



1-1-2012

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Steven Wisotsky

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Recommended Citation

Steven Wisotsky, *Not Thinking Like a Lawyer: The Case of Drugs in the Courts*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 651 (1991).
Available at: <http://scholarship.law.nd.edu/ndjlepp/vol5/iss3/4>

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ARTICLES

NOT THINKING LIKE A LAWYER: THE CASE OF DRUGS IN THE COURTS

STEVEN WISOTSKY*

The history of the narcotics legislation in this country reveals the determination of Congress to turn the screw of the criminal machinery — detection, prosecution and punishment — tighter and tighter.

Albernaz v. United States, 450 U.S. 333, 343 (1981)

The world we have created as a result of the level of thinking we have done thus far creates problems that cannot be solved at the same level at which we created them.

Albert Einstein¹

INTRODUCTION

The Supreme Court of the United States and the United States Courts of Appeals have contributed to the generally prevailing confusion, ignorance and prejudice surrounding drug control laws and enforcement policies in this country. Rather than deciding drug law issues based upon the actual effects of drugs and drug control laws, these courts have in the main substituted rhetoric for reason and parroted the “party line” on drugs: That is, there is a need “to combat a national drug problem of epidemic proportion”² and that “the federal government’s efforts to contain and beat back the drug scourge . . . depend importantly on convincing all Americans that drug use

* Professor of Law, Nova Law Center; B.A., 1967, University of Pennsylvania; J.D., 1970, University of Miami; L.L.M., 1971, Yale University.

1. S. WISOTSKY, *BEYOND THE WAR ON DRUGS* 1 (1990) (quoting A. Einstein) [hereinafter *BEYOND THE WAR ON DRUGS*].

2. *United States v. Property Known as 6109 Grubb Road*, 890 F.2d 659, 665 (3rd Cir. 1989) (dissenting opinion). Justice Kennedy used substantially similar language to uphold the Customs Service’s drug testing program in *National Treasury Employees Union v. Von Raab*, 485 U.S. 903 (1988).

is as much a danger to them and to our country as is an external enemy."³

Few opinions combine careful reasoning and attention to evidence or empirical knowledge; we are left instead with drug law decisions based mainly on metaphors of outrage at drug users and sellers. Courts denounce the "degeneracy" of "moral perverts," and call them "vampires" or the "walking dead" engaged in "ugly" and "insidious" drug distribution offenses. Generations of scientific research, scholarly analysis, and the reports of learned commissions have been almost completely ignored. The Supreme Court of the United States has never cited the National Commission on Marijuana and Drug Abuse, the Mayor's Committee on The Marijuana Problem in the City of New York, the Panama Canal Zone Military Investigations, or any of the classic drug policy studies of Canada and Great Britain in opinions concerning drug laws.⁴ Instead, the volumes of the United States Reports and the Federal Reporter⁵ are filled with emotionally charged dicta mimicking the political rhetoric that has dominated drug control in the United States since its inception. Consequently, the courts have reinforced congressional determination to "turn the screw" on criminal procedure and have struck a constitutional balance in favor of law enforcement and against individual

3. *Harmon v. Thornburgh*, 878 F.2d 484, 497 (D.C. Cir. 1989) (Silberman, J. concurring in part and dissenting in part). Judge Silberman thought that the majority had unduly restricted the scope of the Government's drug testing program while personally expressing "grave doubts that the criminal law is the most effective way of dealing with our drug problem" *Id.*

4. Other learned commission reports not referred to include the INDIAN HEMP DRUGS COMMISSION, MARIJUANA, 1893-94; DEPARTMENTAL COMMITTEE ON MORPHINE AND HEROIN ADDICTION (1926) [hereinafter ROLLESTON REPORT]; DRUG ADDICTION: CRIME OR DISEASE?, Interim and Final Reports, Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs (1961); Interdepartmental Committee, DRUG ADDICTION (1961) [hereinafter BRAIN I]; Interdepartmental Committee, DRUG ADDICTION, SECOND REPORT (1965) [hereinafter BRAIN II]; Advisory Committee on Drug Dependence, CANNABIS (1968) [hereinafter THE WOOTON REPORT]; Canadian Commission of Inquiry, THE NON-MEDICAL USE OF DRUGS, INTERIM REPORT (1970) [hereinafter LEDAIN REPORT]; National Research Council of the National Academy of Sciences, AN ANALYSIS OF MARIJUANA POLICY (1982).

5. Overall, the various courts of appeal have performed with greater intellectual rigor than the Supreme Court. *See, e.g.*, *United States v. Moore*, 416 F.2d 1139 (D.C. Cir. 1973); *The National Organization for Reform of Marijuana Laws v. Drug Enforcement Administration*, 559 F.2d 735 (D.C. Cir. 1977); *United States v. Kiffer*, 477 F.2d 349 (2d Cir. 1973).

rights.⁶ Courts have not advanced the cause of intelligent debate about drug policy.

I. THE WAR(S) ON DRUGS

The original war on drugs was fought by U.S. Treasury Agents in the decade following passage of the Harrison Narcotics Act of 1914,⁷ which brought cocaine and opiates under federal control for the first time. A second war was organized around the Marihuana Tax Act of 1937, when Federal Bureau of Narcotics Commissioner Harry Anslinger told Congress the Act was necessary to stop the "marihuana menace" exemplified by teenage gangs who became violent and murderous after smoking marijuana.⁸ A third drug war was officially declared by President Richard Nixon; in a message to Congress he portrayed drug abuse as a "national emergency." Branding it "public enemy number one," he called for a "total offensive."⁹

The drug war that currently has the eye and ear of the American public, or at least the mass media, is the one launched on October 2, 1982, by President Ronald Reagan. In response to Congressional pressure¹⁰ and widespread community support,¹¹ he committed his Administration to a War on Drugs:

The mood towards drugs is changing in this country and the momentum is with us. We are making no excuses for drugs — hard, soft, or otherwise. Drugs are bad and we are going after them.¹²

6. Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 883 (1987) [hereinafter *Crackdown*].

7. Harrison Narcotic Act, ch. 1, 38 Stat. 785 (1914) (current version at 21 U.S.C. §§ 801-969 (1981)). See generally King, *Punishing the Sick and Jailing the Healers*, 62 YALE L.J. 736 (1953).

8. For accounts of the "killer weed" scenario, see Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970), and J. HIMMELSTEIN, *THE STRANGE CAREER OF MARIJUANA: POLITICS AND IDEOLOGY OF DRUG CONTROL IN AMERICA* 49 (1983).

9. E.J. EPSTEIN, *AGENCY OF FEAR* 178 (1977).

10. The House Select Committee on Narcotics Abuse and Control had urged the President to declare war on drugs. H.R. REP. NO. 418, 97th Cong., 2d Sess. pts 1-2, at 50 (1982).

11. Approximately 3,000 parents' groups had organized across the nation under the aegis of the National Federation of Parents for Drug Free Youth. Gonzalez, *The War on Drugs: A Special Report*, PLAYBOY, Apr. 1982, at 134. Pamphlets of Informed Parents of Dade put the number of such groups at nearly 6,000 in the 1985-86 period.

12. President's Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249 (Oct. 2, 1982).

Twelve days later, in a speech at the Department of Justice, the President pledged an "unshakable commitment . . . to do what is necessary to end the drug menace."¹³

There ensued the greatest build-up and mobilization of law enforcement resources in American history to combat drugs: the CIA, the FBI, DEA, Customs, the State Department, U.S. AID, the Coast Guard, the U.S. Navy, NASA and other services were drawn together and deployed in a futile effort to stem the tide of drugs imported into the U.S. Despite Gramm Rudman, the drug enforcement budget rose by a factor of ten-fold, from about \$1.2 billion in 1981 to roughly 10 billion in 1990.¹⁴

Congress, for its part, not only supplied the funds for this war but repealed many of the procedural protections previously guaranteed to those accused of crime, such as a presumption in favor of pretrial release on bail.¹⁵ It also increased severely the penalties for most drug offenses, moving from long maximum prison terms to severe mandatory prison terms, and then to the death penalty for certain persons convicted as drug "kingpins" under the Continuing Criminal Enterprise Statute.¹⁶

Yet by the close of the decade, after numerous escalations, domestic and foreign, and billions of dollars in expenditures, the drug problem was perceived by the public, according to a Gallup poll undertaken at the request of drug "czar" William Bennett, as having gotten out of control. The public perceived drugs as the nation's number one problem, so bad as to justify curtailment of personal freedoms.¹⁷

In response to this perception of crisis, President Bush, having previously pledged to stop cocaine, "the scourge of this Hemisphere," declared a further escalation in the War on Drugs. In a televised address to the nation on September 5, 1989, he announced the impending dispatch of military equipment to Colombia to support a less rhetorical war against the

13. 18 WEEKLY COMP. PRES. DOC. 1311, 1314 (Oct. 14, 1982).

14. N.Y. Times, April 22, 1990, at 6E (city ed.).

15. The Comprehensive Crime Control Act of 1984 created a presumption in favor of pretrial detention for any person accused of a ten-year drug felony. 18 U.S.C. § 3141 (1990).

16. 21 U.S.C. § 848 (1989).

17. A New York Times/CBS poll based on telephone interviews conducted September 6-8, 1989 produced similar results. Sixty-four percent cited drugs as the most important problem facing the nation—triple the percentage of July, 1989. Sixty-one percent favored drug testing of workers generally. N.Y. Times, Sept. 12, 1989, at B8, col. 1.

Cocaine Cartels of Medellin and Cali. Despite these aggressive escalations in the "War on Drugs" at home and abroad, drug suppliers enjoyed a raging bull market throughout the 1980's. Cocaine flooded into the country in multi-ton cargo shipments. Federal authorities seized 198,000 pounds in 1988, more than the total supply to the U.S. black market in 1981.¹⁸ Marijuana, with imports pinched off by Coast Guard interdiction of "mother ships" in the Caribbean, became a major agricultural venture in the United States itself.¹⁹

The media incessantly reported the permeability of U.S. borders to cocaine, marijuana and heroin smugglers. The rise of drug-based urban terrorism compounded the situation. There were reports of burglaries and robberies committed by addicts in search of the next fix; drive-by shootings in the struggle for control of urban turf; and warfare between competing drug gangs armed with automatic weapons. Washington, D.C. led the list of cities in per capita "drug-related" homicides. The violence affected struggling democratic governments in Latin America, as Colombia and Peru teetered on the edge of drug-financed civil war, and at home, media accounts noted the widespread drug-money corruption in big-city police departments in Miami, New York, Chicago, and Los Angeles.

Despite the severity of the social and political problems engendered by the \$100 billion black market in illegal drugs — marijuana, cocaine, and heroin — never once did any branch of the Government seriously consider the soundness of the premises of the "War on Drugs." No one considered whether the "War on Drugs" "cure" may be worse than the drug abuse "disease." The only questions seriously debated have been in what way and to what extent should the existing war expand: whether to spend 10 or 12 billion dollars, whether to shoot suspected drug smuggling planes from the sky, whether to impose the death penalty upon drug traffickers who did not kill, whether to assassinate foreign traffickers beyond the reach of

18. See generally CONGRESSIONAL RESEARCH SERVICE, DRUG ABUSE PREVENTION AND CONTROL: BUDGET AUTHORITY FOR FEDERAL PROGRAMS, FY 1986-FY 1988 (Feb. 27, 1987):

Despite a doubling of Federal expenditures on interdiction over the past five years, the quantity of drugs smuggled into the United States is greater than ever There is no clear correlation between the level of expenditures or effort devoted to interdiction and the long-term availability of illegally imported drugs in the domestic market.

See also Wisotsky, *Exposing the War on Cocaine*, 1983 WIS. L. REV. 1305.

19. BEYOND THE WAR ON DRUGS, *supra* note 1, at xix.

the U.S. justice system, whether to fully deploy military forces in drug law enforcement operations, etc.

The reason for the single-minded intensity of the crack-down mentality is simple — “drugs are bad,” in the words of President Reagan, and “we are going after them.” Although a catchy political sound-byte, “drugs are bad,” is far from being a factual proposition. Instead it is an incoherent claim, as no meaningful statement about the effects of drugs (or alcohol) can be made without considering several fundamental variables, such as the particular drug, the dosage, frequency of use (habitual, occasional), the purpose of use (therapeutic, recreational), and the physical, personal and social circumstances of the user.

That “drugs are bad” falsely presupposes there is a bona fide distinction on health and welfare grounds between socially approved and outlawed drugs. Some Schedule I drugs, defined as drugs with high potential for abuse and no accepted use in medical practice, were in fact once accepted in medicinal use and were later banned on political and legal grounds.²⁰ Thus, marijuana was listed in the U.S. Pharmacopeia as a recognized medicine from 1850-1942; heroin was in use until 1924.²¹ Conversely, socially accepted drugs, such as alcohol and tobacco are protected today by mass consumer denial. Alcohol and tobacco are not called drugs in ordinary conversation, nor are they considered controlled substances under the law. Yet the human destruction from these two drugs is enormous. Reports of the Surgeon General consistently attribute about 1,000 deaths per day → 360,000 annual deaths — to lung cancer, cardiovascular disease and other diseases caused by cigarette smoking.²² The number of alcoholics or “problem drinkers” in the United States is an estimated 10-12 million and the alcohol death toll runs around 50,000-200,000 divided roughly equally between direct morbidity, (e.g. cirrhosis of the liver) and traumatic deaths (as in automobile and industrial accidents) in which drunkenness is thought to be the cause.²³

20. For the listing of schedules of controlled substances, see 21 U.S.C. § 821 (a)-(d) (1989).

21. T. SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS AND PUSHERS 183 (1974).

22. BEYOND THE WAR ON DRUGS, *supra* note 1, at 186.

23. *Id.* at 187. Directly comparable data for illegal drugs is difficult to come by because of the crudeness of the Government's data collection system, the failure of the Government to fund long-term research into the extent and effects of long-term non-abusive illegal drug use, and the natural reluctance of people to volunteer information of criminal conduct. The two major techniques used by the government to track illicit drug use are the

The minimal legal controls placed on alcohol and tobacco, on the one hand, and the total prohibition on the non-medical use of marijuana, cocaine and heroin, on the other, cannot be justified by any rational assessment of the known physical or psychological effects of these drugs on the consumer or society. The literature of science and of drug policy reveals compelling evidence of the vast gulf between law and medicine in the legal status of drugs.²⁴ The point of this article is that the judiciary, like the political branches, has to a significant degree²⁵ ignored the evidence and the authorities, marching to the drum beat of the war on drugs.

II. THE JUDICIAL ROLE IN DRUG CONTROL

Ignorance and irrational fears have driven the drug control system from its inception with enactment of the Harrison Narcotics Act of 1914. As an abstract proposition, the irrationality of the drug control system is not especially remarkable; irrationality in the political arena is not after all surprising or unexpected. What is remarkable is the extent to which the irrationality is shared by the judicial branch, the branch institutionally committed to knowledge and reason. Even tough-minded judges at the highest levels of the federal judicial system, such as William Douglas and Hugo Black, have generally followed the crowd in this domain of drugs, embracing uncritically what J.S. Mill called "the tyranny of majority opinion."²⁶

Judges who have been called upon to answer drug law policy questions arising as issues of statutory interpretation or constitutional challenge have abandoned the method of fact-based, reasoned elaboration that is the essence of thinking like a lawyer or deciding like a judge.²⁷ In place of careful analysis,

National Institute of Drug Abuse Household Survey and the Drug Abuse Warning Network. See *infra* at nn. 77-78.

24. One author argues quite powerfully that the differential treatment of the legal and illegal drugs arises from tradition and culture—particularly the deep-rooted psycho-social need to identify some substances as taboo—rather than any inherent properties of the drugs themselves. T. Szasz, *supra* note 21, at 18-25.

25. There are of course voices of reason on the federal bench. But as in the rest of society, they appear to be a minority. For one recent example of the dialectical tension between acceptance and questioning of the presuppositions of the war on drugs, see the majority opinion of Justice Kennedy and the dissenting opinion of Justice Scalia in *National Treasury Employees Union v. Von Raab*, 485 U.S. 903 (1988).

26. J.S. MILL, *ON LIBERTY* 5 (1940).

27. See K. LLEWELYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1961); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

judges have attempted to justify drug law decisions with misinformation or inflammatory rhetoric.

Indeed, there is often little difference between what is said by politicians and what is written by judges. Compare, for example, the September 12, 1989 televised speech by President Bush to the nation's schoolchildren.

Drugs have no conscience They just murder people. Young and old, good and bad, innocent and guilty — it doesn't matter.²⁸

with the drug dealer as "vampire" image of the Fifth Circuit or the opinion of the Chief Judge of the Southern District of Florida, who condemned drug dealers as "merchants of misery, destruction and death" whose greed has wrought "hideous evil" and "unimaginable sorrow" upon the nation.²⁹ The result of the comparison is that there is no difference between the executive and judicial branches on this drug war.

Even where the rhetoric is not so inflammatory, judges have nevertheless demonstrated that they share the fears and prejudices of the larger society. Cases reviewed here do not show a spirit of inquiry into facts but instead argument rooted in a priori assumptions. The opinions generally display indifference to facts; empiricism bows to orthodoxy. The opinions do not acknowledge gaps in information generally or in the record of the particular case under review; nor distinguish between fact and supposition; nor cite scientific studies on the properties of drugs or the economic effects of drug enforcement; nor differentiate among illegal drugs or make relevant comparisons to legal ones; nor acknowledge the secondary costs of drug enforcement arising from the black market "crime tariff";³⁰ nor fairly balance or otherwise attend to competing values of individual liberty and privacy. The opinions generally do not display the qualities of mind that constitute the critical judgment to be expected of judges.³¹ Instead, the operative premise is that "drugs are bad," so bad that almost any law or law enforcement measure is validated.

28. *Bush Gives Anti-Drug Talk to Kids*, Miami Herald, Sept. 13, 1989, at 1A.

29. *United States v. Miranda*, 442 F. Supp. 786, 795 (S.D. Fla. 1977).

30. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 177 (1969).

31. See R. ALDISERT, *LOGIC FOR LAWYERS* (1989); W. READ, *LEGAL THINKING* (1986). See also M. ROMBAUER, *LEGAL PROBLEM SOLVING* (1973).

III. DRUG IMAGERY IN THE CASES

There are two primary images in the cases on drugs. The original and still dominant theme is addiction as enslavement by drugs.³² This imagery springs from a dark palette of words and phrases in the cases discussed below: "misery, destruction, and death"; "degradation"; "debasement"; "shameful"; "depravity"; "degeneracy"; "evil." The second major theme is drug trafficking as an "insidious crime" that reinforces the subjugation of the addict, causing crime and violence and inflicting "unimaginable sorrow" on society.

The earliest drug cases reached the Supreme Court not long after drug control (historically a matter left to the police power of the States,) was federalized by the Harrison Narcotics Act of 1914. The Harrison Act made it an offense to dispense heroin, cocaine and other narcotics except on forms issued by the Commissioner of Internal Revenue. The prohibition, however, did not apply to a physician distributing drugs to a patient in the course of his professional practice. In a series of cases interpreting the Act and challenging its constitutional validity, the Supreme Court demonstrated its own "drugs-are-bad" philosophy.

In *United States v. Doremus*,³³ the Supreme Court reversed the dismissal of an indictment against a physician for violating Section 2 of the Harrison Act. The indictment alleged that Doremus unlawfully distributed to a man named Ameris 500 one-sixth grain tablets of heroin, without using the prescribed forms, and with knowledge that Ameris was addicted to the drug and was a "dope fiend." The Court condemned the doctor for "gratifying his (Ameris') appetite for the drug as a habitual user thereof"³⁴ without considering the arguments for maintaining an addict on drugs under medical supervision — that it "may . . . become justifiable in certain cases to order regularly the minimum dose which has been found necessary, either in order to avoid serious withdrawal symptoms, or to

32. The Harrison Act was motivated in substantial part by the large addict population that developed around the easy access in the U.S. to potent patent medicines. D. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL* (1973); J. PHILLIPS & R. WYNNE, *COCAINE: THE MYSTIQUE AND THE REALITY* 78-80 (1980). In both the U.S. and Europe widespread "fear and loathing" of cocaine developed not long after Freud's popularization of the drug in the 1880s. R. BYCK, *THE COCAINE PAPERS OF SIGMUND FREUD* (1974).

33. 249 U.S. 86 (1919).

34. *Id.* at 90.

keep the patient in a condition in which he can lead a useful life."³⁵

The *Doremus* indictment was brought as part of the Federal Government's sustained campaign to put an end to the practice of addiction maintenance, a goal that it largely achieved by the mid-1920s. In the attack on addiction maintenance, approximately 25,000 physicians were indicted, and over 3,000 actually went to prison.³⁶ The hostile attitude toward drug dependence underlying that campaign comes into sharper relief in *United States v. Behrman*,³⁷ where a doctor prescribed take-home drugs to an addict named King as treatment for withdrawal and provided no supervision for its use. The prescription was lawful if regarded as being in the course of the doctor's professional practice. The district court dismissed the indictment, as it did not allege a lack of good faith on the part of the doctor, and held that the statute did not prohibit prescribing maintenance doses to addicts.

Noting the legislative purpose "to confine the distribution of these drugs to the regular and lawful course of professional practice,"³⁸ the Supreme Court reversed. The Court concluded that such "so-called prescriptions could only result in the gratification of a diseased appetite for these pernicious drugs" or an unlawful diversion of them to others by the addict, restrained only by an addict's "weakened and perverted will."³⁹

The quantities of drugs involved in *Behrman* as in *Doremus*, permitted an inference that the prescriptions were being re-sold on the black market. King had obtained 150 grains of her-

35. Ministry of Health, Departmental Committee on Morphine and Heroin Addiction, *Report* at 18, cited in A. TREBACH, *THE HEROIN SOLUTION* 85 (1982). This report, also known as the Rolleston Report, was not issued until 1926, and obviously could not have been cited by the Supreme Court in these early cases. However, the medical practices which the report endorses did exist at the time; Trebach states that the Rolleston report "codified the best of the common law of medical practice." *Id.* at 90. There was no good reason for the Supreme Court simply to ignore popular and professional accounts supporting the legitimacy and efficacy of addiction maintenance.

36. King, *supra* note 7.

37. 258 U.S. 280 (1921).

38. *Id.* at 287.

39. *Id.* at 289. The district court had written earlier in a similar vein: "The so-called 'patient' in this case was suffering from no disease except drug addiction . . . [I]t is a well known fact, of which this court has taken notice, that drug addicts as a class are persons weakened materially in their sense of responsibility and in their power of will. . . ." *Id.* at 281.

That generalization is certainly not a fact so well known as to dispense with the need for proof and justify the taking of judicial notice.

oin, 360 grains of morphine, and 210 grains of cocaine, which the Court pointed out was equivalent to three thousand ordinary doses. Reinstatement of the indictment here might have been defended in light of the abuse of the professional privilege. What is remarkable is the contempt shown by the Court for the addict, as though he were something less than human — possessed of a “diseased appetite” and a “perverted will.” By comparison, it is difficult to imagine the Supreme Court of the United States using similar language of condemnation in determining whether other conduct constitutes murder, rape or other crime.⁴⁰

For the next several decades, the Supreme Court made no further pronouncements on drugs. A few cases did arise in the lower federal courts, where judges further developed the theme of degradation and debasement. For example, in *Menna v. Menna*,⁴¹ a wife alleged in a divorce suit grounds of “moral turpitude” on the part of her husband for being twice convicted of Harrison Narcotics Act violations. The court agreed that moral turpitude was established by the violations, even though the Harrison Act was a revenue statute administered by the Department of the Treasury.

The court in *Menna* stated that “it has become a matter of general knowledge that the habitual use of opium produces crime, violence, brutality and insanity.”⁴² The Court even went so far as to adduce “proof” that drugs are criminogenic, citing the Narcotic Bureau’s Report for 1937 that 63% of the drug law violators arrested in that year had previous criminal records. This “proof” completely dispensed with an elementary question of cause and effect: were the individuals made criminals as a result of using drugs, or were they using drugs because they were criminals?

The opinion presumes to answer the defendant’s personal culpability in the divorce suit by reference to the wrongdoing of others, a form of guilt by association.⁴³ Even the guilt by

40. Justices Holmes, McReynolds and Brandeis dissented. A few years later in *Linder v. United States*, 268 U.S. 5 (1925), a doctor was indicted for prescribing one tablet of morphine and three tablets of cocaine to a woman he knew to be addicted to these drugs in order to satisfy her craving. The Supreme Court viewed the case as a conviction for a prescription with “the sole purpose of relieving conditions incident to addiction and keeping [the patient] comfortable.” It was not willing to find that Dr. Linder had “necessarily transcended” the limits of professional practice. *Id.* at 19.

41. 102 F.2d 617 (D.C. Cir. 1939).

42. *Id.* at 618.

43. Guilt by association is done in later cases, such as *Carmona v. Ward*, *infra* note 79, and *Terrebone v. Butler*, *infra* note 90.

association is deeply flawed, the moral turpitude simply assumed from the "common knowledge" that opium is harmful. That the appellant therefore committed "wicked and shameful acts" is not, in the court's view, truly open to question or in need of proof:

There can be . . . no question of doubt in anyone's mind that the peddler of these dangerous drugs is a menace to society. Nor can there be the slightest doubt that the crime which it is the purpose of the statute to punish is one involving moral turpitude.

An act which creates human misery, corruption, and moral ruin in the lives of individuals is necessarily so base and shameful as to leave the offender not wanting in the depravity which the words "moral turpitude" imply.⁴⁴

This is extravagant talk for a court that needed only to decide whether the plaintiff in a divorce action had grounds for divorce by reason of the defendant having been convicted of two Harrison Act violations. The court could have rested its decision on the ground that a felony conviction, by definition, demonstrates moral turpitude. Perhaps the court could have characterized the conviction as a rebuttable presumption of moral turpitude, and examined the statute to see whether the Harrison Act violations were offenses *malum in se*. The court did not consider questions of strict liability or criminal intent.

More importantly, the court failed to examine the facts underlying the convictions. Did the appellant's particular criminal acts cause actual "misery, corruption and moral ruin" to some identifiable victim(s)? Did his acts create a risk of such harm, and if so, how great was that risk? The court ignored these obvious questions in its zeal to condemn a "base and shameless" "menace to society".⁴⁵

44. *Id.*

45. A later case similarly cites "the common knowledge of society" that addicts are indecent people:

The violation of the narcotic drug laws . . . is a violation of a rule which is accepted by all decent people as involving public policy and morals in the United States. The evils which the illicit narcotic traffic brings in its wake are *all well known* and they are rightfully the subject of public abhorrence In my opinion it is clearly demonstrated that either class of offense involves moral turpitude.

It is *common knowledge* that narcotics addicts must, and will in order to obtain a supply of the drug to which they are addicted, lie, cheat or steal. Constant deception and subterfuge are necessary, if an addict is to remain at liberty and to enjoy the dubious boon of his addiction. *United States v. Cisneros*, 191 F. Supp. 924 (D. Cal. 1961) (emphasis supplied).

In *Burke v. Kansas State Osteopathic Association, Inc.*,⁴⁶ the court held that Kansas law did not confer upon osteopaths, as distinct from physicians, the right to administer narcotic drugs:

All legislation respecting the use or any limitation on the use of narcotics, is based upon the established fact that narcotic drugs are dangerous. Not that they are poisons within themselves, but are worse than poisons. Their excessive use destroys will power, ambition, self-respect, and in the end, mentality. They make men and women moral perverts. Their influence upon society is most degrading⁴⁷

In reaching this decision, the court quoted from pop articles warning about the "drug curse," "the evils that come from drugs" and the like. The "established fact" that narcotic drugs are "worse than poisons" which make people "moral perverts" must rank among the most outrageous of anti-drug assertions in the judicial literature. Even the statement that excessive use destroys "mentality" goes beyond the pale of anything resembling reasoned legal discourse. Such language resembles a kind of hellfire-and-brimstone sermon pitting the righteous (virtuous lawmakers) against the wicked (drug users).

As in the *Menna* case, the judicial denunciations are gratuitous; the court had ample grounds on which to base its decision in the definition of osteopathy as being "fundamentally different" in its natural orientation from the practice of medicine involving the administration of drugs. Alternatively, the court might have confined its ground of decision to a simple determination of the legislative intent underlying the Kansas law.

Both *Menna* and *Burke* display an inexcusable ignorance about the effects of drugs and the nature of addiction. Unlike the early Supreme Court cases on Harrison Act issues, the courts of appeals had available to them, in addition to domestic scientific literature, the 1926 Rolleston Committee Report, the landmark study by a distinguished group of British physicians acknowledging the existence of stable addicts and approving the practice of addiction maintenance. Although the issues before the courts in *Menna* and *Burke* were different, those decisions surely could have been improved by consideration of that medical perspective. Rather than speaking in metaphors of "depravity" and "poisons," those courts could have learned that addiction may be considered a disease. The Report defined "addict" as "a person who, not requiring the continued

46. 111 F.2d 250 (10th Cir. 1940).

47. *Id.* at 256.

use of a drug for the relief of symptoms of organic disease, has acquired, as a result of repeated administration, an overpowering desire for its continuance, and in whom withdrawal of the drug leads to definite symptoms of mental or physical distress or disorder."⁴⁸ Rolleston's reluctant endorsement of addiction maintenance, as a last resort, need not be accepted in order to view the addict as a person rather than as a "moral pervert" lacking "mentality." One of the ironies of these cases, containing some of the hottest anti-drug rhetoric in the reporter system, is that they were decided at a time (1939-40) when the black market in illicit drugs was at its nadir. Apparently, the fears survived an earlier societal scare.

Drug-related issues resurfaced in the Supreme Court in the 1960s. The first, *Robinson v. California*,⁴⁹ presented the constitutional validity of a California statute that made it a criminal offense for a person to be addicted to the use of narcotics. The trial court had instructed the jury that the appellant could be convicted upon a finding of his "status" or "chronic condition" as "addicted to the use of narcotics."⁵⁰ In the Supreme Court's analysis, the statute punished a person not for the use of narcotics, nor for selling, buying or possession of narcotics in California, but for being an addict — for status or condition without proof of a common law *actus reus*. The *Robinson* Court struck the statute as cruel and unusual punishment under the Eighth Amendment.

But although the *Robinson* decision may appear to be enlightened, the Court hastened to add, lest it be thought soft on drugs, "[W]e are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of the government."⁵¹ The "evils" were apparently too obvious to specify. In his concurring opinion, Justice Douglas did not shy away from offering a fantastic bill of particulars on the evils of heroin:

"To be a confirmed 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

48. A. TREBACH, *supra* note 35, at 92.

49. 370 U.S. 660 (1962).

50. *Id.* at 662.

51. *Id.* at 667.

blood decreases; bronchitis and tuberculosis develop. Good traits of character disappear and bad ones emerge. 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 plague of being one of the walking dead.”⁵²

Justice Douglas was known for his rebellious streak and his sense of humor, and the purple passage quoted above may have been intended as a parody. If taken literally, it is absurd, the print equivalent of the 1989 TV commercial showing a frying egg as “your brain on drugs.” Even if there were a clinical case to exemplify the foregoing description, it would bear the same relationship to a typical heroin user as a sterno-drinking skid row bum bears to a typical social drinker.

Douglas’ opinion is perhaps unique insofar as it exculpates rather than condemns the drug user. Still, his absurdly livid and inaccurate account of heroin addiction hardly qualifies as an exemplar of lawyer-like fact-finding and analysis. Where are his sources? He cites only an article in a legal newspaper, completely ignoring the extensive body of studies about heroin addiction that had been produced in the United States and Britain. In fact, Douglas had available to him not only the Rolleston Report, but also the first Brain Report, which had been commissioned to review the Rolleston recommendations.

Brain I specifically endorsed the recommendations of the Rolleston Committee on addiction maintenance. The Committee confirmed the existence of “stabilized addicts” based upon “careful scrutiny of the histories of more than a hundred persons classified as addicts.” The Brain Committee concluded that “many of them who have been taking small and regular doses for years show little evidence of tolerance and are often leading reasonably satisfactory lives.”⁵³ This should not surprise those knowledgeable about the physiological effects of heroin: “putting aside the problem of addiction, the chemical heroin seems almost a neutral or benign substance. Taken in stable, moderate doses, it does not seem to cause organic injury, as does alcoholism over time.” Longevity and good

52. *Id.* at 672 (quoting N.Y.L.J., June 8, 1960 at 4, col. 2).

53. A. TREBACH, *supra* note 35, at 104.

overall health are not uncommon in addicts with access to sterile needles and uncontaminated heroin.⁵⁴

Justice Douglas did not have the benefit of the Zinberg and Trebach books when he wrote *Robinson*; he did have access to Rolleston, Brain I, the Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs, *Drug Addiction: Crime or Disease? Interim and Final Reports*, 1961. Also, an extensive body of research in medical journals was available to refute the ridiculous "walking dead" metaphor. The Justice apparently did not want hard data and informed policy analysis; instead he replaced analysis with metaphor, which better suited his goal. The nature of the non-medical source he cited, the *New York Law Journal*, a legal newspaper, indicates that he searched for the most grotesque account he could find. Douglas was able to succeed in this gross distortion of reality on the relatively safe assumption that no one would challenge it. After all, it was an "established fact" that narcotics are "worse than poisons." Given that social reality, there was no need for Justice Douglas to quote from the extensive literature of heroin addiction and treatment.

The extremism of the "walking dead" and the "worse-than-poisons" rhetoric is brought into sharper relief by comparison with the rarely encountered analytical and temperate approach of the court of appeals in *United States v. Moore*.⁵⁵ The court there rejected the defendant's argument that his drug addiction was a defense to drug possession charges, observing that before becoming addicted, a person's heroin use is a "freely willed illegal act."⁵⁶ After becoming addicted, an addict cannot demand exculpation on the ground that he cannot stop his drug taking because he "retains some ability to extricate himself from his addiction by ceasing to take drugs," depending upon his "strength of character."⁵⁷

The metaphysics of free will to one side, the court's insistence in *Moore* on the legal responsibility of the addict is consistent with the premise of rehabilitation: the addict must take

54. A. TREBACH, *supra* note 35, at 60. Norman Zinberg's research in *DRUG, SET AND SETTING* (1984) confirms, in the United States, that a great many heroin users have developed stable, non-addictive patterns of occasional use or "chipping," over long periods of time. Many users and even addicts are employed and have stable family relationships. Compare J. KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* (1983), for an argument against legalization or even addiction maintenance.

55. 486 F.2d 1139 (D.C. Cir. 1973).

56. *Id.* at 1145.

57. *Id.* at 1151.

responsibility for becoming and staying drug free. That it has a basis in reality is demonstrated by the fact that there are millions of *former* addicts — not only of heroin but of the similarly addictive drug nicotine⁵⁸ — who have mustered up the necessary self control. This is a far distance from being one of the “walking dead” or a “moral pervert.”

The concurring opinion in *Moore* by Judge Leventhal is one of the best informed and most intelligent opinions on drug policy ever published by a judge, speaking in a nuanced way of the respective roles of law enforcement and medicine in responding to drug addiction. There are yet other concurring opinions in this unique case.⁵⁹ None of them necessarily captures the elusive truth(s) about drugs and drug addiction. All of the opinions command respect as judicious and judicial. Several opinions canvass and consult the Prettyman Commission, the National Commission on Marihuana and Drug Abuse, and many other authorities on drug issues. This intelligence at work is a far cry from the rantings of the “walking dead” or “worse than poisons” language that in general dominates judicial discussions of drug issues in the cases. Unfortunately, there are few other examples of critical thought by federal judges on the drug issue.

Turner v. United States,⁶⁰ introduced a new, more modern theme into the Supreme Court’s cases on drugs — the “evils of drug trafficking” confused with and misstated as the “evils of drugs.” In this domain, the Court failed to recognize the destructive power of drug money, as distinguished from the drugs themselves. Turner was charged *inter alia* with two counts of receiving and transporting illegally imported heroin and cocaine. The Supreme Court reviewed the case with respect to the validity of the statutory presumption that the drugs in question were illegally imported, as charged in two counts of the indictment.

Justice Black, joined by Justice Douglas, dissented vigorously from the portion of the opinion upholding Turner’s convictions on the other counts. The strongly worded dissent attacked the majority, listing eight separate respects in which

58. REPORT OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION (1988).

59. In dissent, Judge Wright tilted toward the drug-taker-as-victim approach of Justice Douglas: “The confirmed addict is in fact a worried, troubled, harried individual. Misery, alienation and despair, rather than pleasure and ecstasy, are the key features of his existence.” 486 F.2d at 1234. His opinion is marked by compassion rather than condemnation.

60. 396 U.S. 398 (1969).

the decision operates "to undercut and destroy" the constitutional rights of the accused.⁶¹ However, the dissenters ironically provided a rationale for the very crackdown they denounced by assuming, without citation or analysis, that "drugs are bad":

Commercial traffic in deadly mind-soul-and-body-destroying drugs is beyond a doubt one of the greatest evils of our time. It cripples intellects, dwarfs bodies, paralyzes the progress of a substantial segment of our society, and frequently makes hopeless and sometimes violent and murderous criminals of persons of all ages who become its victims. Such consequences call for the most vigorous laws to suppress the traffic as well as the most powerful efforts to put these vigorous laws into effect. *Unfortunately, the grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden short-cuts that might suppress and blot out more quickly the unpopular and dangerous conduct.*⁶²

Active verbs in Justice Black's opinion in *Turner* — "cripples," "dwarfs," "paralyzes," "makes" — smack of factuality. The Justice does not trouble to cite any authority for those claims. Rather, he returns to the theme that "drugs are bad," and relies on what the public "knows" and fears about drugs. This is bad medicine and bad law.

The Justice does not trouble to identify the drugs condemned as mind-body-and-soul destroyers in the opinion. Cocaine is in some respects more toxic than heroin, having a narrower range of variation between an effective dose and a lethal dose.⁶³ Although classified by Title 21 as a Schedule II narcotic — having a high potential for abuse and an accepted use in medical practice in the United States — it is actually a stimulant of the central nervous system similar in its action to amphetamines. It has a legitimate medical use as a topical anesthetic in ear, nose and throat surgery. In 1985, 1,223 people died from illicit cocaine use as reported by Medical Examiners from most major cities (excluding New York); an additional 20,383 persons visited hospital emergency rooms in distress from cocaine.⁶⁴ These casualties must be assessed in the con-

61. *Id.* at 425.

62. *Id.* at 426 (emphasis supplied).

63. See L. GRINSPOON & J. BAKALAR, COCAINE: A DRUG AND ITS SOCIAL EVOLUTION (1976).

64. NATIONAL NARCOTICS INTELLIGENCE CONSUMERS COMMITTEE

text of the consumption by 12.2 million people who reported using cocaine that year.⁶⁵ The fear of cocaine looms larger than its actual threat to life and limb, primarily because celebrity overdose deaths such as those of John Belushi, David Kennedy, and Len Bias, proved to be so dramatic and shocking.

Justice Black's claims in *Turner* about cocaine were not true then and remain untrue today even though there is significantly more mortality. Therefore, it is false to say that cocaine in general "cripples intellects" and "dwarfs bodies" as stated in *Turner*. Longer-term physical and mental problems occur, often dramatically, but in unknown proportion to the total population of users.⁶⁶ Clearly, Justice Black was not concerned with empiricism but was engaged in a metaphorical exercise in asserting that drugs cripple minds, dwarf bodies or turn people into "violent and murderous criminals." The use of the anthropomorphic "they" in speaking of drugs is especially revealing: it attributes to "drugs" control over the individual. That conclusion quite falsely assumes that there is a predictable *behavioral* as opposed to physical effect from the taking of a drug.⁶⁷ Medicine can reliably predict that a person who ingests cocaine will experience an elevated heart rate and other physiological changes; no one can predict whether that person will do anything as a result of the drug.

Justice Black's claims not only lack any basis in evidence, they also defy common sense and experience. "Common

REPORT 9 (1989). The comparable figures for 1988 were 2,334 deaths out of some 8.2 million people who had used it that year, and 42,383 hospital emergency room visits.

65. The National Institute for Drug Abuse, *National Household Survey* (1985) data also reported 5.8 million having used cocaine in the 30 days preceding the household survey and 22 million with lifetime experience with the drug. The reliability of such self-reporting measures is called into serious question by NIDA's 1988 National Household Survey. In 1988, reported lifetime experience had declined to 21.2 million; did the other 800,000 all die in three years, or simply deny their criminality in the face of increasing public hostility and punitive laws?

A second doubt arises from the fact that the thirty-day use figure declined by half to 2.9 million, and the annual use figure to 8.2 million. Despite these large reported drops in the number of users, the mortality rose to 2,234 and the hospital emergency room visits rose to 42,512. It is possible that many fewer users were hard-core addicts, especially crack smokers, running much higher risks of overdose and death. Skepticism is warranted, however.

66. The author estimates that the addiction potential for cocaine is about the same for alcohol—about 20% of the population of consumers. BEYOND THE WAR ON DRUGS, *supra* note 1, at 17-30.

67. *Id.* at 17-18.

knowledge" of drinking suggests that alcohol affects people in many different ways. Alcohol "makes" some people aggressive and violent, some cheerful and gregarious, some passive and drowsy, and some simply sick and non-functional. So, too, can cocaine or any other drug affecting the central nervous system vary in its effects. Further, the incidence and prevalence of harms to the user are fundamentally distinct from the "violent and murderous" trade that seeks to reap the risk premium offered by black market sales. But this distinction is never acknowledged by the dissenters in *Turner*; who simply assert that the drug traffic is "one of the greatest evils of our time."⁶⁸ If this is true, it is the result of the black market crime tariff and not the psycho-pharmacological properties of drugs themselves.

The same confusion of drug and drug traffic appeared again in *United States v. Mendenhall*,⁶⁹ one of a series of cases to reach the Court arising from the use of the airport courier profile.⁷⁰ Mendenhall was stopped and questioned during a search and was told that she had a right to refuse to be searched. Because she consented, the Court held that the two bags containing heroin that were found on her person did not constitute a Fourth Amendment violation.

Justice Powell's concurring opinion, joined by the Chief Justice and Justice Blackmun, once again shows the power of the single, simple yet compelling idea that "drugs are bad":

The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized by sophisti-

68. A similar assumption about the relation between drugs and violence appears in *United States v. Holland*, 810 F.2d 1215 (D.C. Cir. 1987), where the court upheld the constitutional validity of a statute doubling the punishment for drug distribution within one thousand feet of a public or private elementary or secondary school. In moderate language, the court held that the statute was "rationally structured" to effectuate its purpose of "threatening pushers who approach our children near school with stiff penalties." *Id.* at 1219. The court did assume, however, without record support or citation, that such transactions "contribute directly to the violent and dangerous criminal milieu Congress sought to eliminate in the proximity of schools." *Id.* at 1219.

69. 446 U.S. 544 (1979).

70. See also *Florida v. Royer*, 448 U.S. 438 (1980); *United States v. Sokolow*, 490 U.S. 1 (1989).

cated criminal syndicates. The profits are enormous. . . .⁷¹

Like Justice Black in *Turner*, Justice Powell assumes the worst about the psychopharmacology of drugs, without troubling to check his opinion against medical or pharmacological authorities. He repeatedly used the word "deadly," for example. But as applied to marijuana, this clearly is wrong. Not a single death from the pharmacological action of marijuana has ever been confirmed.

DEA Chief Administrative Law Judge Frances Young ruled in 1988 that marijuana is "far safer than many foods we commonly consume" and that its medical benefits are "clear beyond any question."⁷² Marijuana's therapeutic applications include the relief of intra-ocular pressure in glaucoma sufferers and the nausea often suffered by chemotherapy patients. Yet marijuana has an outlaw legal status; it is listed along with heroin as a Schedule I drug and is thus completely outlawed in medical practice in the United States, except for experimental and research purposes.

The beating of the tom-toms of the "War on Drugs," especially the war against cocaine, has caused a kind of national amnesia about marijuana. As recently as 1972, the National Commission on Marijuana and Drug Abuse recommended that private "possession of marihuana for personal use should no longer be an offense" and that "distribution in private of small amounts of marijuana for no remuneration or insignificant remuneration not involving a profit would no longer be an offense."⁷³ Similar, sometimes broader, proposals to relax the drug laws came from the American Medical Association, the American Bar Association, the Consumers' Union, the National Education Association, the National Council of Churches, the American Public Health Association, the National Advisory Commission on Criminal Justice Standards and Goals and others.⁷⁴ As late as 1977, President Carter declared himself in favor of decriminalization of marijuana.

71. 446 U.S. at 561.

72. In the Matter of Marijuana Rescheduling Petition, Dkt. No. 86-22, Dept. of Justice, DEA, Sept. 6, 1988.

73. FIRST REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, MARIJUANA: A SIGNAL OF MISUNDERSTANDING 154 (1972). The Commission also recommended that possession in public of one ounce or less of marijuana would no longer be an offense, although the drug would be "contraband subject to summary seizure and forfeiture." *Id.*

74. A partial list of these "decriminalizing" organizations appears in NATIONAL RESEARCH COUNCIL, COMMISSION ON BEHAVIORAL AND SOCIAL

A decade later, the National Academy of Sciences reviewed the findings and recommendation of the National Commission on Marijuana and Drug Abuse. It found no "conclusive evidence" of major, long-term public health problems caused by marijuana, only "worrisome possibilities." On the question of legal control, it basically endorsed the position of the 1972 National Commission: "On balance . . . we believe that a policy of partial prohibition is clearly preferable to a policy of complete prohibition of supply and use."⁷⁵ This scientific and informed view contrasts markedly with the political and uninformed point of view embodied in the Anti-Drug Abuse Act of 1988, which states that "Congress . . . believes marijuana is a serious evil in American society and a serious threat to its people."⁷⁶

In light of these recommendations, we cannot assume that Justice Powell meant "drugs" to refer to marijuana. He might have been referring to cocaine, a far more toxic drug and one that can be (although is not ordinarily) deadly; but Mendenhall was arrested for heroin trafficking. Assuming that Justice Powell meant to refer only to heroin, the drug involved in the case, his use of the word "deadly" is either intended metaphorically or is irresponsibly misleading. Even though heroin has a lethal potential, heroin has benign or therapeutic purposes for the relief of pain, was at one time accepted in medical practice in the United States and Europe, and can be taken by citizens leading "satisfactory lives," as found by the Brain Committee. Heroin is unlike a deadly weapon, for example, one designed

SCIENCES AND EDUCATION, COMMITTEE ON SUBSTANCE ABUSE AND HABITUAL BEHAVIOR, AN ANALYSIS OF MARIJUANA POLICY (1982) [hereinafter NRC COMMISSION].

75. *Id.* at 29.

76. The National Academy focused its concern on the very young: "heavy use by anyone or any use by growing children should be discouraged. Although conclusive evidence is lacking of major, long-term public health problems caused by marijuana, they are worrisome possibilities, and both the reports and a priori likelihood of developmental damage to some young users makes marijuana use a cause for extreme concern." *Id.* Compare *United States v. Rush*, 738 F.2d 497, 513 (1st Cir. 1984):

The question whether the government has an overriding interest in controlling the use and distribution of marijuana by private citizens is a topic of continuing political controversy. Much evidence has been adduced from which it might rationally be inferred that marijuana constitutes a health hazard and a threat to social welfare; on the other hand, proponents of free marijuana use have attempted to demonstrate that it is quite harmless. See also *Randall v. Wyrick*, 441 F. Supp. 312, 315-16 (W.D. Mo. 1977); *United States v. Kuch*, 288 F. Supp. 439, 446, 448 (D.D.C. 1968).

to inflict death or great bodily harm, such as a gun or a knife. To call it deadly is thus a rhetorical flourish. Although overdose death can occur, that is not heroin's intended function.

Moreover, the risk attending the use of heroin, medically supervised, is very small. Without medical supervision, the risk rises with contaminated needles, adulterated heroin, and ignorance of important purity and dose control information, for example. Even so, the annual death toll from heroin overdose is very low in relation to the millions of doses consumed: roughly 1,000 deaths per year in the DAWN reporting system,⁷⁷ out of an estimated heroin using population of 1-2 million dosing itself with varying frequencies.⁷⁸ All of these facts were readily available to Justice Powell. Neither he nor his law clerks troubled to do the research. After all, isn't it a matter of common knowledge?

Perhaps even more fundamentally wrong is Justice Powell's confusion of two entirely distinct issues: the harms that may arise from "the escalating use of controlled substances" and the harms that may arise from the traffic that is "highly organized by sophisticated criminal syndicates" reaping enormous profits. The first is a problem of drugs. The second is a problem of drug money. Many courts have confused the two issues as Justice Powell did, falsely attributing the demonstrable evils of violent black marketeering to the drugs themselves.

A case in point is *Carmona v. Ward*,⁷⁹ where the court considered the argument that mandatory life sentences meted out under New York's "Rockefeller" drug laws constituted cruel and unusual punishment in violation of the Eighth Amendment. In reviewing a conviction on habeas corpus, the court of appeals applied a tripartite proportionality test which considered the gravity of the offense, a comparison of the punishments for other crimes in New York, and a comparison of the

77. DAWN is the acronym for Drug Abuse Warning system, a compilation of information from medical examiners and hospital emergency rooms in most Standard Metropolitan Statistical Areas. The combined figure for morphine/heroin deaths for the first nine months of 1987 was 918, excluding New York City. National Narcotics Intelligence Consumers Committee, *The NNICC Report 1987* (1988).

78. National Institute of Drug Abuse, *National Household Survey 29* (1985).

79. 576 F.2d 405 (2d Cir. 1978). *Carmona* was convicted of two counts of possession of cocaine with intent to distribute, an A-I felony with a mandatory minimum 15-year sentence. She plead to second degree felony and was sentenced to six years to life. Defendant Fowler was charged with an A-III felony, a four years to life sentence, after selling twenty dollars worth of cocaine to an undercover agent.

challenged penalty to those for the same offense in other jurisdictions.

In weighing the gravity of the offense, the court rejected the argument that petitioners' drug sales should be viewed, standing alone, as isolated, relatively minor events. Instead, the court assessed them as "symptoms of the widespread and pernicious phenomenon of drug distribution."⁸⁰ The court then listed the social harms arising from drug trafficking:

1. Narcotic addicts turn to crime — such as prostitution, drug sales and property crimes to feed their habits [a function of inflated black market prices].

2. Drug addiction degrades and impoverishes those whom it enslaves [impoverishment is a function of inflated black market prices].

3. Addicts often commit acts of violence against police officers and other addicts because of the high stakes [a function of the large amounts of money].

4. The profits are so lucrative that police become corrupted [again, the issue is one of money].

The court concluded:

Measured thus by the harm it inflicts upon the addict, and through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank.⁸¹

While this line of argument is obviously far more sophisticated than the rhetoric of "moral pervers" or "worse than poisons," it is still not a serious job of analysis. For even if the social harms listed by the court are accepted as true, the argument evades the question of the gravity of the drug offense *per se*, as compared to the effects of prohibition. The court's litany of social harms arising from drug trafficking unwittingly makes the case for deregulation of the drug markets. The four points — apart from the moral degradation argument, which is contradicted by the "strength of character" premise of the *Moore* case — would not exist but for the black market set up by the legal prohibitions on drug transactions. Indeed, the precise claims made by the court to justify the severity of punishment would have applied to the sale of alcohol during National Prohibition, which greatly enriched bootleggers and empowered organized crime. Such claims would also apply if the sale of cigarettes — a drug as addictive as cocaine or heroin,

80. *Id.* at 411.

81. *Id.*

according to former Surgeon General C. Everett Koop⁸² — were to be outlawed, throwing some 52,000,000 nicotine addicts into craving and withdrawal symptoms. The *Carmona* court would conclude that the illegal sale of a familiar and once socially acceptable drug constitutes “a grave offense of high rank.”

Is this line of economic and historical analysis too much to expect of a court engaged in a serious job of constitutional analysis? Relevant information was easily accessible to the court when it wrote. In response to President Nixon’s declaration of war on drugs in 1972, for example, economist Milton Friedman had written about the drugs/crime connection years before *Carmona* reached the court of appeals in 1978. Friedman wrote that:

Prohibition is an attempted cure that makes matters worse—for the addict and the rest of us. . . . [T]he individual addict would clearly be far better off if drugs were legal. Addicts are driven to associate with criminals to get the drugs, become criminals themselves to finance the habit, and risk constant danger of death and disease. Consider next the rest of us. The harm to us from the addiction of others arises almost wholly from the fact that drugs are illegal. It is estimated that addicts commit one third to one half of all street crime in the U.S.

Legalize drugs, and street crime would drop dramatically.

In a 1989 letter to drug czar Bennett, Friedman wrote that “[d]ecriminalizing drugs is even more urgent now. Our experience with the prohibition of drugs is a replay of our experience with the prohibition of alcoholic beverages.”⁸³

One might question whether a court could appropriately consider the severity of the offense absent black market effects on the assumption that the New York law violated the laws of supply and demand. But irrationality is the core concept of a substantive due process attack such as the Eighth Amendment’s proportionality test as applied by *Carmona*. Judge Oakes, in his dissent, did question the wisdom of the law by citing a report that concluded “the operation of the 1973 New York drug law has had no real deterrent effect on drug abuse or on resulting felonious property crimes.”⁸⁴ He made the fur-

82. REPORT OF THE SURGEON GENERAL, *supra* note 58.

83. Both references are incorporated in *An Open Letter to Bill Bennett*, Wall St. J., Sept. 29, 1989, § 1, at 15, col. 2.

84. 576 F.2d at 447.

ther point that the Governor had appointed a revision committee to reconsider the mandatory sentences.

But even if the law had to be taken as a given, it was unfair to lay the effects of the massive black market in drugs at the petitioner's door on the grounds that he was a cog in a much larger machine: "New York's drug problem is a socioeconomic phenomenon or set of phenomena attributable to a great many factors with which the appellees have had nothing whatsoever to do."⁸⁵

When *Carmona* reached the Supreme Court, Justice Marshall, joined by Justice Powell dissented from the denial of certiorari on the ground that the mandatory penalties of the Rockefeller law were disproportionately severe.

To rationalize petitioner's sentences by invoking all evils attendant on or attributable to widespread drug trafficking is simply not compatible with a fundamental premise of the criminal justice system, that individuals are accountable only for their own criminal acts.⁸⁶

To justify a stringent penalty for an act on the assumption that the act may engender other crimes makes little sense when those other crimes carry less severe sanctions than the act itself. [citation omitted] In sum, by focusing on the corrosive social impact of drug trafficking in general, rather than on petitioners actual—and clearly marginal—involvement in that enterprise, the Court of Appeals substantially overstated the gravity of the instant charge.⁸⁷

That same error was committed by the Fifth Circuit in *Terrebone v. Blackburn*,⁸⁸ where the defendant was convicted of distributing 22 packets of heroin to undercover narcotics agents. After receiving a mandatory life sentence under Louisiana law, Terrebone sought a federal writ of habeas corpus on the Eighth Amendment grounds raised in *Carmona*, and argued that a mandatory life sentence imposed upon an addict constituted cruel and unusual punishment. Following the same analysis as the *Carmona* court, the Fifth Circuit rejected the challenge in vivid metaphors:

It is quite true that the trade in drugs is *an ugly enterprise* which preys upon both the physical and psychological weaknesses of man, and that this enormous danger to

85. *Id.* at 422.

86. 439 U.S. 1091, 1096 (1979).

87. *Id.* at 1097.

88. 624 F.2d 1363 (5th Cir. 1980).

society may justify severe sanctions in many or most distribution cases.

It is a matter of common knowledge and it is a fact, that social conditions in this state are adversely affected by the pervading traffic in and use of drugs. This condition is a serious menace to good social order

It is no defense to this prosecution that distribution of drugs is not a violent crime and consequently punishment for this offense should not be on a par with second degree murder and aggravated kidnapping. Assuming the punishments are equal, traffic in narcotics is *an insidious crime* which, although not necessarily violent, is surely as grave. Indeed, the effect upon society of drug traffic is *pernicious* and far reaching. For each transaction in drugs breeds another and in the case of heroin the *degeneracy of the victim is virtually irreversible*. Compared to the effect of drug traffic in society isolated violent crimes may well be considered the lesser of the two evils.⁸⁹

Following a second en banc consideration, the Fifth Circuit re-asserted its view that heroin dealing, even in small retail amounts, should be ranked for Eighth Amendment purposes as equal to or worse than violent crimes such as aggravated kidnapping or aggravated arson:

Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image — others who create others still, across our land and down our generations, sparing not even the unborn.⁹⁰

Grotesque and damning imagery ("foul hand" and "vampire") again masquerade as analysis and conceal completely the consensual nature of drug transactions. The responsibility of the user, or even an addict, is disregarded; it is the "drug dealing vampire" that "blights" the lives of others and "creates" more vampires, who bear no responsibility for their conduct. They are portrayed as victims, pure and simple. The distinction is crucial for policy purposes. Whereas consumers are entitled to

89. *Id.* at 1369 (emphasis supplied).

90. *Terrebone v. Butler*, 848 F.2d 500, 504 (5th Cir. 1988). The vampire language was quoted by the court in *Young v. Miller*, 883 F.2d 1276, 1283 (6th Cir. 1989), upholding mandatory life without parole upon a first offender under Michigan law, which punished petitioner's offense the same as first degree murder. The defendant was a 25-year-old mother of a small child.

freedom in the marketplace, victims are entitled to legal protection from their victimizers.

The court upheld "the most severe penalty for heroin dealing" among the 50 States largely because of the majority's view that Terrebone "was caught contributing to what seems generally agreed to be our country's major domestic problem: the sale and use of hard drugs."⁹¹ The court did not cite any authority to justify its *ipse dixit*; is it really so obvious that drug trafficking is more serious than homelessness, the impoverishment of children, or the apparent decline of the public schools? The drug problem is simply assumed to be the "major domestic problem."

Assumptions like those are part of a vicious circle. Cocaine floods into the country despite vigorous law enforcement and interdiction. The social pathologies of the black market grow worse and worse. Then it is a short step to the public frustration, outrage and "call to arms" as expressed in *United States v. Miranda*,⁹² where the defendant was convicted of conspiracy to import and importing 23 tons of marijuana and sought release on bond pending appeal. The court analyzed nine criteria specified by the statute then governing bail pending appeal, determined that defendant was a danger to the community, and denied bond pending appeal. Having decided the dispositive questions adversely to the defendant, the court did not rest but added an extended commentary, following the *Carmona* and *Terrebone* "thinking":

Drug trafficking represents a serious threat to the general welfare of this community. Drug importation and its eventual sale is directly involved in the furtherance of drug dependence and is conducive to the proliferation of crimes related thereto. National statistics on armed robbery, assault and murder have increased tremendously as narcotics addicts have sought ways to obtain funds to feed their habits.

The community must be protected from violations of the law which prey on the weak of mankind. A wholesale drug peddler, such as the defendant, exploits this weakness and, in doing so, certainly poses a danger to the welfare of the community.

If narcotics traffic is a social and health hazard, then every narcotics dealer is a danger to society.

91. *Id.* at 505.

92. 442 F. Supp. 786 (S.D. Fla. 1977).

The call to arms, simply stated, it is time for the merchants of misery, destruction and death to be put out of business. The hideous evil wrought by these criminals through their unlawful importation and distribution of narcotics and controlled substances is unforgivable. Engulfed by their greed, these individuals have shown no concern for the thousands of lives that they have ruined and the unimaginable sorrow that they have heaped upon the people of this community, this state and this nation.⁹³

In the years following *Miranda's* call to arms, the United States escalated the current War on Drugs to unprecedented levels. *Albernaz's* "turning the screw" of the criminal justice system in drug enforcement now includes, *inter alia*, pretrial detention, mandatory and severe sentences, expanded search and seizure powers — helicopter overflights, sniffing of luggage by drug detector dogs, electronic surveillance of vehicles by concealed radio-tracking devices, warrantless searches of motor-home residences, public school students' purses, ships in the inland waterways connected to the sea, etc. — mandatory urinalysis, "zero tolerance" forfeitures of cars, planes and boats, the assessment of "civil fines" up to \$10,000 and termination of government benefits for simple possession of personal use amounts.⁹⁴ Yet the drug trade flourishes, openly and notoriously, in outdoor drug markets.

The zeal born of frustration and outrage sometimes borders on vindictiveness, as reflected in anti-drug proposals that have thus far failed to become law: the Arctic Gulag proposal for convicted drug offenders;⁹⁵ the House Republican Task Force bill calling for confiscation of 25% of the adjusted gross income *and* net assets of anyone caught possessing illegal substances;⁹⁶ the proposal to shoot down civilian aircraft entering the United States without having filed a flight plan; the boot camp for drug users proposed by Secretary Bennett or his acquiescence in the beheading of drug dealers; and many others of this genre. On occasion, the outrage spills over into prejudice against those racially or ethnically associated in public stereotype with the drug traffic.⁹⁷

93. *Id.* at 792.

94. *Crackdown*, *supra* note 6, at 907.

95. H.R. 7112, 97th Cong., 2d Sess., § 2,128 Cong. Rec. 7088 (1982).

96. THE DRUG ENFORCEMENT REPORT 2 (June 23, 1988).

97. A district judge remarked that Colombians had little regard for judges, having killed 32 of them. *United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989).

The Florida Highway Patrol drug courier profile alerts troopers to watch

DRUGS IN POLITICAL PERSPECTIVE

The foregoing examples demonstrate the strong emotional, non-rational attitudes surrounding the drug issue. The cycle of crackdown, escalation, failure and repression perpetuates itself. Judges and other policy makers do not seem to be aware that their decisions and actions arise out of preconceptions or presupposition rather than factual inquiry and reasoned study.

If these ideas are false, or at least unproved, why do they persist so strongly? They are deeply rooted in the public consciousness. Consider Musto's account:

By 1900, America had developed a comparatively large addict population, perhaps 250,000, along with a fear of addiction and addicting drugs. This fear had certain elements which have been powerful enough to permit the most profoundly punitive methods to be employed in the fight against addicts and suppliers

In the nineteenth century addicts were identified with foreign groups and internal minorities who were already actively feared and the objects of elaborate and massive social and legal restraints. Two repressed groups which were associated with the use of certain drugs were the Chinese and the Negroes. The Chinese and their custom of opium smoking were closely watched after their entry into the United States about 1870. At first, the Chinese represented only one more group brought in to help build railroads, but, particularly after economic depression made them a labor surplus and a threat to American citizens, many forms of antagonism arose to drive them out or at least to isolate them. Along with this prejudice came a fear of opium smoking as one of the ways in which the Chinese were supposed to undermine American society.

Cocaine was especially feared in the South by 1900 because of its euphoric and stimulating properties. The South feared that Negro cocaine users might become oblivious of their prescribed bounds and attack white society.⁹⁸

Drug control provided a point of convergence for Progressive reformers, moral crusaders, political entrepreneurs and

for "ethnic groups associated with the drug trade." Pollack, *Troopers Aiming at Flow on Turnpike*, Ft Lauderdale News, Aug. 6, 1984, at B9.

98. See D. Musto, *supra* note 32, at 5-7.

those who were simply ignorant, fearful, and prejudiced. Under federal control, the non-rational elements soon drove out the rational; by the mid-1920s, the police model of drug control had almost completely displaced the medical model. Policing drugs not only required a drug abuse establishment, it also invited political exploitation of the drug issue, a legacy from which the United States has never recovered.

Edward Jay Epstein begins his account of political manipulation of federal drug control with Harry Anslinger. Before asking Congress for funds to expand the Bureau, he published an article entitled "Marijuana: Assassin of Youth," in which he warned of an epidemic of violent crimes committed by young people under the influence of marijuana. Unlike opium, which, he told Congress, could be good or bad, marijuana was "entirely the monster [Mr.] Hyde." In short, those who smoked it would go insane or turn violent or both. Congress responded, and over the opposition of the American Medical Association enacted the Marijuana Tax Act of 1937, empowering the federal government to police the marijuana supply. Federal suppression of marijuana was thus based on a false premise.

During World War II, according to Epstein's account, Anslinger waged a press campaign to convince the American public of the baseless charge that Japan was systematically attempting to addict its enemies, including the American people, to opium, in order to destroy their civilization. During the Korean War, Anslinger used a similar ploy. He leaked a report to the press claiming that "subversion through drug addiction is an established aim of communist China," and that the Communist Chinese were smuggling massive amounts of heroin into the United States to "weaken American resistance." Later politicians such as Senator Paula Hawkins (R. Fla.) made essentially the same claims about Cuba in 1984, i.e., that the Government of Cuba, as a matter of policy, was flooding the United States with cocaine in order to subvert our society by ruining our youth. New York Governor Hugh Carey had done essentially the same thing regarding a 1980 wave of jewelry snatching on subways and commuter trains: "The epidemic of gold-snatching in the city is the result of a Russian design to wreck America by flooding the nation with deadly heroin."⁹⁹ Of course, he presented no evidence in support of this claim.

Epstein's account of the politics of drugs extends to Presidential politics. He makes the point that Richard Nixon built

99. E.J. EPSTEIN, *supra* note 9, at 33.

his 1968 "law and order" campaign on public fear of street crime after realizing that "the menace of communism on which he built his early reputation no longer was an effective focus for organizing the fears of the American public."¹⁰⁰ Epstein's interpretation, if correct, is even more persuasive in the 1980s, as Presidents Reagan and Bush have presided over the apparent end of the Cold War.¹⁰¹ These historical and political perspectives show that much of the conventional wisdom about drugs is rooted in decades of disinformation and manipulative rhetoric. Consider how the dark, sinister imagery must have played a decisive role in shaping contemporary public consciousness about drugs: "assassin of youth," "subversion," "Communist China," "Russian design," "national emergency," "public enemy number one." This is powerful stuff, if one accepts that the words and ideas have power.

In fact, the "killer weed" fears frightened Congress in 1937 into passing the Marihuana Tax Act and the "cocaine-crazed Negroes" frightened police departments in the pre-Depression South to trade up to .38 caliber handguns.¹⁰² During virtually all of the twentieth century, with the possible exception of a brief *glasnost* during the 1970s, these false images of drugs have reigned unchallenged. Anslinger's bogus claims about marijuana set an enduring tone and mood. Thirty-five years later, more or less, Pennsylvania Governor Raymond Shafer, Chairman (ironically) of the President's Commission on Marijuana and Drug Abuse, held a press conference at which he announced—falsely—that a youth had taken LSD and stared at the sun until he became blind. He later admitted his scare tactic, justifying it by a desire to save people from what he was convinced was a real danger, although he had no medical evidence to support his preconception. No wonder judges have for the most part accepted what nearly every one "knows" to be the truth about drugs. Misinformation is the norm.

FRESH PERSPECTIVES ON DRUGS

Fresh perspectives on drugs may be impossible for society as a whole. Seven decades of relentless anti-drug propaganda have deprived the public of its power of critical thinking on this subject. The Government, more than ever, is committed to a war on drugs almost as a categorical imperative, irrespective of

100. Szasz, *The War Against Drugs*, 12 J. DRUG ISSUES 115 (1982).

101. E.J. EPSTEIN, *supra* note 9, at 59.

102. D. MUSTO, *supra* note 32, at 28.

whether it produces positive results. Doubting politicians are for the most part cowed into silent submission by a McCarthyite anti-drug witch hunt. Ironically, like the stopped clock that comes right twice a day, the emergence of crack-cocaine in the summer of 1986 finally conferred some plausibility upon the most outrageous claims about drugs that drug enforcement bureaucrats and allied politicians have always made. The very worst, most sensational scenarios of crack addiction seem to resemble the "walking dead" and "worse than poisons" metaphors so promiscuously used in the past, before crack was invented. The more meaningful fact — that we do not know the ratio of crack "victims" to the total population of crack users — carries no clout. One known victim is worth a thousand words of analysis, and maybe even a thousand points of light.

For these reasons, the public is probably lost to reason about popular black market drugs. Judges, one hopes, can be made to look at the evidence and listen to reason. Consider *National Treasury Employees v. Von Raab*,¹⁰³ a case that epitomizes the dialectical tension in the cases between empiricism and catchism. In that case the United States Customs Service implemented a drug testing program to screen for illegal drug use all applicants in three categories. On review in the United States Supreme Court, the Court affirmed that part of the judgment upholding the urinalysis testing of employees involved in drug interdiction or required to carry firearms. Justice Kennedy, carrying on the tradition of Justices Black, Powell and others, repeated the familiar litany: "drug abuse is one of the most serious problems confronting our society today. There is little reason to believe that American work places are immune from this pervasive social problem"¹⁰⁴ The Court concluded that "the government has demonstrated that its compelling interest in safeguarding our borders and the public safety outweigh the privacy expectations of employees. . . ."¹⁰⁵

The Court split 5-4. Justices Marshall and Brennan dissented. Justice Scalia, joined by Justice Stevens, wrote a separate dissent: "In my view the Custom Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."¹⁰⁶ For Justice Scalia, drug testing of customs employees was completely unlike the testing of railroad

103. 489 U.S. 656 (1989).

104. *Id.* at 674.

105. *Id.* at 677.

106. *Id.* at 681.

employees involved in train accidents. In that case,¹⁰⁷ there was actual evidence that railroad accidents had for many years been caused by alcohol use, “including a 1979 study finding that 23% of the operating personnel were problem drinkers.”¹⁰⁸ But the majority opinion, “will be searched in vain for real evidence of a real problem that will be solved by urine testing of customs service employees.”¹⁰⁹

What is absent in the government’s justifications — notably absent, revealingly absent, and as far as I am concerned dispositively absent — is the recitation of even a single instance in which any of the speculated horrors actually occurred: an instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.¹¹⁰

Justice Scalia notes, correctly, that the true basis for the drug testing program is ideological and symbolic:

The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service Employees announcing the program: “Implementation of the drug screening program would set an important example in our country’s struggle with this most serious threat to our national health and security. . . .” What better way to show that the Government is serious about its “war on drugs” than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the Service is “clean,” and — most important of all — will demonstrate the determination of the Government to eliminate this scourge of our society!¹¹¹

Justice Scalia concluded that this justification is unacceptable to validate an otherwise unreasonable search. He closed by rejecting the proposition that the end justifies the means.

Close analysis of this kind, so generally powerful in the law, has so far failed to carry the day on drug issues because the

107. *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602 (1989).

108. *Id.* at 607.

109. *Von Raab*, 489 U.S. at 681.

110. *Id.* at 683.

111. *Id.* at 686.

values at stake carry heavy baggage of emotion and symbolism. Fact, logic and reason become relatively unimportant.

CONCLUSION

During the editing process, the editors raised several questions that I would like to address in question-and-answer format, by way of a conclusion.

Q. What difference does it make that the courts use hot rhetoric to describe drug effects when everyone knows that drugs are bad?

A. Drugs — referring primarily to marijuana, cocaine and heroin, the big three in the black market by dollar volume — are neither good nor bad. They are both. They can facilitate healing¹¹² and provide pleasure; they can also contribute to illness, addiction or death. Drugs are not like radioactive waste, where mere proximity can be lethal. For a court to call drugs “poisons” is as irresponsibly misleading as calling kitchen knives murder weapons. With both drugs and kitchen knives, the ordinary intended purpose is benign. The dangers are those of misuse and abuse. Further, judicial demagoguery obscures the vital point that drug use is largely volitional.¹¹³

Unless one assumes that they are infantile or insane, drug users, like other competent adults, must be understood to be acting in what they perceive as their own best interests. Responsible public policy on drugs must begin with a pluralistic society's deference to individual self-governance and, insofar as harm to others may justify restrictions, a realistic cost-benefit analysis of the restrictions. The necessary risk assessment has been largely preempted by the prevailing imagery of misery, destruction and death.

Q. What practical difference does it make that the courts use loose language in speaking of drugs, drug abuse and drug trafficking?

A. In *The Least Dangerous Branch* (1962), Alexander Bickel argued that the true purpose of the power of judicial review was to elaborate the principles of the Constitution; otherwise, the Framers' insulation of the Supreme Court from the political branches was inexplicable. As we have seen above, the Supreme Court, and the courts of appeal, frequently address issues of principle presented by drug cases — questions of

112. L. Grinspoon & J. Bakalar, *Medical Uses of Illicit Drugs*, in *DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL* (R. Hamowy ed. 1987).

113. *United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973).

search and seizure, cruel and unusual punishment, the sixth amendment right to retain private counsel with drug money, and so on.¹¹⁴

In performing the mission of making constitutional law case-by-case, the courts have skewed the balance sharply in favor of the power of the State precisely because they are hostage to the simple false idea that drugs are bad and that the nation confronts a drug crisis. Thus, in balancing individual rights against the claims of public necessity, the scales of justice are weighted against the Bill of Rights. Accordingly, the courts have validated every important Congressional "turning of the screw" in drug enforcement. Instead of cautioning the political branches that they will be required to make a convincing factual demonstration of the basis for the war on drugs, the courts have sent a message that in the field of drug enforcement, virtually anything goes. As Justice Scalia put it in *Von Raab*, Supreme Court decisions on drugs represent "a kind of immolation of privacy and human dignity in symbolic opposition to drug use."¹¹⁵ The courts, in order to discharge their role as guardian of the Bill of Rights, should be raising hard questions about the premises, and proof, that might be claimed to justify the legislative and enforcement crackdowns. But that is not intellectually possible, generally speaking,¹¹⁶ so long as the tens of millions of citizens who have ever taken illegal drugs are stigmatized as less-than-human "walking dead" or "moral perverts." The result of all the anti-drug invective has been the slow death of the Bill of Rights¹¹⁷ as a necessary sacrifice to the perceived exigencies of the positivist state besieged by drugs.

Q. What are the ethical implications of the judicial abdication of responsibility for critical analysis of governmental claims about drugs and drug abuse?

A. The adversary system employs a dialectical opposition of the interests of contending parties as a means of achieving truth in a particular case. In that sense, the adversary system may be considered an epistemology, a method of coming to know the truth, although it is restricted by rules of procedure and evidence that would be intolerable (or so a layman sup-

114. See *Crackdown*, *supra* note 6.

115. 109 S. Ct. at 1395.

116. There are occasional exceptions. See *United States v. Verdugo-Urguidez*, 856 F.2d 1214, 1218 (9th Cir. 1988): "We also must take great pains to ensure that the Constitution does not become the first casualty in the war on drugs."

117. See, e.g., Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment*, 48 U. PITT. L. REV. 1 (1986).

poses) in a purely scientific inquiry. Still, the basic idea is one of aggressive inquiry into facts organized by logical methods.

But as the cases discussed above demonstrate, the courts have passively accepted unproven and often unprovable claims in reaching conclusions about drug abuse and drug trafficking. In this respect, they have damaged the ethical basis of the adversary system, converting it largely into a propaganda tool for the party line.

My colleague Gerald Uelmen,¹¹⁸ has offered a particularly revealing example of how the Court has boot-strapped political "truth" into legal doctrine. It begins with a concurrence by Justice Powell in *Mendenhall*, upholding a warrantless strip search initiated after an airport drug courier profile stop and citing a DEA source for "concern [over] the escalating use of controlled substances."¹¹⁹ In *United States v. Montoya de Hernandez*,¹²⁰ the Court upheld an incommunicado detention and rectal examination of a traveler, citing Justice Powell's *Mendenhall* concurrence as authority for the existence of a "national crisis in law enforcement caused by the smuggling of illicit narcotics." Finally, in the *Von Raab* case, Justice Kennedy cited the *Montoya* Court's assertion of a "national crisis in law enforcement" as support for the majority's ruling in favor of the Customs' drug testing program.¹²¹

Apart from the incestuous sourcing of the proposition that there was a national crisis, the statement was false — or at least not provably true. NIDA's 1988 National Household Survey on drug abuse reported significant declines in nearly every category of drug abuse compared to the 1985 and 1982 surveys. For example, it noted that rates of marijuana use had been "steadily decreasing since 1979."¹²² This information was well publicized in the press and available to any modestly skilled researcher who was interested in learning the facts rather than simply repeating a preconceived notion. Dean Uelmen concluded that the justices "accept without skepticism . . . that a national crisis of the greatest conceivable magnitude now besets us."¹²³

118. Dean, Santa Clara University Law School, "When Supreme Court Justices Enlist in a War," address to the Plenary Session of the Drug Policy Foundation, Nov. 1, 1990, Washington, D.C. [hereinafter Address].

119. 446 U.S. at 561.

120. 473 U.S. 531 (1985).

121. 109 S. Ct. at 1392.

122. National Institute of Drug Abuse, *National Household Survey 3* (1981).

123. Address, *supra* note 118, at 2.

Q. How should the legal profession respond to the judicial blind spot on drugs?

A. There are several practical reforms that might be pursued to improve the situation described in this paper. First, lawyers must ensure that judges have the benefit of good Brandeis briefs when arguing cases with primary or secondary drug issues. There is no good reason why a skilled advocate could not make use of the kinds of materials cited in this article.¹²⁴

By the same token, the law schools could make it a lot easier for the next generation of lawyers and judges¹²⁵ to be knowledgeable by covering basic drug issues in criminal law courses and by offering drug law and policy courses and seminars. Very few do so at present. Traditional first year criminal law courses do not generally include drug law. One reason is that criminal law books are silent on the issue, an incredible omission in an era when nearly half of felony filings are drug law violations. The law schools have long had their own blind spot on the drug issue.¹²⁶ They could do a lot more, not only in teaching but also in sponsoring symposia and supporting faculty research on the subject. Finally, law journals should encourage the line of critical thinking represented by this symposium.¹²⁷

A final recommendation is for more comprehensive research than has been presented here in this somewhat impressionistic account of the work of the courts. Thoughts on a research agenda follow.

124. See BEYOND THE WAR ON DRUGS, *supra* note 1, at 263 for a bibliography listing every major work of drug policy analysis published as of 1986, including congressional committee hearings, government monographs, and many other sources. Lawyers would do well to consult G. UELMEN & V. HADDOX, *DRUG ABUSE AND THE LAW SOURCEBOOK* (1989). For additional information, refer to the Drug Policy Foundation, NORML, and the National Drug Strategy Network, all in Washington, D.C., which serve as clearinghouses for researchers.

125. Judicial training institutes should also offer courses that educate judges about drug policy issues and encourage them to think critically about alternatives.

126. Another example of neglect is that, on information and belief, 1991 was the first time that the AALS conducted a panel on drug policy since the author entered legal education in 1975. The author was a speaker at a Criminal Justice Section panel on "legalization of drugs" in January, 1991 in Washington, D.C.

127. See also Symposium: *The War on Drugs: In Search of a Breakthrough*, 11 NOVA L. REV. 891-1052 (1987); Symposium: *Testing for Drug Use in the American Workplace*, 11 NOVA L. REV. 291-823 (1987); and Symposium: *Drug Decriminalization*, 18 HOFSTRA L. REV. 457-942 (1990).

A METHODOLOGICAL POSTSCRIPT AND AGENDA FOR FUTURE RESEARCH

This essay does not purport to make a comprehensive survey of the attitudes of appellate judges as reflected in opinions dealing with drug issues. The sheer volume of such cases decided since 1914, and the diversity of issues they decide, would make such an undertaking impracticable. The goal here is more sharply focused: to review those decisions in the United States Supreme Court and Courts of Appeal that reveal something of the courts method or general approach — whether based in empiricism and logic or preconception and ideology — in deciding drug policy issues.

In most, but not all, of the landmark cases, the Supreme Court had ruled for the Government. Moreover, it did so in flights of rhetoric that were unnecessary to the decision of the particular issues before the Court. Then, in 1981, on the eve of the contemporary War on Drugs, the Court delivered a strong message about its own basic orientation. In *Albernaz v. United States*,¹²⁸ the Court, in an opinion by Justice Rehnquist, held that its constitutional interpretation of the Double Jeopardy Clause would cleave to the statutory intent expressed by Congress. The latter would control the former. Statute would trump the Constitution.

Of course, *Albernaz* alone cannot speak for past Courts or for future ones. But the argument of this essay — that judges when they have revealed themselves on drug policy issues have followed political rather than judicial standards of knowledge — is based on several dozen such cases. The reader might well ask to what extent is it valid to generalize from the small number of cases reviewed here to the tens of thousands that deal with some aspect of the drug issue?

The strength of this assertion must be judged against the methods that were used in selecting the cases discussed in this article. Computer searches of the Supreme Court and Federal databases were used to generate lists of cases. The top tiers of the judicial pyramid were chosen for three reasons: the landmark cases are almost all federal cases; the Supremacy Clause makes federal decisions on constitutional questions binding on the States, and the Federal Government has since 1914 been the dominant force in the field of drug regulation and law enforcement.

128. 450 U.S. 333, 343 (1981).

But the goal of this paper was to cull those cases that spoke to issues of drug policy, that engaged the broader questions of a principled and effective national drug policy, and that displayed some awareness of methodological issues. (None fit the latter category.) These questions arise, if at all, when a court is asked to interpret a statute regulating controlled substances or decide a question of constitutional law bearing on drug law enforcement powers. To winnow those cases from the routine cases, search techniques were used combining "drugs" and "drug trafficking" with limiting phrases, in the same sentence or paragraph, such as "public health" or "danger to society" or "morality" or "evil" and the like. Several hundred cases thus generated were read by me and by research assistants; many turned out to contain no more than a passing reference to the search phrase. This reflects the inherent limitations of computer research, which functions best at simple word-recognition and cannot effectively isolate abstractions or concepts.

In the end, no single search phrase or combination of phrases could be relied upon to yield up the type of case sought — a case in which the opinion engaged basic issues of drug policy in *some* manner, whether hotly rhetorical or coolly analytical. Thus, I freely concede that case selection for this article was necessarily "subjective" in turning on my judgment whether an opinion fit the foregoing criteria for inclusion. I should add that these judgments were informed by more than a decade of experience reading drug law cases as author, teacher and appellate practitioner.

My students and I did not find very many cases in the Supreme Court or the federal courts of appeal that fit the policy model that we were looking for. It thus remains arguable that the lack of rhetoric in most drug cases supports the view that most federal appellate judges do a proper job of judging in most drug cases — they apply the law to the facts and eschew unnecessary statements of a political or policy-oriented character. But I think that argument misses the point. The opinions we have turned up purport to speak for whole courts, if not the entire federal judiciary. On those relatively few occasions when judges have troubled to declare themselves on matters of drug policy, they have done so, with several notable exceptions, in denunciatory language parallel to that prevailing in the political arena. And even when there are dissenting opinions, it is rare to find a judge distancing himself from the intemperate and uninformed rhetoric of his brethren.

Still, as a final point, I would like to emphasize that these observations are offered in a preliminary and tentative way.

They should be tested by other researchers. I suggest a less global technique using a narrower query. It would be interesting to focus, for example, on the issue of the oft-assumed connection between drugs and other crimes, especially violent crimes. Researchers might also find it more manageable to select a smaller data base, e.g., a state jurisdiction or a federal circuit for a relatively short time frame. 1983 to the present would be most reflective of the cases decided in the crackdown atmosphere of the War on Drugs. The question to be pursued by the researchers is whether courts are employing proper decisionmaking techniques on a subject vitally affecting the rights of millions of persons charged with drug offenses and also the rights of citizens generally.

