

# WILL MONEY TALK?: THE CASE FOR A COMPREHENSIVE COST-BENEFIT ANALYSIS OF THE WAR ON DRUGS

The Honorable Robert W. Sweet<sup>†</sup>

The “War on Drugs” has been a central concern of the justice system for the more than thirty years I have served as a federal district court judge in New York City. At the start of my tenure, it was a learning experience for me, as I was introduced to an industry with which I was unfamiliar, beyond the well-publicized stories of busts, codes, and conspiracies. In 1989, after more than ten years of accumulating doubts about the efficacy of drug prosecutions, the fairness of the harsh sentences imposed, and the social and economic forces underlying drug-related crime, I publicly questioned the validity of the War on Drugs.

In December of 1989, I spoke out about the need for reform.<sup>1</sup> I had my fifteen minutes of public attention and reiterated my position in various fora.<sup>2</sup> My comments emphasized the absence of evidence of the War’s success, the massive size of the underground economy sustained by criminalization, and the need to adopt a therapeutic, rather than punitive, approach toward drug addiction. My primary recommendation was that Congress eliminate the federal criminal prohibition on drugs and regulate drug sales similarly to those of alcohol.

The subsequent twenty years have served only to fortify and amplify my conclusions. While there is a vast amount of data indicating the toll that the War on Drugs itself has taken on our society, evidence regarding the social and

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1. See Stephen Labaton, *Federal Judge Urges Legalization of Crack, Heroin and Other Drugs*, N.Y. TIMES, Dec. 13, 1989, at A1. That initial speech is annexed in the Appendix to this Article.

2. See Robert W. Sweet, *U.S. Drug Laws: The New Jim Crow? Crack in the Wall*, 10 TEMP. POL. & CIV. RTS. L. REV. 337 (2001); Robert W. Sweet & Edward A. Harris, *Just and Unjust Wars: The War on the War on Drugs—Some Moral and Constitutional Dimensions of the War on Drugs*, 87 NW. U. L. REV. 1302 (Summer 1993) (reviewing THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (1992)); Robert W. Sweet, *The War on Drugs is Lost*, NAT’L REV., Feb. 12, 1996, at 44.

economic benefits of the present system remains scant. If all the relevant facts can be determined and disseminated through a comprehensive, high-level, well-funded study of the costs and benefits of the drug war, common sense, social policy, and public opinion will dictate an end to criminalization and the adoption of a public health approach to drugs.<sup>3</sup> Indeed, as 2008 marked the seventy-fifth anniversary of the repeal of Prohibition, parallels must be drawn between the present economic crisis and the bleak financial situation facing the nation during the final years of Prohibition.<sup>4</sup> “Change is the law of life,”<sup>5</sup> and after three-and-a-half decades of the War on Drugs, at a time of national economic and budgetary turmoil, change is imperative.

Thirty-five years after the so-called War began, the United States is the world leader in incarceration, with approximately 1 in 100 adults imprisoned.<sup>6</sup> Of the nearly 2.3 million people behind bars, nearly half a million are incarcerated for a drug offense.<sup>7</sup> Drug offenders represent more than half of the federal prison population.<sup>8</sup> The number of drug arrests has more than tripled since 1980,<sup>9</sup> reaching a total of over 1.8 million in 2007, more than for any other offense, 82.5% of which were for possession.<sup>10</sup> Lengthy incarceration has not been reserved for the worst offenders; the overall average sentence length for a

3. I made a similar proposal in a 1996 piece in *The National Review*, see Sweet, *supra* note 2, as did others who contributed to the compilation in which my essay appeared. See Kurt Schmoke, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 37 (recommending “a national commission to study all possible alternatives . . . to our failed strategy of blanket prohibition,” similar to the Wickersham Commission, discussed *infra* p. 237; cf. William F. Buckley, Jr., *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 34 (highlighting the many dimensions of the costs of the drug war and the value of a utilitarian analysis).

4. See, e.g., Ethan Nadelmann, Op-Ed, *Let's End Drug Prohibition*, WALL ST. J., Dec. 5, 2008, at A21 (“[T]here’s nothing like a depression, or maybe even a full-blown recession, to make taxpayers question the price of their prejudices.”); Neal Peirce, Op-Ed, *It's Time to End the War on Drugs*, THE SEATTLE TIMES, Dec. 12, 2008 (arguing that where “[r]epeal of alcohol prohibition created tens of thousands of new legal, taxpaying jobs,” “[r]epeal of drug prohibition could do the same now”).

5. President John F. Kennedy, Address in the Assembly Hall at Paulskirche in Frankfurt (June 25, 1963).

6. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_andcorrections/one\\_in\\_100.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_andcorrections/one_in_100.pdf).

7. MARC MAUER & RYAN S. KING, THE SENT'G PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2, 10 (2007), available at [http://www.sentencingproject.org/Admin/Documents/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/Admin/Documents/publications/dp_25yearquagmire.pdf).

8. U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, QUICK FACTS ABOUT THE BUREAU OF PRISONS (2009), available at <http://www.bop.gov/news/quick.jsp#4>.

9. MARC MAUER, RACE TO INCARCERATE 159 (2d ed. 2006); MAUER & KING, *supra* note 7, at 3-4.

10. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2007 (Sept. 2008), <http://www.fbi.gov/ucr/cius2007/arrests/index.html>.

federal drug offense ranges from 129 months for crack cocaine to 40.4 months for marijuana,<sup>11</sup> with the majority of cocaine and crack offenders subject to five- and ten-year mandatory minimums,<sup>12</sup> despite the fact that the overwhelming majority of them, approximately 90% in 2005, committed no violence in connection with their drug crimes.<sup>13</sup> In state prisons, more than half of the inmates incarcerated for drug offenses have no history of violence or high-level drug trafficking activity.<sup>14</sup>

As has been well-documented, the enforcement of the drug laws has been discriminatory in both its implementation and its effects, although constitutional attacks have not met with appellate approval.<sup>15</sup> While it is estimated that African-Americans represent only 14% of regular drug users, they constitute 37% of those arrested for drug offenses, and 56% of state inmates incarcerated for drug offenses.<sup>16</sup> The African-American community suffers disproportionately from the one-two punch of mandatory-minimum sentences and the Sentencing Guidelines' crack-cocaine disparity; in 2007, African-Americans represented only 29.5% of all drug offenders, but 82.7% of defendants convicted of crack offenses.<sup>17</sup> The average sentence for a crack cocaine offense, 129 months, is longer than that for offenses involving any other type of drug.<sup>18</sup>

Despite the astronomical numbers of arrests and prosecutions, the illegal drug industry, estimated at \$320 billion worldwide, remains untaxed and undeterred, except by strict corner violence and drive-by shooting. The U.S. Office of National Drug Control Policy estimated that in 2002, the economic cost of drug abuse was \$180.9 billion, having risen at a rate of 5.34% annually since 1992.<sup>19</sup> According to data released by the U.S. Department of Health and Hu-

11. U.S. SENT'G COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.J, available at <http://www.ussc.gov/ANNRPT/2007/figj.pdf>.

12. U.S. SENT'G COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.43, available at <http://www.ussc.gov/ANNRPT/2007/Table43.pdf>.

13. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 38 (2007).

14. MAUER & KING, *supra* note 7, at 2, 20.

15. See, e.g., U.S. v. Hanna, 153 F.3d 1286 (11th Cir. 1998) (rejecting a constitutional challenge to the crack-cocaine sentencing disparity on equal protection grounds); U.S. v. Teague, 93 F.3d 81 (2d Cir. 1996) (same). For a discussion of equal protection challenges to the drug laws, see David A. Slansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

16. MAUER & KING, *supra* note 7, at 20 (citation omitted).

17. U.S. SENT'G COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.34, available at <http://www.ussc.gov/ANNRPT/2007/Table34.pdf>.

18. U.S. SENT'G COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.J, available at <http://www.ussc.gov/ANNRPT/2007/figj.pdf>. (does it matter that this is the same chart cited to in footnote 11?)

19. OFFICE OF NAT'L DRUG CONTROL POLICY, THE ECONOMIC COSTS OF DRUG ABUSE IN THE UNITED STATES 1998-2002, at tbl.IV-I (Dec. 2004).

man Services, neither marijuana nor cocaine usage rates in the U.S. have changed dramatically since 1971.<sup>20</sup> In fact, according to one recent international survey, the United States leads the world in lifetime incidence of drug use, particularly with regard to cocaine.<sup>21</sup> Despite efforts to cut off supply, the price of drugs has actually fallen over the past twenty years, from \$350 for one pure gram of cocaine in 1981, to less than \$100 in 2003.<sup>22</sup>

Even in the absence of significant signs of success, the federal government appears to be staying the course. The 2009 National Drug Control Budget totals \$14 billion (not including prosecution and incarceration funds), approximately two-thirds of which will be dedicated to supply reduction measures, including \$3.8 billion for domestic law enforcement efforts.<sup>23</sup> In contrast, the Federal Bureau of Prisons has requested only \$69.2 million from Congress for inmate drug treatment programs.<sup>24</sup>

The costs of incarceration in state prisons and jails, which house the vast majority of drug offenders incarcerated nationwide, dwarf federal efforts as a percentage of total budgets. Such costs exceed \$1 billion in thirteen states, and total \$8.8 billion in California alone.<sup>25</sup> In 2007, five states spent as much or more on corrections than on higher education.<sup>26</sup>

These dollar costs pale in comparison to the less quantifiable, but even

20. U.S. DEP'T OF HEALTH & HUMAN SERVS., 2006 NATIONAL SURVEY ON DRUG USE & HEALTH tbl.8.38B, 8.39B available at <http://www.oas.samhsa.gov/NSDUH/2k6NSDUH/tabs/Sect8peTabs1to46.htm#Tab8.38B>.

21. The United States led the seventeen nations studied in rates of cumulative lifetime incidence of cannabis (42.4%) and cocaine (16.2%), with the percentage of American respondents who had tried cocaine nearly four times higher than that of the next nation on the list. Louisa Degenhardt, et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MED. 141 (2008) (“[C]ountries with more stringent user-level illegal drug policies did not have lower levels of use than countries with liberal ones.”).

22. *Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearing before the Joint Econ. Comm.*, 110th Cong. (2008), available at [http://jec.senate.gov/index.cfm?FuseAction=Hearings.HearingsCalendar&ContentRecord\\_id=9d0729b4-eefe-2b3e-7931-fb353bebe2a8&Region\\_id=&Issue\\_id=](http://jec.senate.gov/index.cfm?FuseAction=Hearings.HearingsCalendar&ContentRecord_id=9d0729b4-eefe-2b3e-7931-fb353bebe2a8&Region_id=&Issue_id=) (providing link to chart with cocaine price data).

23. OFFICE OF NAT'L DRUG CONTROL POL'Y (“ONDCP”), NATIONAL DRUG CONTROL STRATEGY, FY2009 BUDGET SUMMARY 1 (2008). For a critique of the supply-side emphasis of the 2009 budget, see *The National Drug Control Strategy, Budget, and Compliance: Priorities and Accountability at ONDCP, Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2008) (statement of Rosalie Liccardo Pacula, The RAND Corp.) [hereinafter Statement of Rosalie Liccardo Pacula], available at [http://www.rand.org/pubs/testimonies/2008/RAND\\_CT302.pdf](http://www.rand.org/pubs/testimonies/2008/RAND_CT302.pdf); see also HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 9 n.15 (2008).

24. *Id.* at 87.

25. PEW, *supra* note 6, at 11.

26. *Id.* at 16.

more significant, collateral costs, including broken families and communities; lost wages and child support; eroded community-police relations; and public health challenges posed by untreated addiction, including the spread of HIV and hepatitis through intravenous drug use. In addition, of course, are the opportunity costs of each dollar spent on law enforcement and incarceration rather than early childhood, K-12, and higher education, health care, housing, and other underfunded social services.

There are costs to the judicial system as well. Drug trafficking offenses have constituted the largest portion of the federal criminal docket for over thirty years.<sup>27</sup> Between 1985 and 2002, the number of drug prosecutions brought in federal court increased by 144%.<sup>28</sup> It is estimated that federal prosecutions and incarceration of drug offenders may alone cost approximately \$5 billion annually.<sup>29</sup>

This says nothing of the exasperation and moral quandary faced by sentencing judges who are forced by statute to sentence addicts and non-violent, low-level offenders to lengthy terms of imprisonment despite being virtually certain that such sentences will neither reduce the demand for drugs and the associated violence,<sup>30</sup> nor address the needs of many individual defendants for long-term, comprehensive treatment. I am charged by statute with imposing a sentence that is “sufficient, but not greater than necessary,” to, *inter alia*, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>31</sup> But when faced

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27. U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 47 (Nov. 2004), available at [http://www.ussc.gov/15\\_year/chap2.pdf](http://www.ussc.gov/15_year/chap2.pdf); see also 2007 U.S. SENT’G COMM’N, ANNUAL REPORT 31, available at <http://www.ussc.gov/ANNRPT/2007/ar07toc.htm>. (“As in previous years, drug offenses were again the largest single category of federal convictions, making up 34.4% of all offenders sentenced in 2007. Among drug cases, 45.4% involved cocaine (24.7% powder cocaine and 20.7% crack cocaine), followed by marijuana (25.2%), methamphetamine (20.3%), and heroin (5.5%).”).

28. MAUER & KING, *supra* note 7, at 8. See also BUREAU OF JUSTICE STATISTICS, KEY FACTS AT A GLANCE: TRENDS IN THE TYPES OF CASES CONCLUDED IN U.S. DISTRICT COURT, available at <http://www.ojp.usdoj.gov/bjs/glance/tables/fedtyptab.htm>.

29. Statement of Rosalie Liccardo Pacula, *supra* note 23, at 1-2.

30. See, e.g., Anne Morrison Piehl & John J. Dilulio, Jr., *Does Prison Pay? Revisited*, THE BROOKINGS REV. 21, at 25 (Winter 1995) (“We believe that the best estimate of the incapacitation effect (number of drug sales prevented by incarcerating a drug dealer) is zero, and therefore value drug crimes (sales and possession) at zero social cost. Other analysts, including many whom no one can accuse of being soft on crime or in favor of drug legalization, have reached similar conclusions. For example . . . James Q. Wilson observed that prison terms for crack dealers ‘do not have the same incapacitative effect as sentences for robbery. . . . A drug dealer sent away is replaced by a new one because an opportunity has opened up.’”).

31. 18 U.S.C. § 3553(a) (2006).

with mandatory minimum sentences, a complete absence of rehabilitative alternatives to incarceration,<sup>32</sup> and limited options regarding recommendations for drug treatment, such considerations are largely illusory. Many of my colleagues have expressed similar frustrations, and such dilemmas have led at least one of my colleagues on the bench to resign.<sup>33</sup>

The past twenty years have produced some amelioration of this punitive policy. In 1994, Congress added a “safety-valve” provision, intended to relieve non-violent, low-level, first-time drug offenders from statutory minimum sentences.<sup>34</sup> More recently, the United States Sentencing Commission adopted amendments to the federal Sentencing Guidelines which have the effect of reducing, although not eliminating, the disparity between sentences for cocaine and crack offenses.<sup>35</sup> It must be noted that while this reduction represents long-overdue progress, the amended Guidelines maintain an essentially arbitrary crack-cocaine disparity, ranging from 25:1 to 80:1, which, like the 100:1 ratio, is unsupported by scientific or economic data.<sup>36</sup> In the last session of Congress, there were several proposals to eliminate the crack-cocaine sentencing disparity entirely, in addition to repealing the five-year mandatory minimum for crack possession.<sup>37</sup>

On the state and local levels, progress has been more substantial. Twelve states currently have laws permitting the use of marijuana for medical

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32. Cf. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 55-56 (2003) (“The priority of modified just deserts over the other purposes of sentencing is clear in the Guidelines’ approach to rehabilitation. Whether one agrees with this philosophy or not, it is simply impossible to make a case that the Guidelines rank rehabilitation as anything but the lowest priority among the four purposes of sentencing. This treatment of rehabilitation is completely consistent with the [Sentencing Reform Act of 1984] and reflects the times in which the Guidelines were developed, when disillusionment with rehabilitation was widespread among both liberals and conservatives.”).

33. See *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at 22.

34. Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. No. 103-322, § 80001, 108 Stat. 1796 (1994). In 2007, 38.6% of drug offenders convicted received safety-valve relief. 2007 U.S. SENT’G COMM’N, ANNUAL REPORT, *supra* note 27, at 33.

35. U.S. SENT’G GUIDELINES MANUAL § 1B1.1 app. C, amds. 706, 711 (2007).

36. See, e.g., U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY B-9-B-12 (summarizing medical and scientific testimony regarding the biological effects of crack and cocaine); *id.* at B-12 to B-17 (summarizing academic research regarding the effects of the sentencing disparity on the markets for crack and cocaine).

37. For an overview of the legislation, see FAMILIES AGAINST MANDATORY MINIMUMS, COMPARISON OF SENATE CRACK COCAINE BILLS 2007, [http://www.famm.org/Repository/Files/FINAL\\_COMPARISON\\_OF\\_CRACK\\_BILLS%5B1%5D.pdf](http://www.famm.org/Repository/Files/FINAL_COMPARISON_OF_CRACK_BILLS%5B1%5D.pdf).

purposes. State and local authorities are increasingly experimenting with alternative adjudication and sentencing programs, including specialized drug courts and community-based treatment alternatives to incarceration.<sup>38</sup> Experience tells us that when state legislatures find themselves under intense pressure to shrink their budgets to accommodate decreasing revenue, they often look to cut costs by reducing incarceration rates, in part by ameliorating the harsh effects of their sentencing laws.<sup>39</sup> By repealing mandatory minimum sentences, paring back truth-in-sentencing requirements, and granting judges greater discretion in sentencing, many state officials have been “forced” by tough economic realities to develop more cost-efficient, sensible responses to the challenges presented by illegal drug abuse.<sup>40</sup>

However, despite steps toward the rationalization of our drug policy, the costs and calamities of the War on Drugs at the federal level have not yet reached deep enough into the public consciousness to overcome the prejudices initially seeded by Harry Anslinger, the infamous first commissioner of the Federal Narcotics Bureau and ruthless advocate of marijuana criminalization, who fanned the flames of fear and racism by offering exaggerated accounts of the effects of drugs on the psyche and portraying drug use in America in overtly racist terms.<sup>41</sup> A comprehensive cost-benefit analysis in the context of the War on Drugs would provide a particularly necessary and powerful check against this biased rhetoric.<sup>42</sup> Until now, the federal government has not been forced to question many of the flawed assumptions on which the War on Drugs is based because, since the “War” was first declared, it has not faced the same

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38. See, e.g., Erik Eckholm, *Courts Give Addicts a Chance to Straighten Out*, N.Y. TIMES, Oct. 15, 2008, at A1; cf. Judge Donald P. Lay, *Rehab Justice*, N.Y. TIMES, Nov. 18, 2004, at A31 (“Given the success of drug courts in the states, the federal government should study how to modify its sentencing to incorporate elements of the drug court model and to assess the effectiveness of community-based alternatives to imprisonment for nonviolent federal drug felons.”).

39. Reports on the budget crunch during the first half of the decade note that much of the progress in reform at the state level was the result of financial pressure coinciding with lower crime rates. See generally DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. FOR JUSTICE, *IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION?* (2002), available at [http://www.vera.org/publication\\_pdf/167\\_263.pdf](http://www.vera.org/publication_pdf/167_263.pdf); RYAN S. KING & MARC MAUER, THE SENT’G PROJECT, *STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT* (2002), available at [www.sentencingproject.org/pdfs/9091.pdf](http://www.sentencingproject.org/pdfs/9091.pdf).

40. See WILHELM & TURNER, *supra* note 39, at 5-6.

41. See generally, STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA’S LONGEST WAR* 91-93 (1994).

42. Rachel E. Barkow, *Sentencing: What’s at Stake for the States?*, 105 COLUM. L. REV. 1276, 1278, 1283 (2005) (writing that despite falling crime rates, “the politics of sentencing at the federal and state levels have been dominated by ‘get-tough’ rhetoric and ever harsher sentences” and arguing that “[t]he gross imbalance of political power creates an institutional bias against sentencing reforms that would result in shorter sentences.”).

financial constraints with which the states have been forced to contend.<sup>43</sup> However, with the new administration facing an almost unprecedented economic slowdown and with Congress's attention focused intently on returning stability to the country's economy, the time is ripe for a coordinated, objective, scientifically rigorous cost-benefit analysis of the War on Drugs. Such an analysis is long overdue.

According to the last estimate published by the Office of National Drug Control Policy, expenditures on illegal drugs in the United States total approximately \$65 billion annually.<sup>44</sup> If the criminal prohibition were replaced by a tax similar to that on tobacco or alcohol sales, instead of expending \$14 billion on enforcement and approximately \$5 billion more on incarceration, the federal government could collect billions in tax revenues to dedicate to therapeutic measures, thereby lowering addiction rates and further reducing the costs to the national economy associated with drug abuse, most significantly lost wages and medical care expenditures.<sup>45</sup> Both moral and economic benefits would result.

As a nation, we have before overcome a criminal regime affecting personal choice. Prohibition lasted from 1920 to 1933, and the facts surrounding its enforcement and efficacy were significant factors in reversing the criminal prohibition. Similar to the War on Drugs, the direct and indirect costs of Prohibition were high, including not only the dollar costs of enforcement, but also the social costs of illegal activity spawned by the vast underground alcohol economy, the erosion of constitutional rights as a result of aggressive enforcement and prosecution tactics, and the usurpation of personal autonomy. In the early years of Prohibition, the Association Against the Prohibition Amendment (AAPA) reported that "[t]he dearth of facts is a remarkable manifestation of the fog of controversy which still obscures the study of Prohibition."<sup>46</sup> Following the 1928 election, supporters of Prohibition's repeal realized that voters needed to "see varied and impressive evidence of prohibition's ill-effects," and began publishing research exposing the practical effects of national Prohibition on crime, the economy, and the criminal justice system as a whole.<sup>47</sup> This research, however informative, was funded by interest groups committed to the repeal of Prohibition, and while it drew attention to the cause, it was a study

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43. *Id.* at 1301-03 (describing ways in which the federal government is less susceptible to financial pressures in criminal justice decisionmaking).

44. ONDCP, WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS 3 (2001), available at [http://www.whitehousedrugpolicy.gov/publications/pdf/american\\_users\\_spend\\_2002.pdf](http://www.whitehousedrugpolicy.gov/publications/pdf/american_users_spend_2002.pdf).

45. According to ONDCP, lost productivity accounts for 69% of the economic costs of drug abuse. ONDCP, ECONOMIC COSTS OF DRUG ABUSE IN THE UNITED STATES: 1992-1998 at 3 (Sept. 2001), available at [http://www.whitehousedrugpolicy.gov/publications/pdf/economic\\_costs98.pdf](http://www.whitehousedrugpolicy.gov/publications/pdf/economic_costs98.pdf).

46. DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 104 (Kent State Univ. Press 2d ed. 2000) (1978).

47. *Id.* at 105.

commissioned by the newly-elected President both confirming the AAPA's findings and drawing national attention to the facts that ultimately contributed to Prohibition's decline.

President Hoover's National Commission on Law Observance and Enforcement (otherwise known as the "Wickersham Commission"), although its official recommendation was that the government redouble its Prohibition efforts,<sup>48</sup> ultimately played a part in Prohibition's demise by exposing the failures and abuses of its enforcement.<sup>49</sup> Today, given the materially similar facts surrounding the experience of criminal prohibition of alcohol, public opinion should respond reasonably once more. Knowledge should still provide power, four centuries after Francis Bacon.<sup>50</sup>

Congress has tipped its hat to the need for a careful development of the relevant facts. The Violent Crime Control and Law Enforcement Act of 1994 provided for a "National Commission on Crime Control and Prevention" which was to study, among other things, "the economic and social factors leading to or contributing to crime and violence, including the causes of illicit drug use and other substance abuse."<sup>51</sup> The Commission's twenty-eight members were to be appointed by the President and the Congressional leadership, and were to include experts in "such areas as addiction, biomedicine, sociology, psychology, law, and ethnography and urban poverty (including health care,

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48. Although, under pressure from the Hoover Administration, the Commission's report recommended against the repeal of Prohibition, in their individual statements accompanying the report, "[a] preponderant majority of commissioners found the current system of nationwide prohibition unenforceable or unwise." Kyvig, *supra* note 46, at 113. The report's findings included "increased drinking since 1920, widespread bootlegging and official corruption, overburdened judicial and penal systems, lack of state support for enforcement, and damaged respect for law." *Id.*

49. See Harry Gene Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, 12 CONTEMP. DRUG PROBS. 63, 74-77 (Spring 1985), cited in DUKE & GROSS, *supra* note 41, at 103 ("The report of Hoover's National Commission on Law Observance and Enforcement played a significant role in the collapse of both elite support and public legitimacy of prohibition."); Kyvig, *supra* note 46, at 114-15 ("The Wickersham Commission did draw increased attention to the debate over prohibition. The study of existing conditions . . . which the . . . Wickersham commission independently confirmed, produced a general agreement that the law was not effective"). For a contemporaneous account of the Commission's reports, see Albert E. Sawyer, *Report on the Enforcement of the Prohibition Laws of the United States*, 30 MICH. L. REV. 7 (1932).

Of course, the Wickersham Commission report was only one among a variety of factors leading to the repeal of Prohibition, the most significant of which was the onset of the Great Depression. See, e.g., Levine, *supra*, at 68-75 (discussing the effect of the Depression on the debate over prohibition, in particular the issues of loss of tax revenue and "widespread disrespect for all law" engendered by mass violations of prohibition). See also Schmoke, *supra* note 3.

50. FRANCIS BACON, RELIGIOUS MEDITATIONS, OF HERESIES (1597).

51. VCCLEA § 270002, Pub. L. No. 103-322, § 80001, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 3553(f) (2006) and U.S.S.G. § 5C1.2 (2007)).

housing, education, and employment).”<sup>52</sup>

The bill provided a specific outline of issues to be investigated regarding the causes of drug demand and the efficacy of drug policy, including the relationship between illicit drug use and “environmental factors” such as unemployment, poverty, and homelessness; “cultural values, attitudes and traditions” and physiological and psychological factors contributing to illicit drug use; the efficacy of federal, state and local prevention, control, and sentencing policies; the allocation of resources among interdiction of drugs entering the United States, enforcement of laws relating to the unlawful production, distribution, and use of controlled substances, prevention and education, and treatment and rehabilitation; and current treatment and rehabilitation methods.<sup>53</sup> Although the Commission was legislated, no report was ever produced, and, to date, no rigorous, comprehensive, high-level study of these issues exists.

Perhaps the recent amendments to the Sentencing Guidelines to reduce the crack-cocaine disparity, while only a very small step, will prompt further discussion and lend additional support for a broader movement to reconsider the larger drug prohibition regime, including, at a minimum, our illogical approach to the nature and severity of drug sentencing.<sup>54</sup> The 100:1 crack-cocaine sentencing disparity is emblematic of draconian drug policy produced with no supporting scientific research or economic analysis.<sup>55</sup> In contrast, the Sentencing Commission’s 2007 report recommending reduction of the disparity cited testimony by medical experts concluding that there was no scientific basis for distinguishing between crack and cocaine offenses in sentencing.<sup>56</sup> President Obama has directly addressed the issue by including the elimination of sentencing disparities on his civil rights agenda.<sup>57</sup>

Also encouraging is the recent focus on rehabilitative alternatives to incarceration. In July 2008, the Sentencing Commission held a “Symposium on Crime and Punishment in the United States: Alternatives to Incarceration,” followed by a formal announcement of its plan to focus on the development of al-

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52. VCCLEA § 270002 (codified at 42 U.S.C. § 14192 (2006)).

53. VCCLEA §§ 270001-09 (codified at 42 U.S.C. §§ 14191-99 (2006)).

54. In a promising development, on June 19th, 2008, the Congressional Joint Economic Committee held hearings specifically focused on the economic costs of the drug war and the need for alternative approaches. See David Lerman, *Webb Urges Fresh Look at the War on Drugs*, DAILY PRESS, June 20, 2008, at A2. On March 29, 2009, Senator Webb introduced the National Criminal Justice Commission Act of 2009 calling for the creation of a blue-ribbon commission to examine the criminal justice system. See S. 714, 111th Cong. (2009).

55. See Vanessa M. Gezari, *Cracking Open*, WASH. POST, June 1, 2008, at W18 (describing circumstances surrounding passage of mandatory minimum drug sentences still in place).

56. See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS, *supra* note 36.

57. See The Agenda, [http://www.whitehouse.gov/agenda/civil\\_rights/](http://www.whitehouse.gov/agenda/civil_rights/).

ternatives to incarceration in the coming year.<sup>58</sup> It is, of course, far from certain what the Commission will recommend or whether its recommendations will receive serious consideration from federal lawmakers. However, the Obama Administration has expressed its support for expanding the use of drug courts to “give first-time, non-violent offenders a chance to serve their sentence, where appropriate, in the type of drug rehabilitation programs that have proven to work better than a prison term in changing bad behavior.”<sup>59</sup>

While a step in the right direction, these studies, hearings, priorities, and symposia represent a piecemeal approach to an issue that must be considered comprehensively, with an eye toward serious reform. An authoritative analysis of the War on Drugs would provide a much-needed evidentiary basis for either reinforcing or reconsidering the present approach. Some of the facts that need to be determined include: 1) relevant scientific and medical conclusions about the causes and effects of addiction, including neuroscience research with respect to the operation of presently prohibited substances on the brain and the progress of research and development of inhibitors of such effects, as well as the actual relationship between individual drug use and violent activity; 2) alternative strategies that have been successful in reducing drug crime in the states, as well as abroad; 3) the contours of the drug economy, including the presently estimated amount of domestic drug sales, both in dollars and quantity, and the revenues attainable if drugs were regulated and taxed; 4) the actual costs of the current law enforcement strategy, including not only the costs of investigation, prosecution, adjudication, and incarceration, but also the costs of lost productivity and wages; 5) the root causes of drug crime, including sociological factors such as unemployment and poverty; and 6) a survey of the rates of drug use and drug-related crime, as well as incarceration and arrest rates, in nations with less prohibitive drug policies.

Such a study should be long-term and its results should not be released incrementally, but as a single, comprehensive report with conclusions and recommendations based on a holistic view of the problem. Meanwhile, the laboratory of the states should be encouraged to function, and consideration should be given to allocating penalties for possession to the states.<sup>60</sup> When federal policy conflicts with state law, such as in the case of state laws permitting the use of medical marijuana, federal authorities should abstain from enforcement unless

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58. See Gary Fields, *U.S. Sentencing Panel to Focus on Alternatives to Jail*, WALL ST. J., Sept. 6, 2008, at A3; Notice of Final Priorities, 73 Fed. Reg. 46341 (Aug. 8, 2008), available at [http://www.ussc.gov/FEDREG/20080908\\_Finalpriorities.pdf](http://www.ussc.gov/FEDREG/20080908_Finalpriorities.pdf).

59. *Supra* note 57.

60. For a brief discussion of the benefits of “federalism, not federalization,” see JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT* 231-34 (2001).

a substantial interstate effect can be established,<sup>61</sup> so that the states will have a chance to develop reliable data on the economic and public health effects of such legalization.

One logical institution to initiate or coordinate this investigation is the Sentencing Commission, which is tasked by statute with establishing policies and procedures that “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”<sup>62</sup> and “develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.”<sup>63</sup> It has been argued that in wake of *United States v. Booker*, the Commission must “reconsider where to expend its time, energy, and resources.”<sup>64</sup> Revisiting the goals and effects of our drug sentencing scheme would be a particularly fitting place for the Commission to start. As the Supreme Court discussed in *Kimbrough v. United States*, “[c]arrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’”<sup>65</sup> Therefore, “in the ordinary case, the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve the § 3553(a)’s objectives.’”<sup>66</sup> However,

61. Under *Gonzales v. Raich*, 545 U.S. 1 (2005), the federal government is permitted to regulate the intrastate production, distribution, and possession of marijuana intended for personal medical use, even in states which permit such activity. Dissenting in *Raich*, Justice O’Connor, joined by Chief Justice Rehnquist and Justice Thomas, stated:

This case exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.

*Id.* at 42-43.

62. 28 U.S.C. § 991(b)(1)(C) (2006).

63. 28 U.S.C. § 991(b)(2) (2006); see also U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 12 (NOV. 2004), available at [http://www.ussc.gov/15\\_year/chap1.pdf](http://www.ussc.gov/15_year/chap1.pdf) (quoting the statutory language).

64. Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 1, 219 (2005).

65. 128 S. Ct. 558, 574 (2007) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

66. *Id.* (quoting *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007)).

“the crack cocaine Guidelines . . . do not exemplify the Commission’s exercise of its characteristic institutional role,” as, in formulating those Guidelines, “the Commission looked to the mandatory minimum sentences [enacted by Congress] and did not take account of ‘empirical data and national experience.’”<sup>67</sup> Now is the time for the Commission to gather and analyze that data and experience.

One way for the Commission to begin to incorporate the type of cost-benefit analysis suggested here is to “forecast the fiscal costs of any provision affecting sentencing in pending criminal legislation prior to congressional enactment and . . . similarly forecast the costs of any proposed Commission amendment to the Guidelines before those amendments go into effect.”<sup>68</sup> While this proposal is not a substitute for a thorough cost-benefit analysis, it could function as a first step toward drawing the necessary attention to the costs associated with the federal drug laws.

In 1994, the Commission did, in fact, convene a “Drugs Violence Task Force” to compile a report regarding the relationship, if any, between drugs and violence, however, the task force never agreed upon nor published its final report.<sup>69</sup> According to one member, the task force did agree on the broad conclusions in the unpublished final report that “drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting the drug laws,” that existing research about the prevalence of crime related to the selling of drugs as opposed to their ingestion “contradicted widespread beliefs about the existence of psychopharmacological violence,” that “past drug control efforts had inappropriately emphasized the supply side,” and that greater resources should be devoted to reducing demand.<sup>70</sup> Given the indication that research into the drugs-violence relationship alone would reveal that our current approach is based on a host of flawed assumptions, it is worth urging the Commission, having learned from the experience of the initial task force, to revisit these questions and redouble its research efforts.

If Congress continues to fail to provide the funding and political capital for such an analysis, however, a consortium of foundations and academics concerned with law, public health, and the economy should be formed to undertake it. A careful analysis of all the facts will have a profound impact on policy and public opinion.

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67. 128 S. Ct. 558, 574-75 (2007) (internal citations omitted).

68. Letter from the Center on the Administration of Criminal Law at New York University School of Law to U.S. Sentencing Commission (Aug. 29, 2008).

69. Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749, 749-50 (2000).

70. *Id.* at 755-59.

We must acknowledge that the “War on Drugs” is not a war at all, but an attempt to avoid the real challenge of addressing our shortcomings as a society, as a nation, and as individuals, by pretending that drugs themselves are to blame. Perhaps today, as we find our armed forces engaged in warfare on two fronts abroad, our nation embroiled in a global “War on Terror,” and our economy in turmoil, the elucidation of the facts will produce the collective will necessary to disengage from this domestic conflict of our own making and finally declare an end to the War on Drugs.

## APPENDIX

Speech Given by  
Robert W. Sweet, U.S.D.J.  
Cosmopolitan Club, N.Y.C.

December 12th, 1989

Ladies and gentlemen,

After that gracious introduction, I want to tell you first how I have been driven into wrestling with the demon of the drug war, then second, to share with you my assessment of our society's response to drug use, third, to consider what is driving this abusive conduct—and I'll tell you right now, that it is what drives all too much in our society— money, or the lack of it. Fourth, to advance the abolition of prohibition and finally to evaluate the reality of accomplishing such a proposal. First, what is the basis of my presumption to raise these issues with you. It is my exposure for the past eleven and a half years as a federal trial judge to the futility of sentencing criminals who have been convicted of violating the drug laws and to the frustration of seeing our justice system overwhelmed by a social phenomena. I did not come to this experience totally unprepared. I was an AUSA in the early fifties and in the sixties served as Deputy Mayor and participated in John Lindsay's effort to encourage alternatives to addiction—methadone, as well as experimental treatment programs such as Day Top and the Phoenix House. And, even more painfully, I was a parent during the sixties and seventies—and happily still am. To explain part of the reason why I'm now speaking, let me describe for you the morning of October 13, this year, and the three matters to be dealt with, which I assure you are completely typical. Radman had pleaded guilty to violating the drug laws and was up for sentence. He is forty years old and came to the United States from Syria in 1977 to escape the violence in Damascus. He worked at odd jobs, as a peddler and in the construction business. He and his wife opened a juice bar on MacDougal Street selling middle eastern specialties, operating on the margin of profitability. He has two children, seven and two. Radman was asked by someone in the community if he knew anyone who could provide heroin. He did but that person after being approached declined to make the sale but offered money to Radman to conduct the negotiation. Radman sold two ounces of heroin for \$16,000, and received \$1,000 for his part in the transaction. The numbers escalated, the customer sought a kilogram, the source came up with nine ounces, and the transaction appeared to have been consummated—unfortunately for Radman with a confidential informant, and Radman was arrested. The mandatory sentence for his crime is five years. He had no prior criminal history. He

explained his participation by stating he needed the money to prevent losing his store and his apartment.

On September 16, 1987, Antonio was arrested on a street sweep, in law enforcement jargon "a buy and bust." A police officer acting undercover at 47th Street and Ninth Avenue walked down the street, heard someone say, "Pick up Driver," responded that he wanted two, was steered to Antonio who sold him two envelopes for thirty dollars, containing 1.3 grams of heroin. Upon arrest, Antonio stated he sold heroin and crack for money to support his own addiction. Antonio is twenty-five years old. His father and mother were not married and his father left home shortly after his birth. In 1982 Antonio with thirteen others committed a mugging. After four years supervision, he successfully completed probation. In 1987 he was arrested trying to remove a license plate from a car for which service he was to be paid twenty dollars. The car, it goes without saying, was stolen. Since 1983 he has had a cocaine and heroin habit that cost him \$200 a day to maintain. He spent seven months in a residential drug treatment program. He has no high school diploma, no vocational skills. He was sentenced initially on May 7, 1988, and returned on October 13 for violating his supervised release after serving a jail sentence for failing to report to his probation officer and for using cocaine and heroin. On his probation violation he received a sentence of another year.

Beno was born in Manhattan in 1967, his mother was unable to care for him, his father was abusive and when he was three years old threw him to the sidewalk, cracking his head open. He was comatose for a month, hospitalized for six months, and has been diagnosed as hyperkinetic with severe learning disabilities. He was then adopted. After nineteen years he left home to hang out with his natural brothers. He then left high school to hang out with the Savage Ghosts because, in his words, "I felt like I was important." From 1986 to 1989 he worked at odd jobs. Before the summer of 1989 he was arrested twice, once for the sale of marijuana and once for involvement in a heroin transaction.

On May 23 this year an undercover agent met with Beno's co-defendant who had undertaken to supply the agent with nine ounces of heroin for \$52,000. Beno arrived with a message to go to a restaurant where the package would be delivered. At the restaurant, Beno delivered a second message that "Joey would be arriving shortly." Beno was arrested. He stated that he had met a friend who asked him if he wanted to make some money. When he said yes, he was told he had to tell some guys where to meet. After the transaction was completed, he was to receive \$500. He knew narcotics were involved but did not know how much. After this arrest he has returned to his adoptive parents and now is working regularly as a carpenter. The mandatory minimum sentence imposed by Congress for Beno based on the size of the transaction is five years.

Then Maria was before me the following week. She was a pregnant addicted defendant, who was the second generation of an addicted family, who was then carrying a third generation already afflicted, which would be simply

more of the same. The point is that imposing sentence in these cases forces me to face the issue of drugs in the society in the most direct and painful manner.

To these cases, of course, can be added the trials such as the Pizza Connection or the government's successful prosecution of some twenty-five Ghanaians who imported heroin from Africa and made the miscalculation that their telephone conversations in their native dialect—Twi—were secure. But, of course, as the Ghanaians are convicted, Dominicans rise in their place like the targets in a shooting gallery after a round is over. Quite properly, these cases, like all criminal cases, are subject to Speedy Trial requirements, disposition within ten weeks of indictment, broadly speaking. Consequently, the prosecution of drug cases, of course, skews the rest of a judge's calendar. There is no reason to assume that my calendar is atypical. We all get our cases the same way, by lot. Since Labor Day, I have tried eight cases, all but two criminal, all of the criminal cases but one drug cases. In September, I'm told, there were no juries available to try cases other than criminal cases, more than fifty percent of which were drug cases in our court.

The pain of sentencing in this area, and the time committed to enforcement of the drug laws could not be a subject of complaint if the process can be said to promote an appropriate national purpose. More than a decade of this, and its likely continuation, like the prospect of a hanging, tends to sharpen the concentration. I concluded that I should admit to my own thoughts and to be prepared to speak my mind on the subject fortified by Canon 4 of the Code of Judicial Conduct which permits me to make recommendations concerning the law and the administration of justice. Two questions immediately were thus presented, does our present prohibitive structure work? Is it right?

I suppose the moral question should be faced first—is it right for the society to prohibit the use by some of its members of a mind altering substance?

Obviously we have conflicting strains in national character, Cotton Mather, and Carrie Nation, on the one hand, and Thomas Jefferson and A1 Smith on the other. The adoption of narcotics prohibition in 1914 followed a period where Coca Cola was what it sounds like it ought to be and patent medicines with opiate derivatives were freely available.

Of course, we also tried Prohibition of booze at the same time—the Noble Experiment—as a war time measure. After only some nineteen years as a nation we rejected the idea that it was in the national interest to prevent some of our members from being able to partake of a mind altering liquid which has been part of our social and religious heritage throughout western civilization. The prohibition against drugs remains.

I suggest that at its roots this controversy lies between those who wish to place responsibility on the individual and those who seek to place it on society and its agencies. In this day and age to prevent the harm to our fellow citizens, perhaps our society should prohibit cigarettes, maybe ham and eggs, or perhaps

anything other than a prescribed diet. The issue is one of control and responsibility. Government and laws exist in my view to accomplish for the citizen what he or she cannot accomplish for themselves or to punish those who do unto others what others abhor. Given my experience, I'm afraid, I support the thought expressed by John O'Sullivan in 1837 that "the best government is that which governs least."

But that debate, perhaps too abstract for the practicalities of a modern world, can be left aside by the application of a different test—does our present prohibition work?

The numbers are fairly well beyond dispute.

Both Ed Koch and Jesse Jackson have used the same number for the size of the drug market in the United States—\$150 billion dollars. Other students of the problem have estimated that it is between \$10 to \$15 billion. By the very nature of the marketplace, of course, accurate statistics are not available, but it is undisputable that the numbers are big—very big.

The profits are huge. The Pizza Connection case which took my brother Leval twenty-three months to try contained testimony about rooms filled with cash in Swiss warehouses. The Economist estimates that the mark up on cocaine and heroin is 5,000% from cost of materials to sale to the consumer.

A recent federal study described in the *Times* on December 5th estimated that drug use is costing our economy \$60 billion annually. The costs of treatment is estimated by Senator Bentsen at \$2.5 billion. The Federal Reserve has estimated \$125 billion in currency is missing from our economy, much of it attributable to drug sales. This is an underground, untaxed, unregulated economy which in some Andean countries is equal to the amount of goods legally exported. The *Times'* headline was: "The study means that narcotics is one of America's major industries." It has been calculated that between thirty-five and forty million Americans have illegally consumed a drug during the period covered by the National Institute of Drug Abuse Household survey. The numbers of those persons severely dependant are estimated by the same organization to be some 6.5 million. Other experts place the number at two to three million. Tom Wicker tells us there are 875,000 addicts in New York. The American public has not been slow in absorbing some of these realities. The CBS/New York Times survey of public opinion in the United States in September 1989 stated that 54% of Americans thought drugs were the most important problem facing our country—in 1985 the same survey found only 1% to believe drugs to be our most serious problem.

The message is not lost on our political leaders who also read the polls. Although fourteen years ago President Nixon stated that we had turned the corner on drugs, this fall before adjourning for the Christmas recess, Congress upped the president's ante and on November 14th added \$3.2 billion to his request for funds to mount the drug war in what Senator Glenn referred to as a "feeding

frenzy.” The total expenditure this year will reach \$8.8 billion, \$1 billion of which will go to federal prisons. We have almost one million people in jail, and last year some 750,000 arrests were made, three-quarters of which were for possession—typically marijuana. In New York City 40% of all felony indictments are for drug law violations. Building jails is now a growth industry for our country which already has the highest jail rate for any western nation except South Africa, in part the result of Congressionally mandated minimum terms of twenty, ten, and five years for certain violations of drug laws.

More money, more prisoners, more addicts—these numbers demonstrate to me our present prohibitive policy has failed, flatly and without serious question.

The war on drugs has failed to stop the traffic, or to alter the societal patterns which produce the phenomena. It is expensive and diverting, and has come close to causing foreign excursions, subversions, and has caused us to reconsider whether or not as a nation we wish to employ assassination as an expression of policy. Not only has domestic fabric been stretched but our foreign relations have been skewed and distorted. Third world economists question our good faith as we seek to prohibit their participation in a cash crop that our society is demanding. I suggest that the war on drugs is bankrupt.

By the way, a footnote on terminology. This prohibition against the use of mind-altering substances by our fellow citizens has been given the sound bite of the “war on drugs.” Of course, it is not a war, there is no foreign challenge to our security, there is no external enemy. In Pogo’s classic definition—“we have met the enemy and they is us.” This phenomenon is not a war, it is far less catchy. It is a sore, a debilitating disease, a flaw in ourselves and our society.

Should I happen to be correct, the problem then is not without but within—my third point—what about our world has created this frustrating, debilitating and destructive condition? At the risk of over simplifying, I suggest it’s one thing—money, or its obverse, the lack of money. Although it’s anecdotal, let me report a conversation told to me by a probation officer who had taken a particular interest in one of his clients, a bright eighteen year old, whom he had once supervised. When he found his client to be once again in jail on a drug violation, he went to see him and asked him why, given his capacities, he chose to adopt a course of conduct that placed him at such risk. The response, “You want me to take a minimum wage job when I can make \$200 a day on the street.” It is a ticket out—a risky ticket—but one which works and is understood. Fifty dollars, \$100, or \$300 for riding shotgun, or acting as a steerer or a lookout, is immediate and available money. It is the risk that creates the reward, it is the money that permits recruitment to replace those removed from operation by force of law or otherwise.

Leonard Rauch, a thirty-two-year-old resident of the South Bronx who works in his own neighborhood at a security job tries to act as a role model for

the teenagers in the neighborhood. But, Rauch has stated: "they see that in order to do better than this you need big money, and for them, big money means drugs. They see a guy like me making \$250 a week, and a dealer with gold chains and a new car making \$2,000 a week. Who do you think they want to be like."

The cause and success of the distribution of drugs is obviously, indisputably the money to be made—the analogy with Prohibition—the Noble Experiment—in this regard fits like a glove.

But how about the consumer—from Dionysus or Noah's vines on, mind altering by alcohol has been part of Western culture. Not so, marijuana, cocaine, heroin and crack. However, these substances, to a greater or lesser extent, and in varying degrees, do alter one's consciousness, one's view of the world. Even as alcohol dulls the suppressor and enhances one's view of oneself, cocaine gives a sense of exhilaration, heroin a glow, a warmth, and marijuana a sense of relaxation and ease. What then is wrong?

Incidentally, as to marijuana, particularly today, the answer is nothing. It is reported to be our fourth most important cash crop. In 1972 President Nixon's commission on the drug laws recommended the regulation and taxation of marijuana, a recommendation repeated in 1982 by the National Academy of Sciences. Whatever can be said about heroin, cocaine and synthetic drugs, twenty-seven years is long enough to learn that the prohibition against marijuana should be abolished.

Prohibition produces two negative results which are directly contradictory to the goal of prohibition. They create an economic incentive for drug sellers to increase the use of drugs which I've just mentioned. And they bestow upon certain chemicals the mystical quality of being forbidden by society. The use of forbidden drugs satisfies the individual's need to assert himself against society. The Netherlands learned this lesson well, according to the Wall Street Journal:

Marijuana has ceased to be a big issue in the Netherlands. Pot has been sold freely in cafes and youth centers since 1978, when the government concluded that the substance was "relatively innocuous" and dropped all criminal penalties for using it.

As to cocaine and heroin, it is the strength of their addictive quality and the efficacy of their mind-altering which causes the concern and the identification of the users.

While there is documentation of the use of narcotics by whites with middle and upper incomes, the majority of users are black and at or near the poverty level. It is not infrequent to see second and sometimes third generation users before me. Recent projections by the City Health Department estimate that 5% of newborns in our City will be born addicted.

The mark of this user is the need for escape, the loss of hope, the absence of a stake in the society. One out of four of the youth in this country will experience poverty in the decade ahead as opposed to one out of nine a decade ago.

Harold Howe, a Harvard professor, but otherwise respectable, as chairman of a task force to identify the problems of the forgotten half of our youth, the twenty million non-college bound, some of whom use drugs, drop out of school, and commit crimes, identifies the cause of this antisocial conduct—firmly and precisely as poverty. In 1986, 33% of families headed by persons under twenty-five were below poverty levels, a rate double that for 1967 and triple the 11% rate of all American families in 1986. It is the primary root cause of drug abuse as well, as one must suspect it always has been in those societies where the problem has existed in the past.

Drugs have become an escape for those without a stake in society whose sense of self is weakened to the point that they will knowingly risk destruction and addiction absent an alternative motivation. That is our real problem.

If then what we are doing is not working, if the driving force behind the use of drugs is money—or the lack of it, poverty—I arrive at my fourth proposition—comfort to all of you who have endured the first three. I suggest it is time to abolish the prohibition—to cease treating indulgence in mind alteration as a crime. The first result of such a course would be the elimination of the profit motive, the gangs, the drug dealers. The second would be the identification of users, those who seek drugs at cost, those who are at risk in the society. Finally, of course, some revenue should be produced to reinforce research, educational and treatment programs and almost \$9 billion dollars could be rechanneled and pin-pointed for prevention and rehabilitation. Obviously, the model is the repeal of Prohibition and the end of Al Capone and Dutch Schultz.

The method by which this might be accomplished might be the legislative repeal of federal prohibition, the setting of federal standards for the dispensation of drugs and their taxation, the availability of funding and revenue to state and local governments which would undertake to identify users, perhaps by a DNA print, to research blocking alternatives for the addict and to increase in therapeutic treatment centers. Perhaps making methadone available to the 200,000 heroin users who now seek it instead for the 30,000 for whom slots are presently available. Perhaps making residential treatment available for anyone who meets a defined threshold of addiction, permitting anyone beyond that threshold to obtain drugs only after medical intervention. Resale and distribution outside the controls would remain a federal crime. With greater proportionate resources of enforcement and adjudication, punishment for violation would be swifter, surer, and equally—or perhaps even more—punitive than at present.

The simple statement of the proposition raises a host of questions—what about the English experiment—what about youth—what about crack—what about increased use of narcotics—what about Charlie Rangel.

As to the English experiment, during the sixties, Great Britain set up treatment centers for heroin addicts. Originally made available through prescription,

it was later dispensed through some forty clinics. The strategy has not been successful, the clinics are inadequate and rather than withdrawing from addiction, many have simply moved to long term methadone maintenance. The addiction of the users has not been eliminated, but at the same time the evils of prohibition present in this country have not yet been documented.

As to youth, it is difficult to make a differentiation between the mind-altering resulting from alcohol and that resulting from drugs. Society does not, will not, and should not condone such usage before majority, and distribution to minors should remain prohibited. Given the realities of today's world, special outreach has to be made to the young, not only education but motivation, perhaps even substantial stipends for athletic, educational and vocational accomplishments, an enrollment program with levels and accomplishments for all.

As for crack, its potency is frightening and yet to draw the line with crack on the outside of the circle of control appears logically to defeat the underlying premise of abolition. Crack is, of course, but the latest expression of a drug culture following heroin, angel dust and cocaine. Indeed, there is evidence that ice, a synthetic drug, is following and succeeding crack, as crack succeeded cocaine, as cocaine succeeded heroin as the drug of choice. To draw distinctions on the degree of addiction may not be empirically possible, nor does it appeal to logic and symmetry. In my view, you don't outlaw 120 proof while permitting eighty.

But the logic of that position, which appeals to me, has great difficulty overcoming the emotion created by what is referred to as the "crack epidemic." There is little use in noting that the addictive quality of crack is yet to be established, except anecdotally, and that research may reveal an antidote. The esteemed head of the Legal Aid Society has noted a 500% increase in Family Court proceedings involving abandoned and abused children which he attributes largely to crack. One of my distinguished brothers, Bob Patterson, has noted in imposing sentence upon a dealer that the presence of drugs in those arrested has risen from 42% in 1984 to 68% in 1986.

Yet the very existence of the abandonment of responsible parenthood demonstrates the failure of our present prohibition. Instead we should identify those at risk and reach out to provide services and ultimately hope. There is no present evidence that prohibition has, or will, break this vicious cycle of dependence and abandonment.

As to increased use—it must be anticipated, given the history of the repeal of Prohibition, although the picture is by no means as clear as one's first assumption might be. First of all, the reality is that today one who seeks to buy drugs has little difficulty in finding the marketplace and purchasing the product. I venture we could mosey over to Sixth Avenue and 43rd Street right now, down the street from the Century, and buy whatever we might want for recreational purposes. The history of alcoholic consumption is relevant: before Pro-

hibition, 2.6 gallons per person per year, during Prohibition, .73 gallons, ten years after repeal, 1.5 gallons and only now back to 2.6 gallons. The gamble would have to be that addressing the underlying causes, providing safe narcotics and treating the users, would ultimately result in a healthier America. If it is otherwise, it will be because our citizens have lost the capacity to act affirmatively and to control their individual addictions. The present climate seems to me to be optimistic, there is an emphasis on health, diet and what one ingests. If our society can learn to stop using butter, it should be able to cut down on cocaine. If it cannot, no prohibition can be effective.

As part of the specter of increased use, there is the cry of genocide, that abolishing prohibition will destroy those least able to survive in the society. This challenge is real, and political dynamite. Unless it is carefully analyzed, someone like myself is accused of insensitivity, racism and worse.

If this is the anticipated effect, it is to confess that the disadvantaged, the poverty stricken, are the source of the problem and, yes, this group is largely non-white. Then let's face that honestly and recognize that we must alter our society to eliminate, or at least substantially reduce poverty and those conditions which result in drug use. It will take money, restructuring and worst of all, increased taxes. Among the 23 industrialized nations, although our infant mortality rate is among the top four, our tax revenues as a percentage of gross domestic product are among the bottom three and we are number two in defense spending. Our commitment for jobs, education, health and housing must be enhanced. If we are not willing to be our brothers' keepers, then we will have to become our brother's jailers—and that's not an acceptable alternative to a nation which professes to prize personal liberty.

Perhaps then this is a watershed issue, one of responsibility, responsibility by the individual for his or her life, and responsibility of the society to provide the setting and the knowledge so that individual decision can be made appropriately. Perhaps we must ask not what can we do to eliminate drugs but what can we do to eliminate or at least reduce the level of poverty.

One of the most powerful voices questioning change in our present prohibitive program is Congressman Rangel. He is close to becoming the dean of our NYC Congressional delegation, a highly respected leader in our community and chairman of the House Select Committee on Narcotics Abuse and Control. Rangel has challenged by his Op Ed piece in the New York Times, and by his Committee's release of June 16, last year, the advocates of change to answer a series of tough questions. As he puts it:

Press them, the advocates of change, about some of the issues and questions surrounding this proposed legalization and they never seem to have answers. . . . Those who tout legalization remind me of fans sitting in the cheap seats at the ball park. They may have played the game, and they may know all the rules, but from where they're sitting they can't judge the action.

...  
 Let's take this legalization issue and put it where it belongs—amid idle chit-chat as cocktail glasses knock together at social events.

Well, I don't consider myself a tout, nor is my seat a cheap one, but I'm not afraid to judge the action in this particular ball park—so far it's been a no-hitter, even I can see that. But I do feel that even though Rangel's questions were intended by their weight to sink the prospect of change, they do raise issues to be faced.

What drugs should be covered?

All mind altering substances.

Who would administer the dosage, the state or the individual?

The state would set the amounts and prices, and the individual would be denied a lethal frequency of purchases without a doctor's prescription. Otherwise purchases would be at will.

Would the Government establish tax supported facilities to sell these drugs?

Though the question is loaded, the answer is yes, and the support would be derived from the tax on the sale.

Would we get the supply from the same foreign countries that support our habit now, or would we create our own internal sources and dope factories, paying people the minimum wage to churn out mounds of cocaine and bales of marijuana?

Let's skip the minimum wage issue—the supply would be from pharmaceutical companies who are today manufacturing drugs of the same characteristics.

Would there be an age limit?

Yes, the same as alcohol.

What would be the market price and who would set it, would private industry be allowed to have any state in any of this?

See booze.

What are we going to do about underage youngsters?

This is the toughest question, but we have to recognize that they have access to drugs as we speak. The part of the problem that is attitudinal may be altered. The education and training of moral youth extends well beyond drugs, however, and must be our first priority for survival—see the "Forgotten Half."

How many people are projected to become addicts? Maybe no more than today, given the reality of present availability. But even if the numbers of the addicted increase—which would seem to be a common-sense result, but who knows, we have to face the moral issue.

As Lester Grinspoon of the Harvard Medical School has said: "We have to believe that in the long run, people will respond in a rational way to the availa-

bility of substances with a potential for destruction. There will always be casualties with alcohol. There will always be death.”

Back to Congressman Rangel’s questions:

Since marijuana remains in a person’s system for weeks, what would we do about pilots, railroad engineers, surgeons, police, cross country truckers and nuclear plant employees who want to use it during off hours?

And what would be the effect on the health insurance industry?

The short answer, I think, is “see alcohol.”

Finally the Congressman refers to the problem as “this foreign-based national security threat.” As I have already indicated, it is an internal issue of moral, educational and economic dimensions, to be solved not by guns and tanks and the paraphernalia of war, but rather with faith, moral suasion, family commitment and individual responsibility. Foreign adventure and enhanced prison terms will not provide hope and have not changed attitudes.

I end with the persuasion that it is time for a change. Kennedy at the Berlin Wall said, “Change is the law of life.” When we have failed, we should have the courage and the stamina to think anew, to change, and in this instance, to abolish the prohibition. In terms of Bill Moyers’ recent program, it is time to recognize the truth as eventually we did with Vietnam and to end the lie that we have a successful policy.

Finally, then, is any of this real? My fifth and mercifully final point. I am told by an ABC journalist who participated in Ted Koppel’s program on this subject that no politician would espouse such a radical “soft on drugs” position. But some have. Mayor Schموke of Baltimore, Mayor Fraser of Minneapolis, some Congressmen, George Shultz, a judge, Bill Buckley and Pete Hamill, an occasional prosecutor, the Law Reform Committee of the New York County Lawyers Association, defense lawyers such as Alan Dershowitz, and some of the experts in the field, like Professor Nadelman of Princeton.

I’m also told by students of the Repeal of Prohibition that the same condition existed then. Those who live by public opinion will not act until a critical mass is perceived. The simple solution—jail the dealers—echoes other simple solutions of the past and remains appealing to many. But how about the cost of increased jails when it costs the society about as much to keep a criminal in jail as it would to send him to Harvard. That particular equivalency appeals to me as an old Yale.

If there is to be change it will be because at some point, if I am correct, the rhetoric will prove hollow, and it will be apparent that the drug war with its present battle lines cannot be won, that our resources have been spent repressively and more significantly unproductively. I note the change of tone and emphasis in the proposals presented to Governor Cuomo in the past few weeks—more emphasis on treatment than on enforcement. If the repeal of Pro-

hibition is the model, researchers, civic organizations and concerned citizens will increasingly challenge the allocation of resources and the imposition of a social problem upon the criminal justice system. What seems today like a lost cause, a Berlin Wall if you will, may tomorrow achieve the critical mass necessary to motivate those who seek to discovery and enact the public will.

One of the most prescient observers of the present scene, crime and punishment, is Norval Morris, a delightful and razorsharp Australian and a former dean of the University of Chicago Law School. He has stated with respect to law enforcement as a tool for social change:

The criminal justice system is a necessary, but limited, system. We've rarely been able to demonstrate any changes in crime rates by making marginal or even relatively substantial changes in policing or in correctional practice.

...

In family situations today in America, 20 percent of all children are born to unwed mothers. Unwed mothers account for 15 percent of all white births, 60 percent of black births. . . . I'm not making moralistic propositions, I am speaking of the problems of people being locked in, unable to escape from an inner city underclass. All I've done is underscore an excruciatingly difficult and worsening situation.

...

I had written a conclusion—he said—but a couple of critics I shared these ideas with tell me that I shouldn't say it, since it might be offensive to some. So I have decided not to say it. But, just for your information, the rejected conclusion was: The whole law and order movement that we have heard so much about is, in operation though not in intent, anti-black and anti-underclass—not in plan, not in desire, not in intent, but in operation.

That speaks, I believe, to the undesirability of leaving the issue of drug use to prohibition and its concomitant enforcement through the legal system.

To end on what is for me a proper Blue note, I quote the President of Yale addressing the class of 1989 on the conditions which they face upon graduation:

They are conditions of physical deterioration more suited to a theater of war than to the heart of great cities in the most powerful and principled nation in the history of the world. They are conditions of spiritual deterioration that have spawned the breakdown of family, the failure of education, saturation with dangerous drugs, and levels of violent lawlessness approaching anarchy. They are conditions of unemployment and poverty that breed a cycle of helplessness. They are conditions of physical and mental disease that are a scandal in a modern, progressive democracy. They add up to a cancer at the very heart of our democracy.

What is to be done? The first thing that needs to be done is to recognize that something must be done, something massive in proportion to the massive nature of the problem. . . . We cannot afford not to deal with these problems. They threaten our survival as a free and powerful nation. The costs of not dealing with them are vastly greater than the costs of meeting them. To say that we lack the will to come to grips with these problems is to say that we lack the will to justice and even to our survival.

My message is then—we must abandon rhetoric and simplistic solutions and be willing to think anew, reallocate our resources and be willing to sacrifice so that dignity and capacity—can alter the minds of our youth instead of crack, ice and heroin. In short, abolish prohibition.

I am most grateful for your generous and unflagging attention.

