harm caused by alcohol consumption can be extreme:

The adverse health consequences of chronic heavy drinking are staggering. When taken in large quantities—perhaps three or four ounces per day—alcohol is a poison . . . [with] pernicious effects on the human body. . . . It causes three types of liver damages. . . . Regular alcohol use can precipitate esophagitis, exacerbate peptic ulcers and increase the risk of gastrointestinal cancer and pancreatitis. Chronic alcohol abuse contributes to cardiac dysfunction and other cardiovascular disorders, including hypertension. Alcohol also adversely affects immune, endocrine and reproductive functions. . . . Heavy, prolonged alcohol consumption also takes a terrible toll on the human brain, causing dementia, blackouts, seizures, hallucinations and peripheral neuropathy.

*Id.* (citations omitted).

344. Jonas, *supra* note 275, at 765-66. Jonas described the impact of cigarette smoking as follows:

If it were not for cigarette smoking, there would be little lung cancer or chronic obstructive pulmonary disease in this country. Additionally, cigarette smoke also effects the health of non-smokers. Non-smokers, particularly children, who live or work in confined spaces with smokers, involuntarily inhale smoke and "show a higher rate of pathology than non-smokers" living or working in quarters without smokers. This effect of cigarette smoking has been referred to as "passive smoker's syndrome."

*Id.* (citations omitted).

345. *Id.*

346. Morley Jefferson, *Cross Fire in the Drug War: Aftermath of a Crack Article*, NATION, Nov. 20, 1989, at 592.

347. Barnett, *supra* note 50, at 2600.

348. DUKE & GROSS, *supra* note 74, at 26.



American crime and violence as the venerated liquid intoxicant.<sup>349</sup> For generations, alcohol has *legally* devastated entire communities and cultures without even a hint of governmental concern.<sup>350</sup>

Contrary to what our government told us when it imposed drug prohibition, most illegal recreational drugs have no pharmacological properties that produce violence or other criminal behavior. Heroin and marijuana diminish rather than increase aggressive behavior. Cocaine—or cocaine withdrawal—occasionally triggers violence but usually does not. Very little crime is generated by the mere use of these drugs, especially in comparison to alcohol, which is causally related to thousands of homicides and hundreds of thousands of assaults annually.<sup>351</sup>

This gross hypocrisy of the American drug regime can be captured in two sentences. Every twenty-four hours, one thousand people are *arrested* for simple marijuana possession.<sup>352</sup> During that same span of time, one thousand people *die* from tobacco and alcohol use.<sup>353</sup>

The above figures are not intended to suggest that illegal drugs are safer than their legal counterparts; *they are not*. Heroin and cocaine can cause addiction and death, just like alcohol and tobacco can. However, as argued by Baltimore mayor Kurt Schmoke, “no rational person would advocate criminalizing tobacco. . . . Alcohol prohibition . . . proved to be one of the worst social experiments ever undertaken.”<sup>354</sup> People understand that alcohol or tobacco prohibition would be impossible to enforce and unreasonable, given that alcohol and tobacco are “used by most consumers in moderation, with little in the way of harmful effects”<sup>355</sup> and “for most people [alcohol] adds to the enjoyment of life in ways that are not at all destructive.”<sup>356</sup>

These same arguments, however, support complete drug legalization. In order to justify a distinction between the legal drugs—nicotine and tobacco—and the illegal drugs—marijuana, heroin, and cocaine—one would have to show that the latter group is more likely

349. Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 41.

350. *See id.* at 45 (“One would be hard pressed to argue that its role in many Native American and other aboriginal communities has been any less destructive than that of illicit drugs in America’s ghettos.”).

351. Duke, *supra* note 14, at 575 (citations omitted); *see also* Barnett, *supra* note 50, at 2601 (reciting the conclusion of Steven Duke and Albert Gross that alcohol is more conducive to violence than either cocaine or heroine); Ostrowski, *supra* note 13, at 651 (noting that most drug-related crime stems from “territorial disputes” and not from the use of drugs).

352. Richard Cowan, *How the Narcs Created Crack: A War Against Ourselves*, NAT’L REV., Dec. 5, 1986, at 26, 30 [hereinafter Cowan, *How the Narcs Created Crack*].

353. *See id.*

354. Schmoke, *supra* note 187, at 521-22.

355. Nadelmann, *Drug Prohibition*, *supra* note 250, at 944.

356. Scheer, *supra* note 5, at 49.

to overpower the consumer's free will,<sup>357</sup> either through higher addiction rates or a causal connection to violence. However, neither of these phenomena is a "demonstrable medical complication[ ] of these substances."<sup>358</sup> In other words, people are not more likely to become addicted or violent due to illicit, rather than licit, drug use.<sup>359</sup> In fact, the exact opposite is true; people are more likely to become addicted to nicotine and to become violent under the influence of alcohol than with marijuana, cocaine, or heroin.<sup>360</sup> Thus, the historic delineation between licit and illicit drugs is merely history untrammelled by modern science and irrefutable logic.<sup>361</sup> America's current system is simply in medical denial. Most people who use drugs lead normal, unhabituated lives. The few people who become addicted require medical treatment, not an involuntary "vacation" in a correctional facility.<sup>362</sup>

### B. Long-Term Medical Effects of Drug Use

Once the rhetorical demons are exorcized from illicit drugs (e.g., "reefer-madness" has the same validity as southern claims of "cocaine-crazed Negro rapists"), one question still remains: *What are the long-term effects of drug use?* Unfortunately, strident legal restrictions have prevented definitive answers; medical research on drug use has become a secondary victim of the drug war. However, medical studies to date have shown few harsh side effects from long-term drug use (not to be confused with long-term abuse).

All research has found that marijuana is relatively benign and that moderate use has no long-term adverse physical or psychological effects on otherwise healthy individuals.<sup>363</sup> Claims of damage to repro-

357. See Greene, *supra* note 325, at 232.

358. *Id.*

359. See *id.* at 234-35 (noting that "addictiveness is more user-specific than drug-specific").

360. See *supra* notes 349-51, 353 and accompanying text (discussing the connection between violence and alcohol).

361. See Greene, *supra* note 325, at 234-35 ("[L]ong-standing societal distinctions between legally prescribed and illegal drugs are traditional and arbitrary. . . . Societal beneficence by fiat has degenerated into casuistry and caprice, arbitrarily restricting dangerous drug-related behaviors but not other forms of equally dangerous activities. . . . Tortured legal distinctions between various drugs are simply a matter of custom and tradition with no logical reference to harmful consequences. There is no compelling argument to show that alcohol and tobacco should receive preferential treatment over the pantheon of illegal dangerous drugs. Rather, their legal status suggests only that they are more popular and that prohibition would again be a failure.") (citations omitted).

362. See Scheer, *supra* note 5, at 49.

363. Richard Cowan, *Pot-Talk: Is Decriminalization Advisable?*, NAT'L REV., Apr. 29, 1983, at 492 [hereinafter Cowan, *Pot-Talk*]. One study found "reduced gas exchange capacity" in fifteen chronic pot users. Cynthia Cotts, *Condoning the Legal Stuff?*, NATION, Mar. 9, 1992, at 300.

ductive organs have been completely rebuffed.<sup>364</sup> Physical addiction to marijuana appears to be unlikely, with no reported cases of marijuana withdrawals or obsessive drug-seeking behavior.<sup>365</sup> As discussed above,<sup>366</sup> no empirical study has found debilitating medical or psychological effects from regular heroin use.<sup>367</sup> Again, this is not to suggest that people cannot get hooked on heroin—they can. Heroin is addictive. However, heroin is less addictive than nicotine.<sup>368</sup> Moreover, addiction does not necessitate destitution. Instead, as argued below,<sup>369</sup> the converse is more likely: Destitution leads to addiction.

As for cocaine, most users suffer no negative long-term mental or physical effects.<sup>370</sup> Like consumers of marijuana and heroin, only a slight fraction of all users develop some form of cocaine dependence.<sup>371</sup> “But what about crack?,” drug warriors often retort. The portrayal by government officials and the media might lead one to believe that crack is some deadly foreign contagion seeping from an unknown source. It is not:

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None of the subjects, however, had any serious respiratory problems: “[W]e are not suggesting that smoking marijuana . . . will necessarily produce symptomatic or disabling respiratory impairment.” Cowan, *Pot-Talk*, *supra*, at 493 (citing Donald Tashkin of the University of California Los Angeles).

364. See Cotts, *supra* note 363, at 301 (“[S]cientists have injected a lot of pregnant monkeys with THC, the key psychoactive chemical in marijuana, but they’ve yet to come up with hard evidence.”).

365. Jonas, *supra* note 275, at 764.

366. See *supra* note 339 and accompanying text (demonstrating benign, short-lasting effects on otherwise healthy, moderate, illicit drug users).

367. DUKE & GROSS, *supra* note 74, at 62; see also Nadelmann, *Drug Prohibition*, *supra* note 250, at 944 (“[D]espite the popular association of heroin use with the most down-and-out inhabitants of urban ghettos, heroin causes relatively little physical harm to the human body. Consumed on an occasional or regular basis under sanitary conditions, its worst side effect, apart from the fact of being addicted, is constipation. That is one reason why many doctors in early 20th-century America saw opiate addiction as preferable to alcoholism and prescribed the former as treatment for the latter where abstinence did not seem a realistic option.”) (citation omitted).

368. See Barnett, *supra* note 50, at 2600.

369. See Ostrowski, *supra* note 13, at 700-01.

370. See DUKE & GROSS, *supra* note 74, at 70-72.

371. Prohibitionists frequently cite animal studies which have demonstrated that captive rats “will starve themselves to death if provided with unlimited cocaine.” Nadelmann, *Drug Prohibition*, *supra* note 250, at 944. What they fail to mention is “that these addicted rats—if returned to pleasant, socialized rat environments (“rat parks”)—lose all interest in drugs.” Greene, *supra* note 325, at 46. In fact:

[T]here is overwhelming evidence that most users of cocaine do not get into trouble with the drug. So much of the media attention has focused on the relatively small percentage of cocaine users who become addicted that the popular perception of how most people use cocaine has become badly distorted. . . . [Evidence] suggests that only a small percentage of people who snort cocaine end up having a problem with it. In this respect, most people differ from captive rats.

*Id.*

[Crack] is simply cocaine that has been mixed with baking soda, water, and then boiled. What this procedure does is to permit cocaine to be smoked. . . . [A]ny drug ingested in that way—i.e., absorbed by the lungs—goes more efficiently to the brain, and the result is a quicker, more intense experience. That is what crack gives the consumer. But its impact on the brain is the same as with plain cocaine. . . .<sup>372</sup>

*So, what are the true facts about crack?* The National Institute of Drug Abuse found that crack is not “highly addictive.”<sup>373</sup> Numerous studies have concluded that any inherent addictive quality of crack is no greater than that of other drugs.<sup>374</sup> In fact, crack is less addictive than tobacco and, contrary to popular belief, crack dependence can be successfully treated.<sup>375</sup> Further, like heroin, addiction to crack is predominately determined by the user’s environment, lifestyle, and predilection, rather than the drug’s intrinsic pharmacological effects.<sup>376</sup>

Prohibitionists often argue that experimenting with illegal drugs will lead to abuse.<sup>377</sup> This claim, however, appears to be grounded in moral propaganda rather than scientific analysis. According to Dr. Jonathan Shedler of Adelphi University, “It’s absolutely not the case that experimentation leads to abuse.”<sup>378</sup> One of the most convincing pieces of evidence has been available for a quarter of a century. Reliable estimates asserted that eighty percent of the American soldiers in Vietnam were using marijuana, while forty percent were experimenting with heroin.<sup>379</sup> In a study commissioned by President Nixon, Dr. Lee Robbins of Washington University tested nearly 14,000 returning GI’s for drug use.<sup>380</sup> A few months later, she retested for drug use, and the “results were crystal clear.”<sup>381</sup> More than ninety percent of the wartime users ceased drug consumption “cold turkey” without

372. *The Federal Drugstore: Interview with Michael S. Gazzaniga*, NAT’L REV., Feb. 5, 1990, at 34, 34 [hereinafter *The Federal Drugstore*].

373. Jonas, *supra* note 275, at 765 (citation omitted).

374. Ostrowski, *supra* note 13, at 700; see also Michael Gazzaniga, *Just the Facts, Fellas*, NAT’L REV., Apr. 1, 1990, at 44 (“There are no scientific data that crack is more addictive. Dr. Shigla Murphy, who is carrying out a NIDA-sponsored research project in Oakland, maintains that the stereotype is incorrect. Just as many people walk away from crack as from other drugs, she finds.”).

375. Ostrowski, *supra* note 13, at 700-01.

376. *Id.* at 700.

377. Mark S. Gold, *Legalize Drugs: Just Say Never*, NAT’L REV., Apr. 1, 1990, at 42.

378. Sileo, *supra* note 259, at 6.

379. See *The Federal Drugstore*, *supra* note 372, at 40.

380. *Id.*

381. See *id.*

any adverse effects.<sup>382</sup> Follow-up studies found that the soldiers continued to be drug free years after returning home.<sup>383</sup>

What Dr. Robbins' study suggests—and what other studies have reiterated—is that drug consumption levels go up and down, but the rate of addiction is fairly constant.<sup>384</sup> Currently, there are around six million “steady users” (i.e., non-casual consumers) of illegal drugs, with less than twenty percent suffering from symptoms of addiction.<sup>385</sup> Per capita, drug abuse has not shifted much, going up as much as it has gone down, in spite of increased drug war efforts.<sup>386</sup> This fact is not surprising to experts like Michael Gazzaniga, a professor at Dartmouth Medical School, who argues that “[t]here is a base rate of drug abuse, and it is achieved one way or another.”<sup>387</sup> Consumption in a community might go up during a period of “high stress,” but the addiction rate is constant.<sup>388</sup> The vast majority of users simply discontinue consumption once the “stress” dissipates.<sup>389</sup> Contrary to drug-war propaganda, only a minute fraction (less than one percent) of those who have tried illicit narcotics experience the indicium of addiction.<sup>390</sup> Experts now recognize that among all drug users, those few who become addicted have psychological disorders which predate their introduction to narcotics.<sup>391</sup>

### C. *Causes of Drug Abuse and the Futility of Incarceration*

*If the drug itself is not the major cause of addiction, then what is?* The Health and Public Policy Committee of the American College of Physicians has argued that “drug use alone is not the major factor in the development of addiction[, but] other medical, social, and eco-

382. *See id.*

383. *See id.*

384. *Id.* at 40-41.

385. *The War on Drugs Is Lost*, *supra* note 4, at 44 (editorial of Robert W. Sweet).

386. *Id.*

387. *The Federal Drugstore*, *supra* note 372, at 37.

388. *See id.* at 40-41.

389. *See id.* (“Drug consumption can go up in a particular population, fueled by stress, but the rate of addiction doesn’t go up no matter what the degree of stress. Most people can walk away from high drug use if their lives become more normal.”).

390. *See The War on Drugs Is Lost*, *supra* note 4, at 36 (editorial of William F. Buckley) (“Americans who abuse a drug . . . are a very small percentage of those who have experimented with a drug, or who continue to use a drug without any observable distraction in their lives or careers. About such users one might say that they are the equivalent of those Americans who drink liquor but do not become alcoholics, or those Americans who smoke cigarettes but do not suffer a shortened lifespan as a result.”).

391. Gonzales, *supra* note 242, at 104 (quoting GOODMAN & GILMAN: THE PHARMACOLOGICAL BASIS OF THERAPEUTICS (Alfred Goodman Gilman et al., eds., 6th ed. 1980)).

conomic conditions seem to play an important role."<sup>392</sup> Among all potential factors influencing drug use and abuse, only a few appear to have a causal or catalytic connection.

First, age affects drug use (but not necessarily abuse), with eighteen- to twenty-five-year-olds using drugs three times as often as those over the age of twenty-six.<sup>393</sup> Drug consumption is a form of antisocial behavior typical of risk-seeking adolescents and young adults.<sup>394</sup> Drug use is often described as an ignorant, parental defense mechanism. Many young drug users appear to be "just going through a phase" which subsides with maturity.

Second, the *ex ante* psychological health of the drug user affects drug abuse. A comprehensive study tracking children from age three to twenty-three found that the vast majority of those who experimented with drugs suffered no adverse social or scholastic effects.<sup>395</sup> Of those who did become addicts, all experienced pre-consumption psychological disorders—low impulse control, general despondence, and social withdrawal.<sup>396</sup> Other studies have found that drug abusers, as compared to simple drug users, tended to suffer from poor family relationships, emotional immaturity, general denial, low self-esteem, and a variety of other psychiatric disturbances.<sup>397</sup> A number of scientists have expanded on this research, suggesting that many addicts are taking drugs as a form of "self-medication."<sup>398</sup> Rather than Prozac or Ritalin, some addicts are seeking psychological solace through drugs that are more accessible than their licit-but-prescription-required brethren.<sup>399</sup> It is both appalling and pathetic to think that the incar-

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392. *Drug Therapy for Severe, Chronic Pain in Terminal Illness*, ANNALS OF INTERNAL MED., Dec. 1983, at 872.

393. Gazzaniga, *supra* note 374, at 44.

394. See Jarvik, *supra* note 230, at 388 ("Drug use is a form of risk-taking that peaks during the teen years; adolescence is also the peak age for certain types of criminal behavior. There are many theories, but not many facts, to explain this age-related phenomenon. Adolescence is also the time when the level of androgenic hormones rises. A variety of antisocial behaviors, including illicit drug-taking, have been correlated with high testosterone levels.") (citations omitted).

395. Sileo, *supra* note 259, at 6.

396. See *id.* ("[T]hree elements in their psychology made them susceptible: poor impulse control; unhappiness—they were anxious, distressed or depressed; and alienation—they had few friends, they weren't invested in anything like sports or family relations.").

397. Jarvik, *supra* note 230, at 388.

398. *Id.*

399. See Cotton, *supra* note 320, at 1644 ("Some studies suggest that more than two thirds of patients with drug disorders also have a mental disorder, and that almost a third of those with a mental disorder also have a drug problem. [The National Institute of Drug Abuse] recently funded a study of the possibility that some cocaine abusers suffer from attention deficit disorder. They may be self-medicating with cocaine 'in the same way we give ritalin to kids[.]' says Herbert D. Kleber, M.D., medical director of the Center on Addiction and Substance Abuse at Columbia University.").

cerated, but otherwise noncriminal, drug addict may have only been trying to chase the demons from his head and that both his addiction and psychological disturbance could be ameliorated with modern psychotropic drugs and caring therapy.

A third factor that contributes to drug abuse is the culture or ethnicity in which the drug user was raised and/or currently resides. For example, Asian-American and Jewish communities generally consume large quantities of alcohol without ruinous consequences.<sup>400</sup> Native-American communities, in contrast, have been shattered and crippled by alcohol abuse.<sup>401</sup> Moreover, this phenomenon of ethnic vulnerability or relative immunity to addiction has repeated itself on every continent.<sup>402</sup> The cultural and ethnic context in which drugs are consumed influences whether addiction will follow—regardless of legal constraints.

The strongest factor influencing drug use and addiction—and the most important for the purposes of this article—is socioeconomic status. A study of adolescent heroin addicts in the 1950's found that the vast majority were from impoverished communities.<sup>403</sup> Subsequent empirical studies have confirmed the direct connection between poverty and drug consumption.<sup>404</sup> For example, recent data shows that while narcotic consumption in affluent Caucasian communities has dropped precipitously over the past few years, drug use in poor minority communities remains steady and staggering.<sup>405</sup> Social inferiority, poverty, and hopelessness are the antecedents to the urban drug problem. "Many of those users see nothing but a bleak future before them. They have little to lose by drug abuse, and thus, they proceed to lose it."<sup>406</sup> It is the penniless indigent, hopeless and downtrodden, who seeks relief through intoxication.

One should not confuse destitution with the impetuous proxy of race and ethnicity. A Defense Department study found that African-American soldiers had lower drug-consumption rates than their Cau-

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400. Greene, *supra* note 325, at 231 (citation omitted).

401. Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 45.

402. See Greene, *supra* note 325, at 231 ("France leads the Western World in per capita consumption of alcohol, mostly wine, and has the highest rate of alcoholism (about 15%). The United States and West Germany have similar rates of consumption, about one-half that of France. Though Germans drink beer and Americans distilled spirits . . . , they both have a 9% rate of alcoholism. In contrast, Israel, as a consequence of longstanding Judaic sacramental traditions, has both the highest percentage of active drinkers and the lowest rate of alcoholism.") (citation omitted).

403. Riga, *supra* note 251, at 7.

404. *Id.* at 6.

405. Duke, *supra* note 14, at 606 (citation omitted).

406. *Id.*

casian counterparts.<sup>407</sup> However, African-Americans outside of military egalitarianism—and typically subjected to de facto segregation and disproportionate poverty—are far more likely to use drugs than Caucasian civilians.<sup>408</sup> What this demonstrates is that the drug dilemma is not racial or ethnic, but economic.<sup>409</sup> People become addicts not because they are African-American or Hispanic but because they are impoverished. Unfortunately, race, poverty, and drug abuse in our country are intimately intertwined, allowing the great American bigot to argue illogically that people use drugs *because* they are African-American or that Hispanics are poor *because* of their race. The dynamics of inner-city poverty and addiction do not reduce to racist tautologies. Understanding comes from compassion and deep intellectual thought—commodities which are in short supply around the drug war.

There are drug warriors who understand the correlation between drug abuse and age, mental health, culture, and socioeconomic status. However, even the cognizant prohibitionist finds a silver lining in draconian punishment. The threat of criminal punishment dissuades addicts from actively pursuing their drug. This argument, however, is not just dubious on its face; it is demonstrably false. As opined by the mayor of Baltimore, Kurt Schmoke, “addictions are, for most users, lifetime afflictions that are impervious to the criminal justice system’s threat of punishment.”<sup>410</sup>

The perverse irony of the current regime has gone largely unnoticed. Those who need the protection allegedly provided by drug criminalization also happen to be the least daunted by the penal consequences.<sup>411</sup> Addicts have drug-seeking personalities which ignore not only the law but all inordinate risks and costs. Damage to their physical and economic well-being is summarily disregarded. The psychological relief that the addict receives from drug consumption simply outweighs the potential costs of incarceration and bodily injury.

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407. *The Federal Drugstore*, *supra* note 372, at 38.

408. *Id.* As Gazzaniga noted:

If you live in poverty and frustration, and see few rewards available to you, you are likelier than your better-satisfied counterpart to seek the escape of drugs, although the higher rate of consumption does not result in a higher rate of addiction. Virtually every study finds this to be the case with one possibly interesting twist. A recent Department of Defense study showed that drug use in the military was lower for African-Americans than for Caucasians, the reverse of civilian life[, while i]t is generally agreed that the military is the only institution in our country that is successfully integrated.

*Id.*

409. Riga, *supra* note 251, at 6.

410. Schmoke, *supra* note 187, at 511.

411. Ostrowski, *supra* note 13, at 677.



Short of (and possibly including) government-imposed torture, criminal sanctions will not deter the hard-core addict.<sup>412</sup> “He [the hard-core addict] is pitiful,” as Justice Douglas so eloquently articulated in *Robinson v. California*.<sup>413</sup> The addict will continue to use drugs despite the law, economic ruin, social ostracism, and physical deterioration; yet, society throws the addict in jail even though incarceration is “utterly counterproductive,” punishing the socially and economically impoverished who must traverse an already formidable road to recovery.<sup>414</sup> “Blessed are the merciful, for they shall obtain mercy”<sup>415</sup>—except for the drug addict, for he shall obtain a mandatory minimum sentence in a federal penitentiary.

#### D. Death

“Drugs kill” is a common drug-war aphorism, conforming nicely to each new front (e.g., “Crack kills”). In one sense, the statement is true—drug consumption *can* result in death. Of course, that is true about cholesterol or driving a car. What the American public needs to know is how dangerous illicit drugs are compared to their licit counterparts and whether the deaths attributed to drug consumption are caused by intrinsic qualities of the drugs or by prohibition.

Every year, approximately 390,000 Americans die from cigarette smoking; over 150,000 die from the effects of drinking alcohol; close to 3,000 people die from cocaine and heroin combined;<sup>416</sup> and no one has ever reported a marijuana-induced death.<sup>417</sup> Surprised? This author certainly was, given the nationwide campaign warning the public of

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412. See *id.* at 677-78. Ostrowki made explicit the argument that most addicts are not deterred by the threat of prosecution:

Obviously, for them [the hard-core addicts], the subjective benefits of drugs outweigh the costs of criminal penalties. . . . [Moreover, e]ven without criminal penalties, many drug users continue to use drugs in the face of the severe physical penalties drugs impose on their bodies. Again, they simply consider the psychic benefit of drug use to be more important than the harm the drugs do to their bodies. The fact is that drugs motivate some people—those who most need protection from them—more than any set of penalties a civilized society can impose, even more than some less-than-civilized societies have imposed. This is why the undeniable seductiveness of drugs, usually thought of as a justification for prohibition, actually argues for legalization. If drugs are so seductive, the laws will fail to deter millions of drug users and will greatly increase the social costs of their drug use.

*Id.*

413. See *supra* note 323 and accompanying text (noting that certain drugs such as birth control pills and antibiotics are regulated because those who are not medically trained are unable to appreciate the risks associated with using the drugs).

414. Greene, *supra* note 325, at 229.

415. *Matthew* 5:7.

416. Ostrowski, *supra* note 13, at 686 (citations omitted).

417. *Id.* at 652.

these morbid drugs. That is just standard operating procedure in the drug war—*why give facts when blind hysteria can muster greater support?*

The whole truth about drug-related deaths, however, is much more damning to prohibitionists than the above numbers reveal. Drug prohibition kills nearly 8,000 people per year.<sup>418</sup> Note the distinction: Drug prohibition, not drug use or abuse, causes 8,000 deaths per year. At least 2,400 people die each year from adulterated narcotics<sup>419</sup>—a phenomenon which is unheard of in the legal drug market and is directly caused by the clandestine nature of the black market. Moreover, any student of history could have foreseen this tragedy. Alcohol prohibition earlier in this century resulted in countless deaths and injuries, as consumers were unable to discern between safe “moonshine” and poisonous “rotgut.”<sup>420</sup>

The heroin “overdose” is merely the modern-day version of wood-alcohol blindness. Eighty percent of all deaths ascribed to cocaine and heroin consumption are directly attributable to the black market, not intrinsic drug traits.<sup>421</sup> Moreover, even the twenty percent attributed to intrinsic qualities of drugs might be an overstatement. For example, Len Bias, college basketball phenomenon and N.B.A. prospect, died from a treatable cocaine overdose.<sup>422</sup> Fearing law-enforcement intervention, Bias’ friends sought medical aid only after the star athlete’s third seizure.<sup>423</sup> Their concern was not unwarranted; post-hospitalization arrests by drug-enforcement agents are not uncommon.<sup>424</sup> Who knows how many people like Len Bias would have been saved without the omnipresent threat of criminal sanction?

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418. *Id.* at 654 (citation omitted).

419. See Nadelmann, *Drug Prohibition*, *supra* note 250, at 942 (“Many marijuana smokers are worse off for having smoked cannabis that was grown with dangerous fertilizers, sprayed with the herbicide paraquat, or mixed with more dangerous substances. Consumers of heroin and the various synthetic substances sold on the street face even more severe consequences, including fatal overdoses and poisonings from unexpectedly potent or impure drug supplies. In short, nothing resembling an underground Food and Drug Administration has arisen to impose quality control on the illegal drug market and provide users with accurate information on the drugs they consume.”).

420. See *The War on Drugs Is Lost*, *supra* note 4, at 36 (editorial of William F. Buckley) (“When alcohol was illegal, the consumer could never know whether he had been given relatively harmless alcohol to drink—such alcoholic beverages as we find today in the liquor store—or whether the bootlegger had come up with paralyzing rotgut.”).

421. Ostrowski, *supra* note 13, at 654.

422. See *id.* at 669 (citing *Examiner Confirms Cocaine Killed Bias*, N.Y. TIMES, June 25, 1986, at D25, col. 3).

423. See *id.* (citing *Bias Said to Suffer Seizures*, N.Y. TIMES, Oct. 18, 1986, at A50, col. 3).

424. See *id.*

"Legalization," according to prohibitionist Congressman Robert Garcia, "fails to consider the spread of AIDS through intravenous drug use."<sup>425</sup> Providing clean needles to heroin addicts, argues Congressman Sterling Johnson, "sends out erroneous signals that conflict with any and all efforts to put an end to the use of harmful illicit drugs."<sup>426</sup> *Are these statements true?* Sure, if one believes ignorance is better than knowledge, or message consistency has a higher value than human life.

The National Commission on AIDS has strenuously advocated the lawful availability of hypodermic syringes.<sup>427</sup> It found that one-third of child and adult cases and two-thirds of all prenatal victims contracted the disease via "dirty needles."<sup>428</sup> The Commission was joined by the Centers for Disease Control in concluding that needle exchange programs and general availability of syringes does not inspire drug use.<sup>429</sup> Rather, legal barriers to clean needles only encourage the rapid transmission of the virus.<sup>430</sup> In some cities, as many as seventy percent of new AIDS cases result from dirty needles.<sup>431</sup> Overall, one quarter of a million intravenous drug users have been infected with AIDS.<sup>432</sup> Further, some 3,500 AIDS-related deaths are caused each year by dirty needles—more than the total number of fatalities from heroin and cocaine combined.<sup>433</sup> 3,500 people will die each year be-

425. *IMPACT AND FEASIBILITY*, *supra* note 229, at 10 (testimony of the Honorable Robert Garcia).

426. *Id.* at 15 (testimony of the Honorable Sterling Johnson).

427. Wisotsky, *supra* note 11, at 21.

428. *Id.* In the words of Wisotsky:

[The] most outrageous example in this catalog of wrongs against public health care is the nearly universal American refusal to permit established addicts to exchange used needles for sterile ones in order to prevent AIDS transmission among intravenous drug users. In 1991, the National Commission on AIDS recommended the removal of legal barriers to the purchase and possession of intravenous drug injection equipment. It found that 32% of all adult and adolescent AIDS cases were related to intravenous drug use and that 70% of mother-to-child AIDS infections resulted from intravenous drug use by the mother or her sexual partner. Moreover, the commission found no evidence that denial of access to sterile needles reduced drug abuse, but concluded that it did encourage the sharing of contaminated needles and the spread of the AIDS virus.

*Id.*

429. *See id.*; Shenk, *supra* note 9, at 36.

430. *See* Shenk, *supra* note 9, at 36 ("[Similarly,] in 1994 the Centers for Disease Control issued a report concluding that needle exchange *does not* encourage heroin use, but *does* dramatically reduce HIV transmission. The report explicitly recommends that the federal ban be lifted. The Clinton Administration suppressed the report, but a copy finally leaked. Now, officials deny its basic finding.").

431. *The War on Drugs Is Lost*, *supra* note 4, at 41 (editorial of Baltimore mayor, Kurt Schmoke).

432. Ostrowski, *supra* note 13, at 655.

433. *Id.* at 652-53.

cause the government does not want to “send the wrong message.” Whatever self-serving excuse is given, the true “message” is clear: An amphitheater full of American citizens will die each year because their government is more concerned about appearances than their lives.

Prohibition’s yearly death count also includes another 2,025 murders per year from black-market violence and murders incident to street crime.<sup>434</sup> One just does not see liquor store owners gunning down their competitors or nicotine distributors delivering “Columbian neck-ties.”<sup>435</sup> In contrast, the modern-day Al Capone wages turf-warfare on the streets of Watts or the Bronx every day. When black-market homicides are included, the macabre irony of drug prohibition becomes clear. The War on Drugs—which was supposed to save lives—kills nearly 8,000 men and women each year.<sup>436</sup> This may even be an underestimate; Nobel-laureate Milton Friedman has placed the body count at about 10,000 Americans per year.<sup>437</sup>

ANNUAL DEATHS CAUSED BY DRUG PROHIBITION<sup>438</sup>

Murders incident to street crime	1,200
Black market murders	825
Drug-related AIDS	3,500
Other diseases due to dirty needles	?
Poisoned drugs/no quality control	2,400
<u>Loss of medical use of illegal drugs</u>	<u>?</u>
<u>Total</u>	<u>7,925</u>

E. Pain and Fear

One of the most disconcerting aspects of drug prohibition is that “marijuana is more easily acquired by a 16-year-old who should not use it than by a sixty-year-old cancer or glaucoma patient who needs it.”<sup>439</sup> For those Americans who suffer debilitating, life-threatening, or terminal illnesses, medically- and morally-correct treatment mandates the maximum amelioration of pain. Opiates are unmatched at relieving the physical agony of some terminal diseases.<sup>440</sup> Marijuana

434. See *id.* at 655 (noting that annually there are 1,200 murders incident to street crime and 825 black-market murders).

435. A “Columbian neck-tie” is a favored method of simultaneously murdering an enemy or competitor and leaving a message for the deceased’s cohorts. It involves slitting the victim’s throat and pulling his tongue through the laceration—resulting in one of the most gruesome sights imaginable.

436. See Ostrowski, *supra* note 13, at 654 (positing that there are 7,925 deaths caused annually by drug prohibition) (citation omitted).

437. *The War on Drugs Is Lost*, *supra* note 4, at 43 (editorial of Joseph D. McNamara).

438. Ostrowski, *supra* note 13, at 655.

439. Cowan, *Pot-Talk*, *supra* note 363, at 495.

440. See *The War on Drugs Is Lost*, *supra* note 4, at 38 (arguing that patients choose to suffer “debilitating and demoralizing pain” rather than to take a proper dose of opiates).

provides otherwise unattainable physical and mental solace from the symptoms of, among others, cancer, multiple sclerosis, glaucoma, and AIDS.<sup>441</sup> More than seventy-five percent of the American public believes that illegal narcotics should be available for medical purposes; yet, the federal government has balked at such suggestions and refuses to fund research toward these ends.<sup>442</sup> Prohibitionists worry that medicinal use of opiates or marijuana would be "the back door to legalization."<sup>443</sup> This may or may not be true, but prohibiting these drugs from the sick and dying is tantamount to denying food to the starving. When the government sentences terminally ill Americans to either excruciating pain or a prison cell, any claim to moral authority is relinquished.

The youngest victims of the drug war are the babies who are harmed by their mothers' prenatal drug use. According to Congressman Lawrence Coughlin, "over 50 percent of the child abuse fatalities involved parents who heavily used cocaine. Cheaper, legal cocaine would result in more children dying and more babies being born addicted."<sup>444</sup> While this author has no information to contradict the Congressman's first sentence, the Pennsylvania Representative's latter statement is mere sophistry. This *a priori* logic is precisely what perpetuated the spread of AIDS among drug users. The drug war has inhibited the dissemination of accurate information on the effect of drug use during pregnancy, leaving many expectant mothers (particularly inner-city minority mothers) in the dark about the necessity of prenatal drug abstinence. Rather than preventing pregnant women from using crack, the current laws only discourage mothers from get-

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441. *Id.* (editorial of Ethan Nadelmann). As Nadelmann wrote:

Perspective can be had from what is truly the most pervasive drug scandal in the United States: the epidemic of under treatment of pain. "Addiction" to (i.e., dependence on) opiates among the terminally ill is the appropriate course of medical treatment. The only reason for the failure to prescribe adequate doses of pain-relieving opiates is the "opiaphobia" that causes doctors to ignore the medical evidence, nurses to turn away from their patients' cries of pain, and some patients themselves to elect to suffer debilitating and demoralizing pain rather than submit to a proper dose of drugs. The tendency to put anti-drug ideology ahead of compassionate treatment of pain is apparent in another area. Thousands of Americans now smoke marijuana for purely medical reasons: among others, to ease the nausea of chemotherapy; to reduce the pain of multiple sclerosis; to alleviate the symptoms of glaucoma; to improve appetite dangerously reduced from AIDS. They use it as an effective medicine, yet they are technically regarded as criminals, and every year many are jailed.

*Id.*

442. *Id.*

443. Cowan, *Pot-Talk*, *supra* note 363, at 495.

444. IMPACT AND FEASIBILITY, *supra* note 229, at 5 (testimony of the Honorable Lawrence Coughlin, quoting Pennsylvania Attorney General Leroy Zimmerman).

ting help because they impose fear of imprisonment or having their newborns taken away by state welfare officials.

Those who do seek treatment are often turned away. One survey found that eighty-five percent of poor, drug-addicted pregnant women were turned away after seeking medical help.<sup>445</sup> Nationally, only ten percent of pregnant drug users are eligible for treatment and guidance.<sup>446</sup> It is truly pitiful that innocent babies suffer not only from the ignorance and desperation of their mothers but also from the callous intransigence of the American government.

#### F. *The Hope of Treatment and Research*

Drug treatment programs work—in spite of political claims (“they are too expensive”) and moral arguments (“addiction results solely from a lack of will or moral character”<sup>447</sup>) to the contrary. Today, the unanimous consensus of drug experts is that government resources are best spent on treatment and education instead of criminalization.<sup>448</sup> A Rand study concluded that treatment is at least seven times more effective than criminal punishment in reducing drug use.<sup>449</sup> The National Institute of Drug Abuse concurred, finding that one dollar of treatment yields three dollars in enhanced productivity to the economy and four dollars in reduced tax burden to the public.<sup>450</sup>

Medically, drug treatment programs have proven to be the only effective method of reducing abuse and dependence. For the heroin addict, hope comes in the form of methadone—a synthetic heroin-substitute which can abate and, in some cases, defeat addiction.<sup>451</sup>

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445. Shenk, *supra* note 9, at 36.

446. *Id.* Shenk described the pregnant user's plight:

Lee Brown, White House director of drug policy control, often talks of visiting crack babies in the hospital to shame those who would liberalize drug laws. But, like many addicts, pregnant women often avoid treatment and health care because they fear arrest. Although it's hard to believe, those who do seek help—for themselves or their unborn children—are often turned away. David Condliffe, who was the director of drug policy for New York City in the late eighties, conducted a survey that found that 85 percent of poor, pregnant crack addicts looking for treatment were refused everywhere they tried. Nationwide, treatment is available for only 10 percent of the 300,000 pregnant women who abuse illegal drugs. This is perhaps the greatest moral horror of our current policy—and it should shame everyone from President Clinton on down.

*Id.*

447. Horgan, *supra* note 324, at 17.

448. Duke, *supra* note 14, at 588.

449. *Id.*

450. *Id.*

451. See *The War on Drugs Is Lost*, *supra* note 4, at 39 (editorial of Ethan Nadelmann) (“Methadone is to street heroin more or less what nicotine chewing-gum and skin patches are to cigarettes. Hundreds of studies, as well as a National Academy of Sciences report last year, have

Nearly eighty percent of heroin addicts treated through methadone-maintenance programs stay off of the drug.<sup>452</sup> Further, in spite of near-sighted criticism, local programs have been remarkably successful in reintegrating their patients into society.<sup>453</sup> The scientific evidence simply cannot be ignored. Methadone treatment is directly correlated to the cessation of criminal and misanthropic conduct.<sup>454</sup>

An economic analysis is also persuasive to the legalization movement. A desperate heroin addict might annually commit \$40,000 to \$50,000 in crime or cost the state \$35,000 each year for incarceration.<sup>455</sup> In contrast, methadone treatment only costs about \$3,000 per year per addict.<sup>456</sup> Cocaine-treatment programs have also been successful, mostly through psychiatric therapy.<sup>457</sup> A methadone-type substitute for cocaine is still forthcoming, largely due to underfunding and bureaucratic obstacles, but preliminary research has been promising.<sup>458</sup> As compared to cocaine or heroin, marijuana is not physically addictive and is rarely found to be mentally addictive.<sup>459</sup> Those who do suffer mental "withdrawals" from marijuana can be effectively

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concluded that methadone is more effective than any other treatment in reducing heroin-related crime, disease, and death.").

452. Horgan, *supra* note 324, at 17.

453. See Benoit, *supra* note 251, at 35 ("Dr. Robert Newman, president of New York City's Beth Israel Medical Center, which has the largest heroin treatment center in the nation[, says that methadone programs] are often accused of failing because they substitute one drug for another, methadone for heroin. This makes Newman fume. 'If somebody has epilepsy,' he says, 'and is treated for it with Dilantin, nobody would say, 'All you've done is substitute Dilantin for the seizures.' . . . [A]bout 50% of Newman's clients have full-time jobs. At the time they enrolled, only 10% to 15% were working. Also, he says, '[t]here are some in school, and some part-time employed, but the overall majority are [sic] productively employed.'").

454. See Greene, *supra* note 325, at 235 ("A compelling body of literature shows that there is a simple dose-response relationship between blood levels of methadone and the abandonment of antisocial behaviors."); see also Goldstein & Kalant, *supra* note 322, at 1519 (stating that the reduction of street crime by addicts enrolled in methadone programs is well documented).

455. Cotton, *supra* note 320, at 1644.

456. *Id.*

457. *Id.*

458. Jarvik, *supra* note 230, at 390. As Jarvik reported:

[C]ocaine cravings after withdrawal are reported to be reduced by a variety of agents, especially antidepressants. One investigator found that desipramine reduced cocaine craving for several weeks in cocaine-withdrawn patients who were not depressed, yielding a "window of opportunity" for behavioral therapy; depot flupenthixol decanoate, which has mixed antipsychotic and antidepressant properties, also reduced cocaine craving. Pharmacologic agents that are still under investigation include other tricyclic antidepressants, fluoxetine, buspirone, bromocriptine, clonidine, carbamazepine, and several others.

*Id.*

459. Cotton, *supra* note 320, at 1644.

treated through standard psychological counseling.<sup>460</sup> Overall, drug treatment programs have prevented crime by subduing antisocial behavior, while simultaneously ameliorating the lives of the addicted.<sup>461</sup>

The problem is not efficacy because drug programs are successful, particularly when compared to incarceration.<sup>462</sup> The problem is funding. Federal and state governments refuse to finance adequate treatment programs, opting instead for escalating criminal enforcement.<sup>463</sup> Only one in ten cocaine and heroin addicts in New York and Oakland is able to receive treatment because there are six-month waiting lists to receive treatment.<sup>464</sup> Dr. Robert Newman of Beth Israel's methadone clinic rejects nearly one hundred heroin addicts per month because of federal restrictions.<sup>465</sup> "The extraordinary thing," says Dr. Newman, "is that these people apply knowing that there isn't treatment available, knowing that there is a [long] waiting list."<sup>466</sup>

The direct effects of underfunding—increased waiting time and monetary costs for the addict—create substantial obstacles to effective treatment. When drug addicts ask for help today, there may be no tomorrow. "One of the differences between drug users and us is time scale," argues David Turner, director of the Standing Conference on Drug Abuse.<sup>467</sup> "We want things immediately, but we can cope with delay. An addict is used to taking heroin and getting immediate relief. It's not surprising that if he is told he can have an appointment in four weeks, he will probably forget about it."<sup>468</sup> When the cost of treatment is borne by the addict—an individual who is likely destitute from his addiction—treatment becomes a "luxury" for only those who can afford it.<sup>469</sup> Nevertheless, bureaucrats continue to cut drug-treatment budgets in spite of immense public support for such programs<sup>470</sup> and

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460. See *id.* (arguing that "network therapy in which family and friends cooperate with clinicians in cajoling patients to quit is probably the best therapy for marijuana dependency").

461. Nadelmann, *Drug Prohibition*, *supra* note 250, at 940.

462. Duke, *supra* note 14, at 588.

463. See Nadelmann, *Drug Prohibition*, *supra* note 250, at 940-41 (discussing the increased costs of antidrug law enforcement).

464. *IMPACT AND FEASIBILITY*, *supra* note 229, at 6 (testimony of the Honorable Fortney H. Stark).

465. See Benoit, *supra* note 251, at 35.

466. *Id.*

467. Andrew Kupfer, *What To Do About Drugs*, *FORTUNE*, June 20, 1988, at 41.

468. *Id.*

469. See William Schwartz, *Drug Addicts with Dirty Needles*, *NATION*, June 20, 1987, at 844 ("Prior to the Reagan Administration's budget cuts of 1981, methadone treatment was free in New Jersey. In 1980, 8,703 addicts enrolled in the program, but by 1984, when methadone treatment cost \$50 to \$170, only 3,075 became involved.").

470. Tonry, *supra* note 259, at 25-26.



the aforementioned medical evidence.<sup>471</sup> "Therapy is too important to leave to the criminal justice system," argues University of Southern California's Dr. Greene.<sup>472</sup> Would Hippocrates, himself, not agree?

#### IV. THE LEGAL SYSTEM

*It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.*

—Justice John Marshall Harlan<sup>473</sup>

In its haste to gain ground on the amorphous drug-war adversary, the U.S. government has forgotten, or ignored, the boundaries of its own charter. Every American is a signatory to an agreement limiting the coercive powers of government; it is called the United States Constitution. Through slow accretions of police power annexed from the Bill of Rights, the drug war has resulted in a *de facto* (but certainly not *de jure*) constitutional amendment. Experts and scholars have lumped court decisions, congressional legislation, and executive action into a single aphorism: the "drug exception" to the Bill of Rights.<sup>474</sup> Rather than serving as the ardent sentinel of the Constitution, the United States Supreme Court has both approved and fostered the truncation of Americans' civil liberties.<sup>475</sup>

The Court during the past decade let police obtain search warrants on the strength of anonymous tips (Fourth and Sixth Amendments). It did away with the need for warrants when police want to search luggage, trash cans, car interiors, bus passengers, fenced private property and barns (Fourth). It let prosecutors hold drug offenders

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471. Another casualty of budget cuts is medical and scientific research—research that could provide answers and hope for the future. Given adequate funding:

[N]eurochemical and neurobiological research will yield new understandings about the mechanisms of the drug addictions. In the future, as in the past, such knowledge can be counted on to produce novel diagnostic, predictive, and therapeutic interventions. Specifically, learning more about the neurobiology and pharmacology of reward will lay a sounder basis for therapy. Testing for genetic vulnerability might permit better targeting of prevention efforts to those who are most vulnerable. Novel pharmacologic treatments that need to be developed include a long-acting agonist to supplant cocaine (analogous to methadone in opiate addiction), long-acting antagonists or immunization procedures, and drugs to facilitate detoxification and suppress craving. Finally, we need the patience to fund and carry out very long-term studies on the effectiveness of prevention education strategies.

Goldstein & Kalant, *supra* note 322, at 1519.

472. Greene, *supra* note 325, at 235.

473. *United States v. Boyd*, 116 U.S. 616, 635 (1886).

474. Barnett, *supra* note 50, at 2612.

475. Dan Baum, *The Drug War on Civil Liberties*, NATION, June 29, 1992, at 886, 888.

without bail (Eighth). It permitted the confiscation of property before a suspect is charged, let alone convicted (Fifth). It let prosecutors imprison people twice—at the state and federal levels—for the same crime (Fifth). It let police fly as low as 400 feet over houses in their search for marijuana plants (Fourth). It allowed the seizure of defense attorneys' legal fees in drug cases (Sixth). It allowed mandatory urine testing for federal employees (Fourth). And [it] let stand a sentence of mandatory life without parole for simple drug possession (Eighth).<sup>476</sup>

The Court, however, has not been unanimous in its acquiescence. Nor has it necessarily been a partisan fight. Conservative Justice Antonin Scalia criticized mandatory drug testing of federal employees as an "invasion of their privacy and [an] affront to their dignity."<sup>477</sup> Liberal Justice John Paul Stevens has protested that the "Court has become a loyal foot soldier" in the drug war.<sup>478</sup> Lower courts and singular jurists have also expressed dismay over the trampling of the Constitution.<sup>479</sup>

When all is said and done, the nearsighted and deceptively ignorant decisions of the state and federal judiciary remain the law of the land. Drug warriors can sift through one's garbage without permission.<sup>480</sup> Low-flying police helicopters can "snoop" into one's backyard, patio, or garden.<sup>481</sup> African-Americans and Hispanics can have their bodies and automobiles searched because they fit an imaginary drug criminal "profile."<sup>482</sup> At the American borders, rectal searches can be conducted by police without a warrant, let alone probable cause.<sup>483</sup> Even the sacred right of free expression embodied in the First Amendment has not been spared from the constitutional cutting block.<sup>484</sup> Appar-

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476. *Id.*

477. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 686 (1989) (Scalia, J., dissenting).

478. *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

479. *See* Wisotsky, *supra* note 11, at 17 ("In 1991, the Court of Appeals for the Ninth Circuit declared that '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.' In that observation, the court echoed a 1990 ringing dissent by the chief justice of the Florida Supreme Court: 'If the zeal to eliminate drugs leads this state and nation to forsake its ancient heritage of constitutional liberty, then we will have suffered a far greater injury than drugs ever inflict upon us. Drugs injure some of us. The loss of liberty injures us all.'").

480. Galiber, *supra* note 75, at 841.

481. *Id.* at 842.

482. Duke, *supra* note 14, at 589.

483. Ostrowski, *supra* note 13, at 665 (citation omitted).

484. One commentator told this story in dramatic fashion:

[C]riticism [of the War on Drugs] is essentially forbidden speech. Thomas Kline of Post Falls, Idaho, got a swift lesson in the dangers of speaking out when he wrote a letter to

ently, the mentality of the drug warrior does not allow for trifling concepts like free speech or bodily integrity. As one commentator noted: "Our society was once one in which the very thought of men and women being strip-searched and forced to urinate in the presence of witnesses was revolting."<sup>485</sup>

There was also a time where the adage "the punishment should fit the crime" was a fundamental principle of justice supported by the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>486</sup> The drug war has skewed some Americans' sense of proportionality and fairness. America's prisons are overflowing with nonviolent drug offenders, often serving longer sentences than the "typical" first-degree premeditated murderer.<sup>487</sup> Even worse, thousands of rapists, armed robbers and child molesters are being released to make room for recently convicted drug addicts.<sup>488</sup> *Where has America's sense of priorities gone?*

Another form of drug-war punishment—asset forfeiture—has also been released from the moors of proportionality. For example:

On April 30, 1988, the Coast Guard boarded and seized the motor yacht *Ark Royal*, valued at \$2,500,000, because 10 marijuana seeds and two stems were found on board. . . . The \$80,000,000 oceanographic research ship *Atlantis II* was seized in San Diego when the

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the editor of the *Coeur d'Alene Press* . . . advocating the legalization of marijuana. A couple of days later, agents of the Idaho Department of Law Enforcement (IDLE) searched the garbage can behind his house—which is legal without a warrant—and found three grams of pot stems. On the strength of that evidence, they got a warrant, found seventeen joints in Kline's house and busted him. "We'd do the same thing again," said Wayne Longo, the IDLE agent in charge of the investigation, reached by telephone at his desk in Coeur d'Alene. "It's not that often that we see people writing in saying they're using dope." Of course, Kline's letter says nothing about his using marijuana; it's strictly an argument for legalization. Longo, however, wasn't interested in quibbling. "Look," he said. "I've commented on this all I'm going to." And he hung up.

Baum, *supra* note 475, at 888.

485. Ostrowski, *supra* note 13, at 666.

486. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

487. Shenk, *supra* note 9, at 35. Shenk articulated this discrepancy as follows:

[T]hanks to mandatory minimum sentences, the system is overloaded with non-violent drug users and dealers, who now often receive harsher penalties than murderers, rapists, and serious white collar criminals. Solicited by an undercover DEA agent to find a cocaine supplier, Gary Fannon facilitated the deal and received a sentence of life without parole. Larry Singleton raped a teenager, hacked off her arms between the wrist and elbow, and left her for dead in the desert. He received the 14-year maximum sentence and served only eight years. This disparity is not the exception in modern law enforcement. It is the rule. Non-violent drug offenders receive an average 60 months in jail time, *five times* the average 12-month-sentence for manslaughter convicts.

*Id.*

488. See Scheer, *supra* note 5, at 49.

Coast Guard found 0.01 ounce of marijuana in a crewman's shaving kit. . . . A Michigan couple returning from a Canadian vacation lost a 1987 Mercury Cougar when customs agents found two marijuana cigarettes in one of their pockets. No criminal charges were filed, but the car was kept by the government.<sup>489</sup>

The worst is yet to come. After the recent United States Supreme Court decision in *Michigan v. Bennis*,<sup>490</sup> innocence is no longer a constitutionally mandated defense against having one's property seized.<sup>491</sup> In oral argument, the state government even conceded that its forfeiture program would allow for the uncompensated seizure of a stolen car because the thief, not the legal owner, was caught with narcotics in the vehicle.<sup>492</sup> In spite of its draconian possibilities, the Court upheld the state program *in toto*.<sup>493</sup>

The high courts of other countries have refused to follow the path blazed by the American judiciary. For example, a German appellate court decriminalized the possession of marijuana and hashish, finding that "[i]ntoxication, like eating, drinking and sex, is one of the fundamentals of mankind."<sup>494</sup> Two years ago, the Columbian Constitutional Court legalized the personal use of small quantities of recreational drugs based on the citizenry's right to "free development of the personality."<sup>495</sup> These decisions are powerful reminders of America's civil libertarian roots and of the U.S. government's latter-day rejection of individual liberty, integrity, and responsibility.<sup>496</sup> The United States Supreme Court, however, foreclosed all civil libertarian arguments against drug prohibition more than seventy years ago,<sup>497</sup> and it is inconceivable that the current Court would be willing to re-

489. Wisotsky, *supra* note 11, at 20.

490. 116 S. Ct. 994, 998 (1996).

491. *See id.* (upholding a long line of cases that held "that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use").

492. Oral Argument at \*39-41, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729), *available at* 1995 WL 712350.

493. *Bennis*, 116 S. Ct. at 1001.

494. *The Right To Get High*, *TIME*, Mar. 16, 1992, at 43.

495. C. Torres, *Legalize It?*, *NATION*, June 20, 1994, at 857.

496. *See* D. Keith Mano, *Legalize Drugs*, *NAT'L REV.*, May 28, 1990, at 50, 52 ("Let us say I grow marijuana and sell my neighbor some (I haven't even crossed a state line)—what right can the Federal Government or Vermont or Boston have to arrest me, there being no demonstrable public danger? . . . [None. B]ut, of course, Drug Prohibition has never been constitutional. . . . [It] has been, in one sense, profoundly American—an example of our naïve and well-meaning, but misapplied, hope that enough money or enough statist interference will redeem 'evil.' It has also been profoundly un-American: Drug Prohibition violates individual freedom . . . and the Jeffersonian pursuit principle.").

497. *See, e.g., United States v. Doramus*, 249 U.S. 86 (1919) (holding that the Harrison Act was constitutional pursuant to the federal government's taxing power).

visit these issues. In the end, it will be the American public, not judges or legislators, who must ask themselves whether it is willing to sacrifice its civil liberties for the War on Drugs.

## V. SOCIAL POLICY

*Nor deem the irrevocable Past  
As wholly wasted, wholly vain,  
If, rising on its wrecks, at last  
To something nobler we attain.*

—Henry Wadsworth Longfellow<sup>498</sup>

The noblest of all virtues is not fortuity or even foresight; it is easy to gloat upon success. Nor is it necessarily wisdom because even the unseasoned amateur can be witness to incomparable lucidity. Rather, it is the ability to accept and learn from one's mistakes that makes man the master of his environment and the architect of his own future. "The life of the law[,]" opined the great Justice Oliver Wendell Holmes, "has been experience."<sup>499</sup>

The life of America's drug law has not been experience; it has been moral rhetoric and dogmatism. The "essentially empirical"<sup>500</sup> nature of the law has given way to political punditry; the drug war has taken on a life independent of learned experience. It need not be this way, however. America's finest hours have followed repentance for grave social and political mistakes: the Emancipation Proclamation, *Brown v. Board of Education*,<sup>501</sup> and the withdrawal from Vietnam. America's errors have been uniquely human, but its remorse and amelioration have been divinely inspired. The time has come to reassess a social policy which pits the nation against itself.

### A. Crime, Violence, and Corruption

Dr. Lee Brown, the Clinton Administration's former "drug czar," testified before Congress that drugs "are behind much of the crime we see on our streets today, both those crimes committed by users to finance their lifestyles and those committed by traffickers and dealers fighting for territory and turf."<sup>502</sup> Dr. Brown was partially accurate. "If these remarks had been preceded by two words, '*prohibition of,*'"

498. Henry W. Longfellow, *The Ladder of Saint Augustine*, in *THE POETICAL WORKS OF LONGFELLOW* 186-87 (Cambridge ed. 1975) (1893).

499. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

500. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 *AM. L. REV.* 1, 4 (1870).

501. 347 U.S. 483 (1954).

502. *The War on Drugs Is Lost*, *supra* note 4, at 47 (editorial of Steven Duke).

retorted Yale law professor Steven Duke, "the statement would have been correct."<sup>503</sup>

The drug czar's presumption—drug use results in criminal activity—is demonstrably false.<sup>504</sup> Some studies have shown that the major illicit drugs—marijuana, heroin, and cocaine—do not intrinsically cause crime.<sup>505</sup> Further, as opined by renowned narcotics expert Arnold Trebach, illicit drug use "is a neutral act in terms of its potential criminogenic effect upon an individual's behavior. . . . [T]here is nothing in the pharmacology, or physical or psychological impact, of the drug that would propel a user to crime."<sup>506</sup> Dr. Brown's naive causal analysis belies the true nexus among drugs, crime, and violence: drug prohibition.

A few short anecdotes can provide context and a reality check for die-hard drug warriors:

An innocent 75-year-old African-American minister died of a heart attack struggling with Boston cops who were mistakenly arresting him because an informant had given them the wrong address. A rancher in Ventura County, California, was killed by a police SWAT team serving a search warrant in the mistaken belief that he was growing marijuana. In Los Angeles, a three-year-old girl died of gunshot wounds after her mother took a wrong turn into a street controlled by a drug-dealing gang. They fired on the car because it had invaded their marketplace.<sup>507</sup>

These are the true victims of the War on Drugs, not the purported legion of souls lost to prohibited vice. Every heroin overdose (which, by the way, is usually caused by black-market adulteration<sup>508</sup>) is matched by a hundred drive-by murders.<sup>509</sup> Further, for every "crack baby" (often a result of prohibition-induced fear and ignorance<sup>510</sup>), there are thousands of kids avoiding playgrounds because "they fear

503. *Id.* (emphasis added).

504. *See id.* ("The only possibility more daunting than [the false implication] our leaders are dissembling is that they might actually believe the nonsense they purvey.").

505. *See, e.g.,* TREBACH, *supra* note 22, at 246.

506. *Id.* (heroin not criminogenic); *see also* ERICH GOODE, *DRUGS IN AMERICAN SOCIETY* 145 (3d ed. 1989) (positing that marijuana being criminogenic "receive[s] no attention even in the most vigorous antimarijuana polemics"); GRINSPOON & BAKALAR, *supra* note 337, at 227 (arguing that cocaine is "so seldom [related to violence that] it is not a serious crime problem").

507. *The War on Drugs Is Lost*, *supra* note 4, at 43 (editorial of Joseph McNamara).

508. *See, e.g.,* Barnett, *supra* note 50, at 2604; Duke, *supra* note 14, at 585; Ostrowski, *supra* note 13, at 652-54.

509. *See* Shenk, *supra* note 9, at 33-34.

510. Dennis, *supra* note 315, at 126; Duke, *supra* note 14, at 609; Shenk, *supra* note 9, at 38; Sileo, *supra* note 259, at 6.

'bullies and drug dealers.'"<sup>511</sup> The yarns spun by Bill Bennett and Dr. Lee Brown simply cannot beat the real horror stories on the streets.

The facts are straightforward. Half of the serious crime in America is a result of drug prohibition (not drug use),<sup>512</sup> and two-thirds of all homicides in major cities are connected to the drug trade (again, not drug use).<sup>513</sup> The motive is equally manifest, as succinctly argued by former police chief Joseph McNamara: "It's the money, stupid."<sup>514</sup> Prohibition raises the risks of drug transactions; the possibility of incarceration is factored in by the drug dealer as a cost of doing business. Higher risks for the dealer equate to higher prices for the consumer. An addict who would otherwise support his habit through lawful means now turns to the only "occupation" which can bankroll the exorbitant drug bill—crime. Moreover, drug prohibition ensures that trade squabbles are resolved by bullets instead of conference-room negotiations. A drug deal that has "gone sour" simply cannot be settled in court.<sup>515</sup>

Analyzing the mind of the criminal drug user is far from complex. Addicts who commit crime do so because (1) they are addicted, (2) drugs are expensive, and (3) they are destitute. Prohibition fails to affect the first element—it has had no impact on drug availability,<sup>516</sup> and the specter of criminal sanction is wholly irrelevant to the addict.<sup>517</sup> However, prohibition *causes* the second element—drugs are expensive precisely because they are illegal—and negatively impacts

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511. *Id.* at 34 (quoting one child's reason for avoiding the playground).

512. Duke, *supra* note 14, at 581.

513. Sileo, *supra* note 259, at 9.

514. *The War on Drugs Is Lost*, *supra* note 4, at 42 (editorial of Joseph McNamara).

515. See Boaz, *supra* note 16, at 629-30. According to Boaz:

Drug use does not cause violence. Alcohol did not cause the violence of the 1920s, Prohibition did. Similarly, drugs do not cause today's soaring murder rates, drug prohibition does. The chain of events is obvious: drug laws reduce the supply and raise the price of drugs. The high price causes addicts to commit crimes to pay for a habit that would be easily affordable if obtaining drugs was legal. The illegality of the business means that business disputes—between customers and suppliers or between rival suppliers—can be settled only through violence, not through the courts. The violence of the business then draws in those who have a propensity—or what economists call a comparative advantage—for violence. When Congress repealed Prohibition, the violence went out of the liquor business. Similarly, when Congress repeals drug prohibition, the heroin and cocaine trade will cease to be violent. As columnist Stephen Chapman put it, "the real accomplices to murder" are those responsible for the laws that make the drug business violent.

*Id.* (citations omitted).

516. See *supra* notes 229-41 and accompanying text (discussing the mechanics of how a black market for illicit drugs is created).

517. See *supra* notes 410-15 and accompanying text (positing that drug users are not easily deterred by the threat of criminal sanctions).

the third. If a drug abuser was not poor before his addiction, black-market prices can start him on his way to economic ruin. Moreover, if the addict started out poor, petty theft often appears as the only option in his utter depravity. As for the drug thug and his gangster cohorts; the War on Drugs is their lifeblood. Prohibition creates the black market, which generates the money, which supports the gangs, which deal in violence.

The money has also fostered the worst criminal in civilized society: the crooked cop. The corruption, however, transcends the alderman or the beat cop; federal policy makers and foreign dignitaries have been embroiled in drug profiteering.<sup>518</sup> Between 1983 and 1985, three hundred high-level law-enforcement officials were accused of drug-related corruption.<sup>519</sup> One FBI agent received a ten-year sentence for taking \$850,000 in drug bribes.<sup>520</sup> A narcotics prosecutor went to jail for accepting \$210,000 and a sailboat in payoffs.<sup>521</sup> A New Orleans police officer was convicted of murdering her partner to protect a drug-dealing confederate.<sup>522</sup> A former Detroit police chief was convicted of skimming police "drug-buy" money.<sup>523</sup> In 1992, New York City uncovered its largest police corruption scandal ever, involving a posse of law enforcement agents unofficially "busting" drug dealers and splitting their nefarious take.<sup>524</sup> The agent who arrested Panamanian General/drug-conspirator Manuel Noriega was himself imprisoned for stealing laundered drug money.<sup>525</sup> The litany of official corruption could go on forever; Americans' toleration for such crime should not.

Dr. Steven Jonas of SUNY-Stony Brook has assessed the severity of crime for each of the five major recreational drugs as follows:

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518. See William J. Helmer, *Saint Valentine's Day—The Massacre Continues: Failure of Drug Enforcement Today Compared to Failure of Prohibition in the '20s*, Mar. 1990, at 46 (on file with author).

519. Hacker, *supra* note 273, at 141.

520. Branch, *supra* note 224, at 26.

521. *Id.*

522. *The Drug War Is Lost*, *supra* note 4, at 43 (editorial of Joseph McNamara).

523. *Id.*

524. Shenk, *supra* note 9, at 35.

525. *The War on Drugs Is Lost*, *supra* note 4, at 43 (editorial of Joseph McNamara). Corruption among foreign officials, however, is much more rampant:

The presidential press secretary of Columbia, Roman Medina, was arrested for smuggling cocaine into Spain in his diplomatic pouch. . . . Three Bahamian cabinet ministers had to resign when their association with drug trafficking was uncovered by a royal commission. Two others were fired. Mexico is notorious for its corrupt officials, and one of the numerous military dictators who took over Bolivia was himself a cocaine trafficker.

Gonzales, *supra* note 242, at 111.



CRIME, RANKING BY SEVERITY<sup>526</sup>

Type of Crime	Cocaine	Heroin	Marijuana	Tobacco	Alcohol
1. Drug Commerce					
a. Importation, sale, and possession	High	High	Medium	None	None
b. Corruption of the criminal justice system	High	High	?	None	None
c. Corruption of legal commerce	High	High	?	None	None
d. Violent crime, commerce-related	High	Medium	Low	None	None
2. Money-raising crime	Medium	High	?	None	None
3. Violation of motor vehicle statutes	?	?	Low	None	High
4. Violent crime, not commerce-related	?	?	?	None	High
5. Product tax evasion	None	None	Medium	Low	None

The most notable disparity is between the illegal drugs (cocaine, heroin, and marijuana) and the legal drugs (tobacco and alcohol). Drug prohibition and the resulting black market produce this artificial distinction in crime severity—a discrepancy that would otherwise not exist.

*Would drug legalization prevent the crime, violence, and corruption?* This author answers with an emphatic “yes.” Milton Friedman,<sup>527</sup> George Shultz,<sup>528</sup> and William F. Buckley<sup>529</sup> agree. Science has also chimed in.<sup>530</sup> A British study of 150 addicts found that they committed ninety-six percent fewer crimes when they had access to a low-cost drug supply.<sup>531</sup> “Nothing we could do would reduce violent crime more quickly and efficiently than legalizing drugs,” argues Libertarian Party leader Douglas MacNeil.<sup>532</sup> Even some prohibitionists, like Congressman Charles Rangle, concede that legalization “would reduce crime. Undoubtedly that’s true.”<sup>533</sup> Drug-dealing gangsters would involuntarily cede their business monopoly to the government and its assigns. The pusher on the street could neither undercut the calculated government price nor ensure purity to F.D.A. standards. The economically stripped user would no longer need to steal to support his habit, and the black market would dry up, slithering back

526. This chart appears in Jonas, *supra* note 275, at 793. Jonas used a four-level scale as measurement with a “?” to signify “unknown.”

527. See Scheer, *supra* note 5, at 49.

528. See *id.*

529. See *The War on Drugs Is Lost*, *supra* note 4, at 35 (editorial of William F. Buckley).

530. *Opening Crack*, *supra* note 278, at 56.

531. *Id.*

532. Sileo, *supra* note 259, at 9.

533. *Id.*

under the rock of unintended consequences as the law of unfettered supply and demand restores pre-prohibition equilibrium.<sup>534</sup> Moreover, legalization would free up 400,000 law-enforcement officials to pursue serious criminals—rapists, child molesters, serial killers, etcetera—rather than the pitiful addict in need of medical help.<sup>535</sup> Instead of releasing violent criminals to make room for convicted drug offenders, legalization would open up 300,000 prison cells for the truly malevolent.<sup>536</sup> In sum, the boon to the criminal justice system simply cannot be overestimated.<sup>537</sup>

### B. Drug Consumption

As argued above, the escalating drug war has had no effect on the availability of narcotics.<sup>538</sup> A 1988 General Accounting Office report concluded that in the 1980s: (1) drug consumption was substantial throughout the decade; (2) the amount of cocaine consumed and its purity doubled while the price declined thirty percent; (3) the price of heroin decreased by twenty percent while its purity increased by one-third; and (4) marijuana remained highly available throughout the country and its purity continued to increase.<sup>539</sup> If the drug war was

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534. Church et al., *supra* note 226, at 14. Church posits that the economic forces of legalization would be significant:

The great promise of legalization, say its advocates, is that it would rip this cancer out of the cities. If drugs were legal, the Government could regulate their sale and set a low price. Addicts could get a fix without stealing, and a lack of profit would dismantle the booming criminal industry that now supplies them. Drug gangs would disappear as bootleggers did after the repeal of Prohibition; with them would go the current, pervasive corruption of police officers, lawyers, judges and politicians bribed by drug money. Drug dealing would no longer seem to be the only way out of the ghetto for underclass youths. Says Mayor Schmoke: "If you take the profit out of drug trafficking, you won't have young children hiding drugs [on behalf of pushers] for \$100 a night or wearing beepers to school because it makes more sense to run drugs for someone than to take some of the jobs that are available. I don't know of any kid who is making money running booze." The bottom line for those favoring legalization: drug-related crime damages society far more than drug usage itself.

*Id.*

535. *The War on Drugs Is Lost*, *supra* note 4, at 36 (editorial of William F. Buckley).

536. Duke, *supra* note 14, at 590.

537. Or, in the words of Professor Steven Duke, "[t]he beneficial effects on crime rates can hardly be exaggerated." *Id.* at 580 (citation omitted).

538. See Shenk, *supra* note 9, at 33 ("The hundreds of billions of dollars spent on drug control in the last several decades have yielded only a moderate decline in the casual use of marijuana and cocaine. But there has been no decrease in hard-core addiction. The total amount of cocaine consumed per capita has actually risen. And even casual use is now creeping up."); see also *supra* notes 229-41 and accompanying text (discussing the mechanics of how a black market for illicit drugs is created).

539. Ostrowski, *supra* note 13, at 677 (citations omitted).

achieving its goals, drug prices would rise and drug availability, consumption, and purity would fall. Obviously something is not working.

Drug addicts are not deterred by draconian punishment; people with debilitating diseases simply do not respond to coercive force. More importantly, drug dealers are absolutely unaffected by the threat of criminal sanction. As argued by Baltimore mayor Kurt Schmoke, "going to jail is just part of the cost of doing business. It's a nuisance, not a deterrent."<sup>540</sup> International studies have scientifically refuted the efficacy of criminal sanctions in deterring drug consumption.<sup>541</sup> It is even possible that drug criminalization produces a "forbidden-fruit effect," baiting the "id" in all of us to try drugs for the sheer illegality.<sup>542</sup>

Moreover, the drug war has a deleterious "substitution" effect which has either gone unnoticed (unlikely) or been ignored (likely). "The Iron Law of Prohibition," as it is called,<sup>543</sup> ensures that effective interdiction efforts against one drug will increase the supply and consumption of another drug.<sup>544</sup> Before alcohol prohibition, the United States was largely "a nation of beer drinkers."<sup>545</sup> After prohibition, Americans switched to hard alcohol—with its higher proof (i.e., alcohol concentration), simpler production, and easier concealment.<sup>546</sup>

The Iron Law has had similar effects on illicit-drug-consumption patterns over the past three decades. When the federal government cracked down on marijuana in the late 1960s, dealers and consumers switched to a relatively more dangerous drug—cocaine.<sup>547</sup> The same phenomenon occurred in the 1980s, with cocaine again substituting for marijuana.<sup>548</sup> The Iron Law's "irresistible dynamic" also transformed

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540. Church et al., *supra* note 226, at 14.

541. *Legalizing Drugs*, *supra* note 280, at 44 (challenging "the empirical basis for using deterrence as a means of controlling drug use").

542. *Id.* at 45.

543. See Cowan, *How the Narcs Created Crack*, *supra* note 352, at 27.

544. See Greene, *supra* note 325, at 235 ("Efforts aimed . . . to limit the demand by restricting the supply of one drug or group of drugs, are less effective in that they predictably stimulate consumption of a substitute.").

545. *The War on Drugs Is Lost*, *supra* note 4, at 48 (editorial of Steven Duke).

546. See Barnett, *supra* note 50, at 2608-09 ("Alcohol prohibition [led] Americans to shift their consumption patterns away from comparatively less potent forms of alcohol such as wine and beer—the production and distribution of which were more easily detected by law enforcement—to distilled spirits, which were more concentrated, easier to manufacture in illicit stills, and consequently more difficult to police. It has taken several decades for this Prohibition-induced taste for 'cocktails' to abate and for the more traditional preference for wine and beer to reassert itself—much to the chagrin of distillers.").

547. Scheer, *supra* note 5, at 49.

548. Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 45 (noting that "[i]n the 1980's retail purity of heroine and cocaine increased"); see also Cowan, *How the Narcs Created Crack*,

the black market for cocaine, as dealers and consumers shifted from the powdered version to a more lethal coca-based drug—crack.<sup>549</sup>

From beer to liquor, from marijuana to cocaine and heroin, from cocaine to crack, the Iron Law moves synchronously with law enforcement. “You have to ask what’s the next drug,” says Princeton Professor Ethan Nadelmann, “[a]nd if it turns out to be something that any seventh-grader can make with a home chemistry set, then your whole capacity to control it through the government just crumbles.”<sup>550</sup>

There is also a geographic version of the Iron Law due to the global flexibility in the cultivation and production of illicit drugs. If drug production is checked in one part of the world, a new source invariably springs from another city, nation or continent. Stamp out Humboldt marijuana, and Sonoma growers pick up the slack; cut off Columbian cocaine, and any of a number of South American producers will gladly furnish the necessary supply.<sup>551</sup> Marijuana is literally a weed; cocaine comes from the fast-growing and hardy coca plant; and heroin is derived from poppies. These drugs can be produced nearly anywhere in the world, if a demand is present.

Without the drug war, argue prohibitionists, America would be a “nation of zombies.”<sup>552</sup> “Legalization would result in the widespread use of drugs,” contends Congressman Robert Garcia.<sup>553</sup> *Is that true? Would drug use and abuse spiral after legalization?* If history is an indicator, the answer is “no.”

The repeal of alcohol prohibition was not followed by a mass exodus from the ranks of teetotallers.<sup>554</sup> Rather, alcohol indulgence reverted to a stable, pre-Prohibition consumption rate.<sup>555</sup> Moreover, the rate of alcohol *addiction* has remained constant for over a century

*supra* note 352, at 27 (arguing that strict law enforcement of marijuana is encouraging the use of cocaine).

549. Galiber, *supra* note 75, at 844.

550. Benoit, *supra* note 251, at 35 (citation omitted).

551. See Jarvik, *supra* note 230, at 389 (“Curtailing the supply of demanded drugs has been compared to squeezing a balloon: constrict it in one place and it expands somewhere else. Eradication of coca, opium, or marijuana plantations does reduce use, but it may encourage production elsewhere if demand is not reduced. An example is the expansion of the California marijuana crop after the availability of Mexican marijuana was reduced.”).

552. *The War on Drugs Is Lost*, *supra* note 4, at 47 (editorial of Steven Duke). The phrase “nation of zombies” was originally coined by the “ethically-challenged junior senator from New York,” Alfonse D’Amato. See Marsha J. Ferziger, *Monopolies on Addiction: Should Recreational Drugs Be Patentable?*, 1994 U. CHI. LEGAL F. 471, 495 (citations omitted).

553. IMPACT AND FEASIBILITY, *supra* note 229, at 10 (testimony of the Honorable Robert Garcia).

554. Ostrowski, *supra* note 13, at 675.

555. Greene, *supra* note 325, at 230.

and a half—including the entire duration of alcohol criminalization.<sup>556</sup> Similarly, heroin was legal prior to 1914—yet per capita addiction today is no different from the pre-Harrison Act rate.<sup>557</sup>

In a more recent example, the decriminalization of marijuana in several states during the 1970's resulted in no increase in the number of users or the level of consumption.<sup>558</sup> Over the past decade, other states have decriminalized the personal use and possession of marijuana with no concomitant increase in usage.<sup>559</sup> Other countries have had similar results from their legalization efforts. For example, the Netherlands has decriminalized marijuana and heroin use since the 1970's—with only positive consequences. Every age group experienced reduced marijuana consumption, with a significant drop in teenage use.<sup>560</sup> Moreover, in the Netherlands' capital, Amsterdam, the number of heroin addicts dropped by more than 3,000 during the 1980's.<sup>561</sup>

The American citizenry has opined that legalization will not entice it to start using drugs or to increase drug consumption.<sup>562</sup> In one study (corroborated by later studies), 98.3 percent of all non-drug users said they would not try drugs if legalized.<sup>563</sup> The survey also

556. *Id.* at 231. Greene expanded upon the role of alcohol in American society:

If any drug could destroy the fabric of society, alcohol would have done it by now. Surprisingly steady rates of alcohol use in America suggest that despite ready availability, there is no "epidemic" of alcohol addiction. Rather, we have reached a steady state of equilibrium, in which four million pre-alcoholics provide a pool for up to 200,000 new alcoholics who replace those who die annually of alcohol-related diseases. In other words, despite changes in per capita usage, there remains a constant rate of alcoholism within society, dating back 150 years—again corroborating that there is a constant role of addiction to all substances. There is nothing to suggest that alcohol differs materially from illegal drugs in its ability to recruit new addicts.

*Id.* (citations omitted).

557. See Daniel Koshland, *Thinking Tough*, SCIENCE, Sept. 9, 1988, at 1273 ("[T]he proportion of addicts in the population was not appreciably different than it is today.")

558. See STEVEN WISOTSKY, *BREAKING THE IMPASSE ON THE WAR ON DRUGS* 215 (1986) ("Experience in Oregon, California, and Maine following decriminalization . . . showed no significant percentage of new users or an increase in the frequency of use.") (citation omitted).

559. See Jonas, *supra* note 275, at 785 ("Carefully ignored in all the law enforcement propaganda is the experience of the dozen or so states that have virtually legalized marijuana (among them, Alabama, New York, Maine, California, Nebraska, Mississippi, and Rhode Island). Evidence is spotty, but what there is suggest that the use of marijuana *actually declines* after legalization.") (emphasis added) (citation omitted).

560. See Nadelmann, *Drug Prohibition*, *supra* note 250, at 944 ("[C]onsumption has actually declined significantly; in 1976, 3% of 15- and 16-year-olds and 10% of 17- and 18-year-olds used cannabis occasionally; by 1985, the percentages had declined to 2 and 6%, respectively. The policy has succeeded, as the government intended, 'in making drug use boring.'") (citation omitted).

561. Dennis, *supra* note 315, at 130.

562. Gazzaniga, *supra* note 374, at 44.

563. *Legalizing Drugs*, *supra* note 280, at 48.

found that occasional users would not increase their usage with legalization.<sup>564</sup> The question for the ardent prohibitionist then becomes: *Can one believe the American public?* This author believes that the American public can be believed.

Through education and social coercion, Americans have begun to kick the most addictive drug on earth—nicotine. Between 1965 and 1987, the proportion of adults smoking cigarettes dropped twenty-eight percent.<sup>565</sup> “We have seen a substantial reduction in the use of tobacco over the last thirty years,” argues political commentator William F. Buckley, “and this is not because tobacco became illegal but because a sentient community began, in substantial numbers, to apprehend the high cost of tobacco to human health.”<sup>566</sup> Federal Judge Robert W. Sweet adds, “If our society can learn to stop using butter, it should be able to cut down on cocaine.”<sup>567</sup> Education and social disapproval are the answer, not self-righteous paternalism.

### C. Race, Poverty, and Drugs

The drug war has decimated urban America, turning once productive neighborhoods into enclaves of violence and poverty, ruled by gangsters and governed by de facto martial law.<sup>568</sup> Throughout the past few decades, the media has focused on urban blight as the core of the American drug problem; minorities and inner-city neighborhoods are characterized as the perceived source of America’s drug problem.<sup>569</sup> Photographs showed only colored faces; words linked those images with crime, violence, and poverty. They have produced only

564. *Id.*

565. Jonas, *supra* note 275, at 777 (citation omitted).

566. *The War on Drugs Is Lost*, *supra* note 4, at 37 (editorial of William F. Buckley).

567. Duke, *supra* note 14, at 605 (citation omitted).

568. Wilson & DiIulio, *supra* note 259, at 21. The drug-related violence in America’s largest cities is particularly disturbing:

In south central Los Angeles, in much of Newark, in and around the housing projects of Chicago, in the South Bronx and Bedford-Stuyvesant sections of New York, and in parts of Washington, D.C., conditions are not much better than they are in Beirut on a bad day. Drugs, especially crack, are sold openly on street corners; rival gangs shoot at each other from moving automobiles; automatic weapons are carried by teenagers onto school playgrounds; innocent people hide behind double-locked doors and shuttered windows. In Los Angeles, there is at least one gang murder every day, Sundays included. A ten-foot-high concrete wall is being built around . . . [a] junior high school . . . in order, the principal explained, to keep stray bullets from hitting children on the playground.

*Id.*

569. See Tonry, *supra* note 259, at 52 (“Newspapers, television, and movies regularly portray trafficking in . . . [drugs] as characteristic of inner-city minority neighborhoods. Any minimally informed person in the late 1980s knew that the major fronts in the drug wars were located in minority neighborhoods.”).

societal malice toward the decrepit addict and the powerless inner-city minority.<sup>570</sup> Dr. George Annas, a professor at Boston University's School of Public Health, summed up public sentiment this way: "People just hate addicts. They'd just as soon all the heroin addicts got AIDS and died. They're not going to come out and say that, but I think that's an undercurrent."<sup>571</sup> The effect of race is undeniable. Despising the drug user can be easily transformed into contempt for the inner-city minority, when all that is seen is black and brown faces.

Those in power, largely affluent and Caucasian, have waged the drug war based on these images. The front line has been drawn in Watts and Harlem, rather than Brentwood or uptown Manhattan, because that is where the perceived enemy (read "inner-city minority") lives. Police browbeat the disheveled African-American man standing on the corner of Pico and Hoover, but not the equally unkempt Caucasian man walking down Venice Boulevard.

Concerted law enforcement efforts in inner-city, minority communities have produced some disconcerting numbers. "Ninety percent of today's arrests," says drug scholar Troy Duster, "involve black teenagers buying and selling drugs worth less than \$75."<sup>572</sup> In Baltimore, eighty-five percent of those arrested on drug charges are African-American.<sup>573</sup> Across the nation, forty-five percent of all drug arrests involve African-Americans,<sup>574</sup> yet African-Americans comprise less than thirteen percent of the American population.<sup>575</sup>

The racial discrepancy in incarceration is equally stark. Young African-American men constitute almost half of America's prison inmates, but only two percent of the general population.<sup>576</sup> One-third of all African-American males in the United States are officially supervised by the criminal justice system "largely because of drug arrests."<sup>577</sup> Moreover, when compared to international statistics, the assumed "moral leadership" in the world becomes suspect and sadly ironic. African-American males are four times less likely to be impris-

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570. Schwartz, *supra* note 469, at 845 (noting the "profound contempt for addicts in our society, reinforced by racism, as they are primarily black or Hispanic and poor").

571. *Id.*

572. Scheer, *supra* note 5, at 49 (quoting Troy Duster as support for the proposition that the actual ratio of African-American users to Caucasian users is not proportional to the public's perception of the ratio).

573. Duke, *supra* note 14, at 594 (citation omitted).

574. *Id.* at 594 (citation omitted).

575. THE WORLD ALMANAC AND BOOK OF FACTS 391 (1996).

576. Duke, *supra* note 14, at 595.

577. *The War on Drugs Is Lost*, *supra* note 4, at 43 (editorial of Joseph McNamara).

oned in the recently desegregated South Africa than in the supposedly "colorblind" United States.<sup>578</sup>

These numbers might be more palatable if most (or at least a majority of) drug users were African-American. This, however, is not the case. Nearly eighty percent of all drug users are Caucasian,<sup>579</sup> while African-Americans comprise the majority of those arrested and incarcerated.<sup>580</sup> African-Americans are, in fact, less likely than their Caucasian counterparts to have tried all illicit drugs except heroin.<sup>581</sup> Caucasian Americans are doing the drugs; African-Americans are doing the time.

Some experts opine that popular indifference to the plight of inner-city minorities results from an "our kids, their kids" attitude.<sup>582</sup> For example, when drug use was denominated by the Caucasian middle class in the 1970s, drug arrests and prison sentences were relatively low.<sup>583</sup> In contrast, when drug use became synonymous with impoverished minorities in the late 1980s, law enforcement was uncompromisingly aggressive.<sup>584</sup> Since then, the drug war has only become unpopular when the Drug Enforcement Agency has focused its vast resources on the cars, yachts, and homes of the affluent, powerful—and Caucasian.<sup>585</sup> Otherwise, writes journalist and former addict David Morrison, "who with the power to make a difference really gives a damn? Having decamped for the suburbs, the middle classes don't have to see the dreadful damage done."<sup>586</sup>

In one sense, drug enforcement has evolved into a racial version of property law's "N.I.M.B.Y." dilemma. The drug war can continue as long as it is *Not In My BackYard*. In another sense, economist Rich-

578. See Duke, *supra* note 14, at 595 ("[O]f every 100,000 black males in the United States, 3,109 are incarcerated, while the comparable figure for South Africa is 729.") (citation omitted).

579. See Barnett, *supra* note 50, at 2611 (stating that seventy-seven percent of illegal-drug users are Caucasian).

580. *Id.*

581. Tonry, *supra* note 259, at 56.

582. Alfred Blumstein, *Making Rationality Relevant: The American Society of Criminology 1992 Presidential Address*, 31 *CRIMINOLOGY* 1, 4 (1993).

583. See *id.* ("The decline after the 1974 peak was undoubtedly a consequence of the general trend toward decriminalization of marijuana in the United States. A major factor contributing to that decriminalization was undoubtedly a realization that the arrestees were much too often the children of individuals, usually Caucasian, in positions of power and influence. Those parents certainly did not want the consequences of a drug arrest to be visited on their children, and so they used their leverage to achieve a significant degree of decriminalization.")

584. *Id.*

585. The drug war is only deplored "in those rare instances when the targets have been shifted from ghetto street-corner dealers to middle- and upper-class assets such as yachts seized under the Coast Guard's zero tolerance program." Scheer, *supra* note 5, at 49.

586. Shenk, *supra* note 9, at 9.



ard Dennis has likened drug criminalization to a "regressive tax" which aspires "to save relatively wealthy potential users of drugs like marijuana and cocaine from self-destruction, at tremendous cost to the residents of inner cities."<sup>587</sup> Regardless of how the drug war is viewed, the fact remains that America acquiesces to minority communities which are violent and dilapidated precisely because of drug criminalization.<sup>588</sup> This being understood, the affluent and powerful must eventually face the core issue: *Would the War on Drugs still be acceptable if the affluent and powerful lived in a community devastated by drug-related crime and violence?*

This question remains unanswered, with the status quo only exacerbating the interrelated cycles of poverty, hopelessness, crime, and drug addiction.<sup>589</sup> The current drug scheme ignores these cycles and confuses the difference between acute problems and chronic dilemmas like drug addiction. No simplistic causal analysis is possible when grave social, economic, medical, and political issues are inculcated.<sup>590</sup> As discussed above,<sup>591</sup> it is the poverty and the hopelessness that breeds the drug use and abuse, that pushes young African-American and Hispanic men into the lucrative black market, and that compels the deprived inner-city addict to steal. It is not the color of their skin nor a flaw in their character; it is the miserable, pitiful lives that they lead and the utter despair which clouds their every step. Mercy is needed, but only venom is given.

Some influential African-American leaders have even deemed the drug war to be covert genocide. For example, Louis Farrakhan, the leader of the Nation of Islam, argues that "[t]he epidemic of drugs and violence in the black community stems from a calculated attempt by whites to foster black self-destruction."<sup>592</sup> This conspiracy theory has become widely accepted within the African-American community. One survey found that sixty percent of African-Americans believe that the United States government allows or facilitates drug use in

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587. Dennis, *supra* note 315, at 126.

588. Wilson & DiIulio, *supra* note 259, at 21.

589. Jarvik, *supra* note 230, at 387.

590. See Tonry, *supra* note 259, at 78-79 ("Recent crime-control policies treat crime and drug trafficking as if they were only acute problems: apply a deterrence and incapacitation poultice and the ailment will be cured. Inner-city crime and drug abuse and related social pathologies, however, are not acute problems amenable to easy solutions. They are symptoms of chronic social and economic conditions shaping disadvantaged inner-city communities and the life chances of people within them.").

591. See *supra* notes 568-78 and accompanying text (arguing that "poverty" has become synonymous with "drug use").

592. Duke, *supra* note 14, at 591.

African-American communities to harm the residents.<sup>593</sup> This might seem laughable at first—if government officials could not cover up a simple office burglary in 1972, it seems unlikely that decades of clandestine genocidal policies would go undetected. However, given America's history, the drug war's gravely disproportionate effect on minorities, and centuries of blatant and veiled racism by governmental officials, the theory certainly becomes plausible to the disenfranchised minority communities.<sup>594</sup>

More problematic is the current appearance, if not the reality, of official indifference to the plight of minority communities. Law professor Michael Tonry of the University of Minnesota has argued that government officials: (1) knew in the late eighties that drug use was declining among middle- and upper-class Americans; (2) knew that drug use was not declining among urban minorities; (3) knew that the drug war would be waged almost exclusively in minority neighborhoods; and (4) knew that young African-Americans and Hispanics would be disproportionately arrested and imprisoned.<sup>595</sup> "By analogy to criminal law[*'s mens rea* requirement]," concludes Professor Tonry, "the moral responsibility of the architects of contemporary crime con-

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593. Tonry, *supra* note 259, at 79-80. Indeed, many African-Americans subscribe to such a conspiracy theory:

University of Chicago law professor Norval Morris describes a seminar with black maximum security inmates in Stateville Prison in which patterns of race, crime, and punishment were discussed; of twenty-six prisoners present, only three doubted that American drug and crime control policies were a genocidal (their word) assault on blacks by Caucasians. [In their 1991 book,] Thomas and Mary Edsall . . . describe focus groups held in the late 1980s under both Democratic and Republican party auspices; in every session with black participants, the view was expressed that crime and drug control policies are a conscious effort to undermine black communities. A Democratic pollster, Ed Reilly, similarly reported a belief among Northern urban blacks "that there is an organized approach to keep them [blacks] isolated from mainstream America, that the government system is rigged to keep them in poverty." A New York Times/WCBS-TV news poll in 1990 likewise found that 29 percent of blacks (only 5 percent of whites) thought it was true or might be true that the HIV virus was "deliberately created in a laboratory in order to infect black people," that 60 percent (16 percent of whites) believed it was true or might be true that government makes drugs available "in poor black neighborhoods in order to harm black people," and that 77 percent believed government "singles out and investigates black elected officials in order to discredit them."

*Id.* (citation omitted).

594. See Duke, *supra* note 14, at 595 ("Blacks have suffered from bigotry, poverty, poor health, inadequate education, and disadvantage on virtually every measure of well-being in America since the first Africans were brought here in chains. Moreover, racism has been linked to drug prohibition throughout its history in America. The many blacks who suspect racist motivations in everything the white majority does have history on their side.") (citation omitted).

595. Tonry, *supra* note 259, at 51.

trol policies is the same as if their primary goal had been to lock up disproportionate numbers of young blacks."<sup>596</sup>

This author does not subscribe to the genocide-conspiracy theory; government officials have at worst been negligent and obstinate. However, whether or not a conspiracy in fact exists is not the key issue. In the drug war, appearances do matter.<sup>597</sup> The solution to America's racial problems lies not in affirmative action, increased welfare programs, or busing kids to different schools. These merely soften the effects of the underlying causes. It is the cycles of crime, violence, and poverty which have enslaved inner-city minorities, cycles which are wholly perpetuated by black-market forces and unmerciful criminal punishment. Until these cycles are broken, there can be no racial peace in America.

## VI. THE EXPERIMENTAL CITY

*There is as much chance of repealing the Eighteenth Amendment as there is for a humming-bird to fly to the planet Mars with the Washington Monument tied to its tail.*

—Senator Morris Shepard of Texas in 1930<sup>598</sup>

Many Americans never thought that alcohol prohibition would end.<sup>599</sup> However, influential conservatives like Pierre du Pont and John D. Rockefeller began to question its propriety and effectiveness beginning in 1927, noting that alcohol was just as available after the Eighteenth Amendment as before.<sup>600</sup> All Prohibition did, they finally concluded, was escalate crime and violence while filling the coffers of Al Capone and his brethren.<sup>601</sup> In 1933, the fourteen-year experiment in alcohol criminalization was over,<sup>602</sup> Capone was in jail, and the black-market's illicit profits, crime, and violence vanished just as quickly as they had appeared.

"History reminds us that things can and do change, that what seems inconceivable today can seem entirely normal, and even inevitable, a

596. *Id.* at 74.

597. See Duke, *supra* note 14, at 595 ("When a society creates or permits the appearance of racism in its criminal process, it feeds racial hatred and mistrust. That is a major evil of drug prohibition. However it is administered, drug prohibition cannot avoid creating appearances of racism and thus fostering racial division and mistrust.").

598. Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 48.

599. See *id.* ("Until well into the 1920's most Americans regarded Prohibition as a permanent fact of life.").

600. See Branch, *supra* note 224, at 24 ("It took two more years before well-financed repealers began cranking out propaganda studies claiming that we could more than wipe out the federal deficit by taxing alcohol instead of chasing Capone.").

601. Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 48.

602. U.S. CONST. amend. XXI.

few years hence," contends Professor Nadelmann of Princeton University.<sup>603</sup> "So it was with Prohibition, and so it is—and will be—both with drug prohibition and the ever-changing nature of drug use in America."<sup>604</sup> The groundwork has been laid. William F. Buckley,<sup>605</sup> George Schultz,<sup>606</sup> and Milton Friedman<sup>607</sup> represent an initial break from orthodox dogma and a reclamation of intellectual pragmatism. The next step, however, will require more than lively debate and political posturing—legalization proponents will have to demonstrate that national repeal of drug prohibition is both viable and effective.

This author believes that a brave community will have to step forward, offering itself as a test-study in American drug legalization. An initial small-scale approach makes sense given that federalism is still alive and kicking and that citizens want intimate control over the issues that affect them most.<sup>608</sup> If, by chance, this "experimental city" fails, the vast narcotics enforcement machinery would still be intact and ready for further escalation of the drug war. The downside would be minimized, while the upside—replication of a successful program by other urban communities—would be substantial.

The discussion that follows offers some of the necessary ingredients for an effective prototype. The list is certainly not exclusive; success will depend on creativity, perseverance, and a little trial-and-error. However, with a strong community and forward-looking leadership (e.g., Baltimore mayor Kurt Schmoke), there is little doubt that the "experimental city" will become "the shining city on the hill."

(1) *Production and Distribution.* The City should, with the help of the federal government, acquire and dispense the drugs at public health centers. The purity should be strictly regulated and quality control procedures would be established. The price should be set just below black-market cost to ensure the gradual dissipation of the black market without unnecessary increases in consumption. A quantity limit might be imposed on purchases to ensure that only personal (not commercial) supplies could be acquired. Impoverished addicts could get their drugs at no cost. The minimum purchase age should be twenty-one. Anyone caught selling drugs to minors would be subject to mandatory imprisonment *without exception.*

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603. Nadelmann, *Should We Legalize Drugs?*, *supra* note 40, at 48.

604. *Id.*

605. *See The War on Drugs Is Lost*, *supra* note 4, at 35 (editorial of William F. Buckley).

606. *See Scheer*, *supra* note 5, at 49.

607. *See id.*

608. *See* Jacob Sullum, *Mind Alteration*, REASON, July 1994, at 42 ("[W]e live in a federal system; ideally we want local approaches to local problems.").

- (2) *Medical Treatment.* All profits from sales and taxes should go toward free drug abuse treatment in community clinics, modeled after programs such as the Dutch "harm prevention" programs. Treatment would be on demand; no one should be denied assistance or have to wait months for therapy. Needle exchanges could be established to prevent the spread of AIDS. Group treatment/enlightenment approaches (e.g., Alcoholics Anonymous) should be fully funded and staffed. Pregnant mothers at risk would be given the highest priority. Local doctors and medical associations could be asked to provide pro bono assistance to the treatment centers. Addicts who suffer from chronic psychotic or violent behavior should be subject to involuntary civil commitment.
- (3) *Education.* Drug awareness classes staffed with trained health experts should be required in all public schools, focusing on the facts rather than scare tactics. The particular strategies would vary with student age. School educators should be trained to detect addicted or high-risk children, allowing for immediate intervention. Religious and community leaders should be called on to reeducate and resocialize their constituents. Antidrug messages could be extensively broadcasted or published, emphasizing health facts (e.g., intravenous drug use is the number one way to get AIDS) and changing social attitudes (e.g., smoking dope is not "cool"). Public health and community centers could provide free drug-education programs for individuals and groups.
- (4) *Media Regulation.* All broadcast and print advertisements for drugs should be strictly prohibited, including the marketing of cigarettes and alcohol. All broadcast and cable operators should be banned from telecasting local beer and tavern promotions, and all national beer advertisements would have to be edited-out or preempted. Alcohol and tobacco billboards and displays should be removed from public view, including those at sports and cultural events.
- (5) *Law Enforcement.* The police must become the "good guys" once again. Instead of chasing drug pushers and users, law enforcement should focus on the true criminal in society—the violent recidivist. A massive audit of the local police department should be the first step, purging all officers who have been tainted by corruption or who have been associated with police brutality or evidence tampering. The second step should be extensive recruiting of highly skilled officers from other parts of the country. Local high-school seniors and college graduates could also be recruited for a local "police corp," freeing up experienced officers from ad-

ministrative duties and providing a pool of native applicants for future hiring cycles. The third step should be to make the police force the highest paid and best trained in the nation. The final step should be comprehensive community supervision of police priorities, decision making, and misconduct. One possibility could be to require civilian "ride alongs" for all police vehicles. Civilians could serve as neutral observers, documenting (and possibly videotaping) all police confrontations with local citizens. Police violence and corruption simply cannot be tolerated if legalization is to work.

- (6) *Hope*. The final component is somewhat amorphous; it is also the most critical to the experiment's success. Impoverished inner-city drug users are addicted to the short-lived sensation furnished by narcotics: hope. If any drug policy is to succeed, the fleeting emotion provided by drugs must be replaced with tangible opportunities. Any community member who seeks gainful employment must be rewarded. Job training and placement services must be expanded to ensure that anyone who wants work can find it. This will require input and support from community business leaders, local unions, and corporate executives. High-school dropouts should be encouraged to get their degrees; community outreach programs should stress that it is never too late to get an education. Local community colleges should admit anyone with a high-school diploma (or its equivalent), and financial aid should be provided to anyone who needs it. Local universities should be encouraged to recruit (read "reward") hard-working high-school and community college students. In sum, all obstacles in the way of self-advancement for urban residents must be removed.

If the "experimental city" is successful, it could be imitated throughout the nation. Other communities could adopt the successful components amenable to their particular circumstances and ignore or modify the less effective elements. Adoption and adaption would allow our communities to become Justice Brandeis' laboratories of experimentation, trying "novel social and economic experiments without risk to the rest of the country."<sup>609</sup> Eventually, a national plan might be enacted, or perhaps legalization would stop at the bounds of federalism, with California eliminating its black market and Utah continuing the war. However, these issues are for later discussion, by experts far wiser than this author. For now, America must take that first brave

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609. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

step. The initial courage to stand and be heard will be the very measure of this generation.