Essay

The “War on Drugs”:
One Judge’s Attempt at a Rational Discussion

by Juan R. Torruella†

[Ever since [Columbus mistook his discovery for the islands off Asia],
the American continent has existed between dream and reality, in a
divorce between the good society that we desire and the imperfect
society in which we really live.

—Mexican author Carlos Fuentes, former ambassador to the United
States and the United Nations

Introduction

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

Discussing this topic essentially involves considering the views of two
conflicting camps: (1) those who urge that the present laws not be relaxed and
even that, in some cases, they be made more stringent, and (2) those who
promote, in varying degrees, the decriminalization of the distribution and/or the
use of some currently illegal drugs.

Of course, part of the “problem” lies in defining the “problem.” Proponents
of drug prohibition posit several reasons why government should reduce the
availability of drugs, yet not all within this group embrace all those reasons.
Some defenders of the status quo believe that drugs are bad for those who
consume them, and that a proper role of government is to protect people from
themselves. From this perspective, restricting drug use is analogous to protecting
the public from unsafe food, or prohibiting pornography, even if used privately.
Others justify the war on drugs because of what users do to others. Adherents of

† Chief Judge, First Circuit, United States Court of Appeals. This essay is a revised and adapted
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are, of course, my own.

this view believe in the prohibition of drug use because drug users commit
criminal acts to get drugs, or cause harm to others while under the influence of
drugs, or consume public resources in receiving drug treatment. Whether any of
these conditions is in fact a problem depends on one’s ideas of how people
should live their personal lives and on how society should function, as well as
whether, from an empirical perspective, drug use has the consequences that its
critics claim. Furthermore, even if we conclude that a problem exists, and we
identify its nature, we must determine whether it is a problem worth dealing with
and, if so, which is the best course of action to deal with it. There is general
disagreement not only regarding the ends that we pursue, but also regarding the
means by which we should conduct this “war on drugs.”

My personal views on this subject have changed over my years on the
bench, and they have changed dramatically. This process has happened
gradually, but if I were to pick a point in time when the evolution of my views
began, I could tell you that it was towards the end of my district court tenure.
Perhaps even more specifically, my thoughts about American drug policy began

2. I have chosen this topic with some trepidation. As a public official, particularly one charged with
deciding issues and cases related to drug offenses, I must do nothing which compromises, or even appears to
compromise, the impartial adjudication of disputes arising under the laws that Congress has enacted. See CODE
OF CONDUCT FOR UNITED STATES JUDGES Canon 2, 3A(6) (1992). Judges must be cautious in speaking out
on matters of public policy; on the other hand, judges have an obligation to speak out when their work gives
them a perspective on a particular issue that others do not have. Legislators and executive branch officials see
the drug issue from an overall policy perspective, but influenced, and properly so, by public opinion and public
fears. Professors and other researchers see drug issues from the vantage points of their various disciplines, and
those involved in various advocacy groups see the issue from their particular points of view. Lawyers and
judges who participate in drug litigation, however, see the drug issue on a case-by-case basis. When they have
seen enough of those individual cases, they should begin to see a mosaic. While lawyers see the cases from the
standpoint of the prosecutor or the criminal defendant, judges see both sides. I think that each of these
perspectives is important in helping us analyze the problem, but I fear that so far the debate has not been
sufficiently informed by the judicial perspective.

I believe that there is sufficient intellectual room to allow for what I would hope to be a rational
discussion of the diverse questions raised by this subject. Although judges are in a unique position to contribute
significantly to the discussion of these complex social problems, by virtue of their experience and observations
while on the job, judges have remained almost universally silent about these issues. But see, remarks by Robert
W. Sweet, U.S. District Judge for the Southern District of New York, in Robert W. Sweet, The War on Drugs
is Lost, NAT’L REV., Feb. 12, 1996, at 44-45. This collective judicial experience is sorely needed to advance
improvements in the law, the legal system, and the administration of justice. See CODE OF CONDUCT FOR
UNITED STATES JUDGES Canon 4 (1992). After twenty-one years on the bench, ten of which were spent in a
very active and intensive trial court, I believe that I have sufficiently lost my judicial innocence, at least to the
extent of allowing me to speak frankly about this admittedly controversial subject. Furthermore, because my
record as a sentencing judge hardly classifies me as being “soft” on crime, particularly drug-related crime, I
believe I can speak from a position which is non-apologetic. It goes without saying that the views in this essay
are just my views at the present. They in no way represent those of the court I sit on, or its members, or the
federal judiciary in general, and, of course, I reserve the right to change them. Nevertheless, let me emphasize
that I take my oath of office seriously and that I will continue to comply fully with it, irrespective of my
personal views. The essence of the judicial role is to apply the law regardless of one’s personal view of the law
or how one might try to change it if one sat, not in the courtroom, but in a legislative chamber.

One last caveat. Do not in any way misinterpret anything that I write in this essay as an endorsement of
any type of drug use, legal or illegal. Nothing could be further from my personal beliefs. Mine is but an attempt
at rational discussion of what I understand to be essentially a health and social problem, rather than a criminal
one.
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to change as a result of a trip that I took to El Salvador in the mid-80's, sponsored by the State Department, to speak to the Salvadoran judiciary and bar regarding the American legal system. Toward the end of my tour in El Salvador, which was right in the middle of the civil war in that country, I was speaking to a bar group in one of the smaller cities. Somehow the discussion got around to issues related to drug enforcement. I expounded, I suspect somewhat long-windedly, my views to the effect that the United States needed the cooperation of Latin America in stopping the drug traffic by stricter enforcement, by stopping corruption, by eradicating the illegal crops, and by other similar measures. The audience was very polite. In fact, one or two of those present might have actually clapped when I finished. Someone in the back of the room then raised his hand. The speaker, identifying himself as a lawyer, said to me very deferentially: "Honorable Judge, we very much appreciate your presence and the advice you have given us, but don't you think the United States could help us in solving this problem?" I answered that as I understood the situation, we were already sending considerable sums in aid, and that we had a lot of resources committed to the interdiction of drugs from Latin America and the prosecution of violators. To which he responded, "Excuse me your Honor, that is not the help we are in need of. What we need is for your country to stop consuming these drugs. If your people were not buying drugs, we would not be growing and selling them. We would rather sell you coffee, or oranges, or bananas, if you would only stop buying and consuming drugs." At first glance this interchange might seem rather trite, and perhaps insignificant, but it hit me like a sledgehammer between the eyes. It brought home what I had already suspected, that there might be something fundamentally wrong with our traditional approach to the drug problem in the United States. We had been spending almost all our resources targeting drug supply, even though the drug trade only existed because of demand, which we had largely neglected.

After this incident, I realized that I had already, unconsciously, started to become dissatisfied with the drug laws and their administration, and with the obvious lack of tangible progress in containing what seemed to be a losing battle in the war against drugs. This gradual change in point of view came about in part because I intuitively felt that the strong sentences that I and other colleagues were handing out, as well as the massive government efforts of which I was aware, seemed to have little or no impact on the increasing flow of drugs into this country.

I also had detected a change in the nature of the defendants and groups that were appearing before me. While at first they had seemed to be at best a bunch of disorganized amateurs, they started, more and more, to be well-organized professional criminals. I remembered the defendant tried before me who had been caught with $10 million in manager's checks in his left shoe and who owned a "coffee" farm in Colombia that was almost as big as Puerto Rico, and the banker who had testified under oath that he saw nothing unusal in being
presented with mountains of shopping bags full of $20 to $100 bills, which the defendant brought in on a regular basis, and which took three bank employees from 9 a.m. to 2 a.m. to count. These and similar incidents made me begin to think that something was rotten in Denmark and that the system was endemically flawed.

Initially, this issue appeared to me to be fairly complicated, based on what I had read in the newspapers or what I had seen in, and sensed from, the briefs that lawyers had presented to me, as well as the cases I had heard when I was a trial judge. I have now come to realize that this subject is remarkably complex. Once I began to delve into the reams of government reports, scholarly journals, and interest group publications, these issues revealed themselves to be truly mind-boggling. Worse yet, I am left with a persistent feeling that there may be no single answer, and certainly that there is no quick and easy solution.

Drug enforcement policy involves the consideration of issues as diverse as international and national politics, law enforcement, sociology, economics, organizational dynamics, and penology, to mention only the most salient. In addition, there are complex scientific, pharmacological and health questions, and, of course, moral quandaries, raised by the various policy choices and alternatives. Nevertheless, I do not think that the complexity of the subject should deter us from exchanging views, for we must start at some point, and now is as good a time as any. In fact, I believe that more vigorous and frank public discussion of these issues is what is presently needed.

In this Essay, I will try to lay out some basic, generally accepted facts, analyze what I think they mean, list the pros and cons that are claimed by the various exponents of the different viewpoints, and express some very tentative conclusions. Section I of this Essay examines the magnitude of the drug problem by reviewing trends in the usage of psychoactive drugs, legal and illegal, and looking at the costs of drug usage. Section II weighs the arguments for and against the present policy by asking five fundamental questions:

1. Is the current policy capable of limiting drug use in a realistic way?
2. Does the current policy adequately promote education and treatment as well as law enforcement, and is there an adequate balance between these three courses of action?
3. Is the current policy basically fair in its application?
4. Which alternative imposes greater costs on society, permitting the use of drugs or prohibiting the use of drugs?

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

4. The different viewpoints include status quo, legalization/decriminalization, preventive non-incarcerative sanctioning, treatment, taxation and regulation.
5. What can we learn from the various attempts at drug legalization?

Section III emphasizes that there is a limit to how much we can rely on statistics. The essay concludes with four major policy recommendations: (a) the formation of a bipartisan commission to make recommendations on these issues, (b) pilot tests of some types of limited decriminalization, (c) an increase in medical treatment of drug abuse problems, and (d) a shift in funding priorities from enforcement to education.

These tentative recommendations would de-politicize the drug issue and alter our focus in the war on drugs from attacking supply to reducing demand. I do not have sure-fire solutions; in fact, I may be raising more questions than I answer. But I believe that posing questions in itself may serve a useful purpose.

I. The Magnitude Of The Problem

I begin by trying to get some handle on the figures that delineate the issues.\(^5\) For the purposes of this essay, I will only cover marihuana, cocaine and heroin, of the illegal psychoactive drugs,\(^6\) and tobacco and alcohol, of those that are legal. I have included tobacco and alcohol within the scope of this already complicated overview because the contrast between the societal treatment of legal and illegal drugs, and the outcomes of such treatment, is in my view an important consideration in forming an opinion as to the appropriate course of action. As close as possible, the period covered will be that commencing in 1973, which is more or less the official commencement of the so-called war on illegal drugs, and on through 1994, which is the latest year for which complete statistics are available.

Some may disagree, if not with the figures that I quote, then at least with some of the conclusions that I reach therefrom. I can only say that it is very

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5. My essay is directed almost exclusively at issues raised by the drug trade affecting the United States. It is thus distorted, although I do not know to what extent, by its inability to factor in accurately many of the transnational influences that have indirect, but important, effects on the solution of any national drug problem. For example, how is more, or less, enforcement in or by the United States affected by the failure to follow suit by the rest of the international community? Or, how will legalization in one jurisdiction be affected by the failure to carry out such action elsewhere? Will the drug trade, and/or addiction, move transnationally, as it is affected by these factors? These questions are obviously far from exhaustive, but are sufficient to illustrate what is rather obvious: that we are dealing with a subject that will not yield to mathematically-certain solutions. In fact, the inability to account for the effects of transnational influences is part of a larger problem that one encounters when trying to understand so complex a phenomenon as drug use. I am referring to the presence of competing explanations for most of the trends I will describe to you. I am not the person for the kind of complex multivariate analyses that would be necessary to isolate all the many factors that might be associated with, say, an apparent increase in the use of one drug or an apparent decrease in the use of another. Again, all I can do is present the facts I have found, tell you what I think they mean, and invite your consideration. Thus, for present purposes I think it best to just recognize the existence of these conditions, and then move on.

6. I define "drug" as a substance, other than food, intended to affect the structure or function of the body. See BLACK'S LAW DICTIONARY 497 (6th ed. 1990); 21 U.S.C. § 321(g)(1)(C) (1994). By "psychoactive" I mean a drug that works directly in, and on, the brain to change the way it functions.
difficult to get truly comparative statistics in a complete fashion. I will admit to having engaged in some extrapolation. There are many times when we end up comparing apples with oranges, because that is the best we can do, but I have tried to be as objective as possible.

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

Let me start by stating the overall problem in terms of the general numbers: it is estimated that there are about 46 million tobacco users, 7 103 million alcohol users 8 and almost 12 million illicit drug users in the United States. 9 Of course, these groups are not mutually exclusive, as there are undoubtedly many drug users who can be found within the ranks of more than one of these groupings, and in any combination thereof.

1. Tobacco

In 1970, the per capita consumption of tobacco for those over 18 years was ten pounds per year. 10 This figure had dropped to five pounds per year by 1992, 11 a decrease of 50% in per capita tobacco use during this period. The percentage of cigarette smokers 18 years of age and older had dropped from over 40% in 1965 to about 26% in 1992. 12

2. Alcohol

The average annual household expenditure for alcoholic beverages decreased from $289 in 1987 to $268 in 1993, after a peak period between 1990-1992 of $293-301. 13 Since these numbers do not account for changes in alcohol pricing or household size, age-group historical trends are perhaps more revealing. In the 12-17 year old group, 54% used alcohol in 1974, compared to about 41% in 1993, thus showing a decrease in use among teenagers. 14 In the 18-25 age category, about 82% used alcohol in 1974, increasing to 87% in 1993. 15 The over-26 age group remained stable at about 90% throughout the

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11. Id.
12. Id. at 144. The specific figures were from 42.4% in 1965 to 32.1% in 1983 to 26.5% in 1992.
13. Id. at tbl. 721.
15. Id.
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3. Use of Illicit Drugs

There were significant declines in the use of illicit drugs through the 1980's. This went from almost 14% for all persons over the age 12 in 1979 to about 6% for that same group in 1993, a general decrease of about 59% in the use of illegal drugs during this period.

**Cocaine.** In 1974, about 3% of those 12-17 years old reported using cocaine. Cocaine usage declined to less than 1% by 1993, after peaking at over 4% for the 1979-1982 period. In the 18-25 age group, there was an overall decline from 8% in 1974 to 5.0% in 1993, with a peak of close to 20% in the 1979-82 period. The over-26 age group has generally increased usage from half a percent in 1976 to nearly 2% in 1993, reaching a peak of around 4% in the 1982-85 period.

**Marihuana.** In 1974, approximately 12% of persons aged 12-17 used marihuana, which dropped to about 5% by 1993, after a peak of over 16% in 1979. For ages 18-25, this figure also decreased from about 25% in 1974 to about 11% in 1993, with a peak of over 35% in 1979. There has been a slight increase in the 26 and older group from almost 2% in 1974 to 3% in 1993, with the peak around 6% 1979 and 1985.

**Heroin.** The percentage of persons claiming ever to have used heroin in the 12 to 17 age group went from 1% in 1974 to only two-tenths of a percent in 1993. Those in the 18 to 25 years old bracket went from almost 5% to 0.7% in the same period, and those 26 years old and over increased from half a percent to 1.3% beginning in 1974.

B. Some Costs of Drug Use in the United States

1. Illegal Drugs

Before 1973, the total amount spent to enforce the drug laws of the United States was less than $100 million. In 1994, this figure had grown to $12 billion

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16. Id. The actual figures fluctuates between 87.6% and 92.9% for the 26-34 and over 35 age groups according to the 1985 and 1991-93 statistics.

17. FACT SHEET 1995, supra note 9, at tbl. 1. This data includes marihuana, cocaine, hallucinogens, inhalants, heroin, non-medical use of various sedatives, stimulants, etc. See also OFFICE OF NATIONAL DRUG CONTROL POLICY, THE NATIONAL DRUG CONTROL STRATEGY 79 (1996) (tbl. 5-4 showing 50.2% decrease from 24.3 to 12.2 million in illicit users for the period from 1979 to 1994).

18. FACT SHEET 1995, supra note 9, at fig. 1.

19. Id. at fig. 2.

20. Id.

21. Id.

22. STATISTICAL ABSTRACT OF THE UNITED STATES, supra note 10, at tbl. 217.

annually, more than 121 times that of 1973. This figure is now at about $14 billion annually. Violent crime rates nearly doubled during the same period, from 417 per 100,000 population in 1973 to 757 in 1992. Drug distribution offenses represented roughly 40% of all federal prosecutions and 50% of all federal prison admissions in 1993. Federal prison authorities report that about a third of federal inmates have moderate to severe substance abuse problems. It is estimated that the average annual cost of holding one prisoner ranges from $20,000 to $30,000 per year. The cost of building new prisons, depending on climate and security level, ranges from $50,000 to $200,000 per prisoner.

State and local government expenditures for drug enforcement are substantial but more difficult to determine with precision. A 1987 study estimated that $5 billion was spent for drug enforcement investigations at the local level in 1985. This figure, if accurate, has obviously increased substantially since then. Between 1981 and 1986, state and local drug arrests grew 59%, and thereafter increased an additional 23% from 1986 to 1991. In 1980, only 7% of those admitted to state prisons were convicted of drug related offenses, while by 1990 this figure had risen to 32%.

About 5,000 people die annually from causes directly attributed to the use of illicit drugs, mostly from the effects of prohibition, such as the ingestion of impure drugs. The annual economic loss to business from illegal drugs is estimated to be between $60 and $100 billion; further, it is estimated that drugs cost almost $67 billion each year in terms of crime, as well as the medical and death-related expenses associated with the crimes. The federal government

24. FACT SHEET 1995, supra note 9, at 5.
26. Id. In 1995 there were approximately 100,000 federal inmates, of which 61.4% were convicted of drug law violations (up from 25% in 1980). FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, A JUDICIAL GUIDE TO THE FEDERAL BUREAU OF PRISONS 5 (1995) [hereinafter JUDICIAL GUIDE].
27. JUDICIAL GUIDE, supra note 26, at 37. Federal prison authorities frankly state that "[i]t is particularly unrealistic to expect prison programs to effectively change inmates for the better given the context in which they operate: a setting defined by deprivation of society's freedoms." Id. at 53.
29. McDonald, supra note 28, at 106.
34. Doug Bandow, War on Drugs or War on America?, 3 STAN. L. & POL'Y REV. 242, 245-46 (1991). Of course, there are many drug fatalities from causes other than overdosing, such as accidents, long-term health deterioration, and crime-related deaths, although such data is not available or accurate. Some preliminary studies do suggest, however, that the ill health effects of marihuana are more severe than those of tobacco. See infra note 90.
spends about $66 billion annually for health care and disability costs associated with drug abuse.\textsuperscript{36} The Federal government spent about $1.6 billion in 1994 on drug abuse campaigns.\textsuperscript{37}

2. Legal Drugs

a. Tobacco

In 1965, the annual death toll from smoking-related diseases was estimated at 188,000. This figure more than doubled to 434,000 by the mid-1980’s.\textsuperscript{38} These figures do not include the almost 40,000 nonsmokers who die each year from ailments associated with the inhalation of passive smoke.\textsuperscript{39} The annual cost of tobacco use to American society has been estimated at $147 billion.\textsuperscript{40} The federal government spent approximately $43.56 billion on health care and disability benefits for treatment of disease and illnesses associated with tobacco.\textsuperscript{41}

From 1989 to 1993, U.S. cigarette advertising and promotional expenditures went from $3.6 billion to $6 billion per year.\textsuperscript{42} During 1995, and throughout most of this period, the government spent an estimated $120 million a year on its anti-smoking efforts, mostly on medical research.\textsuperscript{43}

\textsuperscript{36} Alcohol, Drug Abuse, Smoking Account for $77 Billion in Spending Report Says, Mgmt. Briefing (BNA) (Feb. 14, 1995).
\textsuperscript{37} FACT SHEET 1995, supra note 9, at 5. This amount is included within the total $12.1 billion total spent by the federal government on drug control in 1994. Id.
\textsuperscript{40} Joan Beck, Smokers, Chill Out, Think of your Poor Heart, NEWS TRIB., Apr. 18, 1994, at A6.
\textsuperscript{41} Alcohol, Drug Abuse, Smoking Account for $77 Billion in Spending Report Says, supra note 36.
Table 1
U.S. Cigarette advertising and promotional expenditures\textsuperscript{a}
1989-93
(in billions)

<table>
<thead>
<tr>
<th>Year</th>
<th>Expenditure ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>3.617</td>
</tr>
<tr>
<td>1990</td>
<td>3.992</td>
</tr>
<tr>
<td>1991</td>
<td>4.650</td>
</tr>
<tr>
<td>1992</td>
<td>5.231</td>
</tr>
<tr>
<td>1993</td>
<td>6.034</td>
</tr>
</tbody>
</table>

\textsuperscript{a} TV and radio advertising was prohibited effective January 2, 1971.

b. Alcohol

In 1991, there were about 10 million alcoholics in the United States; more than 32 million adults have been touched by this condition.\textsuperscript{44} Each year there are some 20,000 alcohol-related traffic fatalities in the United States,\textsuperscript{45} and thousands of women who drink during pregnancy bear children with irreversible alcohol-related defects.\textsuperscript{46} There are an estimated 100,000 alcohol-related deaths each year in the United States.\textsuperscript{47} The total annual cost of alcohol abuse in the United States for 1990, including direct governmental and private spending as well as indirect costs such as lost productivity, was estimated at $99 billion.\textsuperscript{48} In 1994, about $12 billion was spent by the federal government on health care and disability.\textsuperscript{49} Two-fifths of all crime leading to state prison sentences is committed under the influence of alcohol.\textsuperscript{50}

Overall media advertising of alcoholic beverages (adjusted for inflation) decreased from a high of $1.5 billion in 1986 to 808 million in 1993.\textsuperscript{51}

\textsuperscript{44.} Study Reveals Broad Extent of Alcohol's Impact, ALCOHOLISM AND DRUG ABUSE WEEK, Oct. 9, 1991, at 1.
\textsuperscript{46.} George Steinmetz, Fetal Alcohol Syndrome, NAT'L GEOGRAPHIC, Feb. 1992, at 36-39.
\textsuperscript{47.} Christine Russell, Taxing Vices; Wringing More Dollars From Alcohol, Tobacco Sales, WASH. POST, Oct. 30, 1990, at Z07.
\textsuperscript{48.} INSTITUTE FOR HEALTH POLICY, SUBSTANCE ABUSE: THE NATION'S NUMBER ONE HEALTH PROBLEM 16 (1993).
\textsuperscript{49.} Alcohol, Drug Abuse, Smoking Account for $77 Billion in Spending Report Says, supra note 36. Of $66 billion spent annually by the federal government on health care and disability costs for alcohol, tobacco and drug abuse, 18% were for alcohol ($11.88 billion), 16% for drug ($10.56 billion) and 66% tobacco abuse ($43.56 billion).
\textsuperscript{50.} BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES 1986 39 (1989).
\textsuperscript{51.} See CENTER FOR SCIENCE IN THE PUBLIC INTEREST, NEW CSPI STUDY DETAILS DRAMATIC
Approximately $250 million were spent by the beer industry alone in the last decade on programs to curb alcohol abuse.\textsuperscript{52}

C. \textit{Interpreting the Data}

The salient facts from the above statistics can be summarized as follows:

1. Between 1973 and 1993 there was a general \textit{decrease} of about 59\% in the use of illegal drugs in the United States.
2. During the same period there was a 12,000\% \textit{increase} in government spending in enforcing laws related to illegal drugs.
3. Violent crime \textit{increased} by 100\% during this period.
4. There was a \textit{decrease} in the use of alcoholic beverages of 7\% and that of tobacco of 50\% during this period.
5. In 1993, the annual amounts spent in promoting alcohol consumption was $880 million, and for tobacco $6 billion. In that same year, $25 million were spent in anti-abuse campaigns against alcohol, and $120 million in anti-smoking efforts. The anti-drug campaign by the Federal government was $1.59 billion in 1994.
6. The combined annual cost to society of alcohol and tobacco abuse ($346 billion) is 2.07 times the total cost of drug abuse ($167 billion).

\textsuperscript{52} See generally \textsc{The Beer Institute, Preventing Alcohol Abuse} (1995).
## Table 2
### Drug Use Comparison

<table>
<thead>
<tr>
<th></th>
<th>USERS (In Millions)</th>
<th>RATE OF USERS TO U.S. POPULATION (250 Million)</th>
<th>ANNUAL SOCIETAL COSTS (In Billions)</th>
<th>DIRECT DEATHS (In Thousands)</th>
<th>PERCENTAGE OF DIRECT DEATHS BY USERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOBACCO</td>
<td>46.3a</td>
<td>1:5</td>
<td>$147d</td>
<td>474g</td>
<td>1%</td>
</tr>
<tr>
<td>ALCOHOL</td>
<td>105b</td>
<td>2:5</td>
<td>$99e</td>
<td>100h</td>
<td>.1%</td>
</tr>
<tr>
<td>ILLICIT DRUGS</td>
<td>11.5c</td>
<td>1:25</td>
<td>$167f</td>
<td>5i</td>
<td>.04%</td>
</tr>
</tbody>
</table>

a. 1994  f. 1994
b. 1986  g. 1990 (includes users and passive smokers)
c. 1994  h. 1990 (includes traffic fatalities and deaths caused by disease)
d. 1994  i. 1991 (by overdose)
e. 1990

## Table 3
### Comparison of Advertising Campaigns Promoting Use vs. Anti-Abuse 1993

<table>
<thead>
<tr>
<th></th>
<th>USE PROMOTION (In Billions)</th>
<th>ANTI-ABUSE PROMOTION (In Billions)</th>
<th>PERCENTAGE CHANGE IN USE</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOBACCOa</td>
<td>$6.034</td>
<td>$0.12</td>
<td>-50.0%c</td>
</tr>
<tr>
<td>ALCOHOLb</td>
<td>$0.088</td>
<td>$0.025c</td>
<td>-7.2%f</td>
</tr>
<tr>
<td>ILLICIT DRUGS</td>
<td>N/A</td>
<td>$1.59d</td>
<td>-59.1%g</td>
</tr>
</tbody>
</table>

a. 1993
b. 1993
c. Based on average of $250 million over the past decade. See n.48 of text.
d. 1994
e. 1970-1992
f. 1987-1993
g. 1979-1993
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Table 4
Ratio of Federal Government Spending per Drug User
1994

<table>
<thead>
<tr>
<th>FEDERAL GOVERNMENT SPENDING (In Millions)</th>
<th>USERS (In Millions)</th>
<th>AMOUNT SPENT/USERS</th>
<th>ANNUAL DEATHS (In Thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOBACCO  $43,680.0^a</td>
<td>46.3</td>
<td>$ 943.41</td>
<td>474^f</td>
</tr>
<tr>
<td>ALCOHOL  $11,905.0^b</td>
<td>105.0^d</td>
<td>$113.38</td>
<td>100^g</td>
</tr>
<tr>
<td>ILLICIT DRUGS  $24,257.0^c</td>
<td>11.5</td>
<td>$2,109.30^e</td>
<td>5^h</td>
</tr>
</tbody>
</table>

a. This amount is determined as follows:
   $43,560 (million) for health and rehabilitation
   + 120 (million) anti-abuse campaign
   $43,680 (million)

b. This amount is reached as follows:
   $11,880 (million) for health and rehabilitation
   + 25 (million) anti-abuse campaign
   $11,905 (million)

c. This amount is reached as follows:
   $12,100 (million) for drug enforcement
   1,597 (million) anti-abuse campaign
   + 10,560 (million) for health and rehabilitation
   $24,257 (million)

d. 1986

e. If drug enforcement is excluded this amount is $1,057.13.

f. 1990

g. 1990

h. 1991
What conclusion do these statistics suggest regarding illegal drugs? Has the war on drugs been a success? Is the present strategy cost-effective? Does the present treatment of legal drugs tell us anything that might be of help in terms of a forward-looking strategy to deal with the use of illegal drugs?

The challenge in devising a rational drug policy is to find least-cost solutions to the problems created by the age-old fact that some human beings take more of various mind-altering substances than is good for them (or their neighbors), and by the modern fact that the amount and variety of available psychoactives is rapidly increasing. Implicit in both the status quo and legalization views, as well as the many combinations in between, are cost/benefit calculations in which each side argues that the costs outweigh the benefits.

A superficial overview of the facts and statistics that I have quoted leads me to conclude that the tremendous investments made by the government in law enforcement efforts in the war on drugs have resulted in rather modest gains. In comparison, tobacco usage declined at about the same rate during the same timespan, and alcohol usage also fell, despite minimal government intervention other than relatively insignificant educational investments. These results lead me to conclude that when it comes to reducing drug use, the government probably gets more bang for the dollar from education than from enforcement. A second preliminary conclusion that I reach is that there appears to be some correlation—correlation, not necessarily causation—between increases in violent crime and more vigorous enforcement of prohibition. Lastly, I conclude that although there appear to be societal costs for tobacco and alcohol use of more than two times that of using illicit drugs, government spending related to the use of illegal drugs is twice that spent for tobacco and alcohol abuse. A parallel analogy is that although there are ten times more tobacco and alcohol users than users of illegal drugs, government spending on users of illegal drugs is twice the amount spent on tobacco and alcohol users.

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54. The decline in tobacco usage occurred from a much larger base of users. This fact can be viewed in two ways. First, the decrease in tobacco usage was much more significant in numbers than the percentage figures capture. On the other hand, if one assumes that most of the population takes care of itself when properly informed but that a core percentage of individuals turns to foolish activity even when educated about the costs of such behavior, additional educational expenditures about the harms of drug use may make little difference. Regardless, when viewed against the dramatic example of the decline in tobacco usage, the expensive drug prohibition regime seems decidedly cost-ineffective.
55. It should be noted that there was an increased effort during the timespan in question to eliminate the consumption of alcohol by minors, including federally-mandated 21-year-old drinking laws and stiffer drunk driving penalties. Interestingly, alcohol consumption declined the least among the drugs in question, despite these law enforcement efforts.
56. In addition to educational expenditures, demographic changes and a shift in consumer preferences toward healthier lifestyles are factors which may partially explain the decline in alcohol and tobacco usage.
57. Of course, since there are so many more users of alcohol and tobacco than of illegal drugs, these figures suggest a higher per capita cost for illegal drug usage. If we make two assumptions about
II. Maintain The Present Policy Or Adopt A New One? Weighing The Arguments

One who takes up this topic walks into more than the mass of empirical data about usage, cost, and trends that I have just summarized. There is also a crossfire of arguments for maintaining the present policy and for adopting a fundamentally different policy. Those arguments not only see the empirical data differently; they also see different moral and legal dimensions to the debate over drug policy.

The current policy calls for attacking both the supply and the demand sides of the illegal drug equation. This policy has various, more specific elements: continued international enforcement, border interdiction, domestic efforts to reduce the available supply, attacks on the economic base of traffickers by criminalizing money laundering and by seizures, and various educational and rehabilitation programs. Not all proponents of the current policy favor all elements, or give each element equal weight.

There is similar disagreement among those who favor a fundamental shift in current policy — those, in other words, who advocate “legalization” or “decriminalization.” These terms, although technically meaning different things, have in the heat of the debate been used almost interchangeably. Some advocates of legalization want all psychoactive substances to be available to any willing buyer. Most, however, would limit legal availability to adults and apply the new policy to only some of the current illicit substances. “Legalization” is also used to describe the idea that addicts with established drug habits should have legal access through clinics. Most advocates of “decriminalization” would keep distribution illegal, at least by private persons, but would end arrests of consumers.

Massachusetts attorney Richard Evans, a reform activist, places the alternatives to prohibition into three groups: decriminalization, limitation, and regulation and taxation. Under decriminalization, drugs would remain illegal but the possession would be treated like a minor traffic violation, with little or no loss of liberty and/or fines imposed on the possessor. The limitation models would make drugs legally available but within clearly defined limits as to which institutions and professions could distribute the drugs. This approach has also been called the “medicalization” model. Under the regulation and taxation proposals, the controls would be similar to those presently applied to alcohol use.

which the data previously examined are basically silent—that per capita cost is constant when the population of users increases, and that reduced law enforcement efforts, ceteris paribus, would lead to an increase in the number of users—the status quo policy might make sense.


This latter model is the preferred solution of many knowledgeable commentators favoring legalization.\footnote{Id. at 80.}

Despite these conflicting themes within the two basic positions, it is possible to delineate some basic questions. I see five:

1. Is the current policy capable of limiting drug use in a realistic way?
2. Does the current policy adequately promote education and treatment as well as law enforcement, and is there an adequate balance between these three courses of action?
3. Is the current policy basically fair in its application?
4. Which alternative imposes greater costs on society, permitting the use of drugs or prohibiting the use of drugs?
5. What can we learn from the various attempts at drug legalization?

I want to summarize the contrasting answers to these five basic areas and tell you how I come out, at least tentatively.

A. \textit{Is the Current Policy Capable of Limiting Drug Use in a Realistic Way?}

Proponents of the current policy argue that the very fact that dangerous drugs are illegal is one of the most powerful deterrents to their use.\footnote{Edwin Meese III, \textit{Drugs, Change and Realism: A Critical Evaluation of Proposed Legalization, in Searching for Alternatives: Drug-Control Policy in the United States} 283, 290 (Melvyn B. Krauss & Edward P. Lazear eds., 1991).} They point to the reduction of 59.1\% in overall drug use from 1979 to 1993 as proof.\footnote{Id. at 80.} A comparison between the number of people that use illegal drugs with those that use alcohol and tobacco illustrates this point.

Opponents of the current policy may concede that it has reduced drug use, just as Prohibition reduced alcohol consumption, but they argue that the “war on drugs” initiative is cost ineffective when compared to the results achieved. An increase of 12,000\% in the enforcement budget between 1973 and 1993 to achieve a 59\% decrease in illegal drug use would appear to be highly cost ineffective, particularly when the modest amounts spent by the government in tobacco use education have apparently contributed to a 50\% drop in the use of tobacco for that same period.

Opponents of the status quo argue further that, viewed from a broader perspective, the economic forces of supply and demand make it virtually impossible to control the drug trade in any realistic sense. Law enforcement

\footnote{Melvin Levitsky, a former Assistant Secretary of State for International Narcotic Matters, defends the federal government’s drug policy as working on both the supply and demand side. For his views, see \textit{U.S. Efforts in the International Drug War, in Searching for Alternatives: Drug-Control Policy in the United States} 360 (Melvyn B. Krauss & Edward P. Lazear eds., 1991). See also James A. Inciardi, \textit{Against Legalization of Drugs, in Legalize It? Debating American Drug Policy} 141, 161 (Arnold S. Trebach & James A. Inciardi eds., 1993).}
officials readily acknowledge that they intercept only a small percentage of drug shipments from abroad.\(^{63}\) Attorney General Janet Reno said in 1993 that she has “always being struck” by a statement made by federal officials to a Dade County, Florida grand jury in 1983. At a time when increased federal efforts had managed to interdict only about 25% of the drugs entering the southwest United States, they said that 75% of the drugs entering would have to be cut off before interdiction was effective, a figure which they described as “economically prohibitive.”\(^{64}\)

The problem with the supply-side interdiction approach, however, is even worse than this assessment might suggest. Even assuming that effective interdiction could be achieved, as well as successful crop eradication in source countries, the resulting squeeze in the supply of drugs available to the U.S. consumer would be counterproductive: it would merely cause the price of illegal drugs to rise. As a result, addicts would have to commit more crimes to acquire the needed cash to pay for drugs at a higher price,\(^{65}\) and more criminals would have an incentive to enter the drug trade because the opportunity for higher profits would be greater.\(^{66}\) If the price increase is primarily due to an increase in risk then more criminals would not necessarily enter the market; the increased return would merely be compensation for the increased risk burden. Nevertheless, since lower-income individual tend to be less risk averse, and have a higher marginal utility of wealth, it is not unreasonable to infer an increase in criminal activity.\(^{67}\) On this last point, it is estimated that $500 worth of heroin or cocaine in a source country brings a return of as much as $100,000 on the streets of most American cities.\(^{68}\) What other product permits such a markup (20,000%) tax-free? Yet, it is the black market created by prohibition that allows it.\(^{69}\)

It is rather obvious to most observers that users of illegal drugs are the principal cause of our drug dilemma. In the United States alone, there are one million regular cocaine users (once/week) and five million who regularly use marihuana.\(^{70}\) As the Salvadorian lawyer said to me, “If you weren’t using it, we wouldn’t be growing it and selling it to you.” The need to emphasize demand

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63. Information received from a private interview with highly placed DEA officials. It is estimated that less than 10% of the drug contraband into the United States is interdicted. See also Robert Clifton, Decriminalization of Drugs, Cr. REV., Winter 1995, at 14, 15.


65. It is estimated that at least 40% of all property crime in the United States is committed by illegal drug users to support their habits. James Ostrowski, The Moral and Practical Case for Drug Legislation, 18 Hofstra L. Rev. 607, 647 (1990).


67. Id.


69. Id.

70. William F. Buckley, The War on Drugs is Lost, NAT’L REV., Feb. 12, 1996, at 35, 36.
reduction is recognized by many leading experts, although I have yet to see any proposal that takes into account the hard facts of real politics. The only places that I am aware of in which there is real, no-nonsense demand side enforcement against users are Malaysia and Singapore, as well as some Muslim countries. There, the possession of any amount of illegal drugs is a hanging offense. I do not favor such draconian measures, and regardless of my preferences, I do not see the political climate for such demand side enforcement, and for that reason I do not see much possibility for stemming the demand for illegal drugs in the United States by the use of prohibition tactics. Thus, the tremendously lucrative black market, estimated at $150 billion a year in the United States alone, is likely to continue unabated. Marihuana is reportedly the number one cash crop in the United States.

It was precisely the political attitude against enforcing the drug prohibition laws against young people of nearly all ages and all social classes that brought about the decriminalization of marihuana in 11 states during the 1970s. An attorney involved in lobbying attempts to reduce the penalties for simple possession typically explained to the Utah state senate that: "These are your kids, after all." Another stated "that the courts would be reluctant to convict in marihuana possession cases since the marihuana problem was hitting middle-class families and Mormon youth." Although such tolerance is typically not exhibited towards minority users, particularly when "harder" drugs are involved, the fact is that we cannot prosecute and put all users in jail, even if we wanted to. Already more than one in forty American males between the ages of 14 and

71. See generally Schulhofer, supra note 66.
73. Sweet, supra note 2, at 44.
77. Id. Underlying these arguments is a normative assumption: the recreational drug user is not as harmful as others who might occupy jail space, and although everyone’s kids might be doing it, the activity itself is “not that bad”. Clearly, society would find it prudent to incarcerate mass murderers, even if many middle class adolescents were mass murderers.
78. The United States already has a higher proportion of its population incarcerated than any other country in the world. See Lester Grinspoon & James B. Bakalar, The War on Drugs-A Peace Proposal, 330 NEW. ENG. J. MED. 357, 357 and n.2 (1994).
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34 are locked up. 79

One possible corollary to be gleaned from this scenario is that drug use, legal and illegal, is principally a health problem that is best dealt with not by driving it underground with prohibition tactics, but by having it out in the open to allow for treatment and education. 80 Peter Reuter 81 concludes that drops in marihuana use by high-school age users, particularly in the 1980s, are related more to changed perception of the health dangers of such use than to enforcement efforts. It is difficult to understand why illegal drug addiction should be treated differently from alcoholism or nicotine addiction: all are basically public health problems. 82

B. Does the Current Policy Adequately Promote Education and Treatment as Well as Law Enforcement, and Is There an Adequate Balance Between These Three Courses of Action?

There is almost unanimous agreement among independent observers that the apportionment of anti-drug funding is lopsided. 83 Historically, about three-fourths of available funds have been earmarked for supply reduction (enforcement, interdiction and foreign assistance initiatives), with only one-fourth of the money being assigned to demand reduction (prevention and treatment).

Yet treatment is seven times more cost-effective than prohibition. One dollar spent on treatment of an addict reduces the probability of continued addiction seven times more than one dollar spent on incarceration. Unfortunately, treatment for addicts is not now available for almost half of those who would benefit. Yet we are willing to build more and more jails in which to isolate drug users even though at one-seventh the cost of building and maintaining jail space, and of pursuing, detaining and prosecuting the drug user, we could subsidize effective medical care and psychological treatment. 84

Proponents of the current policy argue that the pharmacological effects of drug use generally support prohibiting their use. E. Leong Way 85 provides a hierarchy of drugs according to their addictiveness and harm, placing cocaine

80. See generally NATIONAL COUNCIL ON CRIME AND DELINQUENCY, JUST SAY WHAT? AN ALTERNATIVE VIEW ON SOLVING AMERICA'S DRUG PROBLEM (1990).
83. See Inciardi, supra note 62, at 198.
84. Buckley, supra note 70, at 37.
85. Renowned scientist and professor of pharmacology, toxicology, and pharmaceutical chemistry at the University of California at San Francisco.
and alcohol at the top, and marihuana and tobacco at the bottom. Avram Goldstein claims alcohol and tobacco are the greatest health problems, and that legalizing other substances will only create further problems. Dramatic examples of drug-related harm caused by cocaine and opiate use include toxic reactions, drug overdose deaths and the spread of AIDS among needle-sharing addicts. Cocaine, which is an extremely potent central-nervous system stimulant, has the physical effects of increasing temperature, heart rate, and blood pressure, all of which can cause serious bodily injury, including death. Heroin is of course highly addictive, with all the concomitant problems that flow from such a condition.

Even marihuana, which many regard as causing few if any serious health problems, has not been studied on a wide scale. There is, however, at least some credible evidence that marihuana causes lung damage. Researchers at the University of California at Los Angeles have reported that the respiratory burden in smoke particulates and the absorption of carbon monoxide from smoking just one “joint” is some four times greater than from smoking a single tobacco cigarette. They found that one “toke” of marihuana delivers three times more tar to the mouth and lungs than one puff of a filter-tipped cigarette, and that marihuana deposits four times more tar in the throat and lungs and increases carbon monoxide levels in the blood fourfold to fivefold. Aside from the health consequences of marihuana use, research by the Center for Psychological Studies in New York City on the behavioral aspects of drug use has led to the conclusion that the use of marihuana severely affects the social perceptions of heavy users.

Proponents of the current regime also note that the pharmacological effects resulting from the use of most illegal drugs, as well as alcohol, increase the chance that users will become victims of crime. Finally, although mandatory civil commitment is a controversial subject, there is considerable statistical evidence in support of this approach, because there is a definite correlation between length and intensity of treatment, and rehabilitative success.

Opponents of the current policy tend to emphasize the modest health risks associated with at least some drugs, particularly marihuana. Harvard’s Lester Grinspoon, for example, has documented the alleged medical benefits of

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87. Medical doctor and professor emeritus of pharmacology at Stanford University.
89. Donald Ian Macdonald, Marijuana Smoking Worse for Lungs, 259 JAMA 3384 (1988).
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marihuana.92 Few opponents claim that all drugs are benign. Most argue instead that the national effort to control their use should be fought as a public health war, with the government putting addicts into the public health system as it has done with alcohol and tobacco abusers.93 As previously stated, prohibition has led to deaths through the use of adulterated drugs and is a principal cause of the spread of HIV virus, especially, as noted below, among African-Americans. Prostitution for drugs and “crack” babies are also direct consequences of prohibition.

C. Is the Current Policy Basically Fair in Its Application?

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

Advocates for changing our drug policy argue that the status quo produces much more profound unfairness in society than any program of decriminalization or legalization would create. Opponents of the status quo contend that the prohibition regime has endangered our fundamental rights and has had a disproportionate impact on poor people and minorities.

First, prohibition’s enforcement has had a devastating impact on the rights of the individual citizen. The control costs are seriously threatening the preservation of values that are central to our form of government. The war on drugs has contributed to the distortion of the Fourth Amendment wholly inconsistent with its basic purposes. Particularly in the areas of search and seizure, we have seen major changes in the law brought about by Congress’ and the courts’ zeal to support the enforcement of drug prohibition. I will not make a full laundry list, but courts have allowed the issuance of search warrants in drug cases based on anonymous tips,94 have jeopardized the attorney-client

94. See, e.g., Illinois v. Gates, 462 U.S. 213, 228-32 (1983) (upholding warrant issued based on partially corroborated anonymous tip, and noting in dicta that anonymous tip or letter of “sufficient detail” based on “totality of the circumstances,” could by itself support a finding of probable cause); United States v. Johnson, 64 F.3d 1120, 1124 (8th Cir. 1995) (noting that if an anonymous tip is predictive in nature and if prediction is true, tip is corroborated sufficiently to create reasonable suspicion to justify search); United States v. Williams, 3 F.3d 69, 72 (3d Cir. 1993) (emphasizing fact that anonymous informant was the housekeeper
relationship through the forfeiture of fees,\textsuperscript{95} and have permitted the use of the grand jury to inquire into the attorney-client relationship.\textsuperscript{96} Some of the most egregious actions committed by the government have been in the area of forfeitures, in which courts have allowed abuses which seriously undermine principles of legality and due process.\textsuperscript{97}

In the federal courts, a regime established by Congress requiring the imposition of high mandatory minimum sentences and a series of nondiscretionary sentencing guidelines have caused a substantial number of individual injustices. In my opinion, the rule of law is debased by the imposition of disproportionate criminal sanctions.

As a judge, I am also struck by how often the penalties for drug trafficking are imposed on individuals other than those most culpable. For example, the importation and selling of drugs is controlled by one set of people, but it is implemented by quite another - the so-called "mules," often poor people, conscripted to smuggle or sell drugs by powerful organizations. Depending on the preferences of the prosecutors, they are charged, tried, and convicted in what may be a futile attempt to reduce their numbers - futile if, as I suspect, there is an inexhaustible supply of people willing to take a chance on drug dealing in order to make a little money. Although I would be the last to justify their commission of crimes for profit, the fact is that these people, who have little information to trade to the prosecutors, end up with heavy sentences. The "big fish," if caught at all, are able to work out deals with the government which may leave them with light sentences or even without any prosecution. This result goes beyond mere injustice in the inequality of treatment; it is essentially an immoral outcome which tarnishes our entire judicial system.

In leaving this point, let me add what may sound like an exaggeration, but which is worth pondering. There are many cases in the history of humankind, some of recent vintage, in which citizens have been willing to give up their collective civil rights in the name of, and in exchange for, an illusory achievement of "law and order." Seen from one viewpoint, there undoubtedly

\textsuperscript{95} See, e.g., United States v. Nichols, 841 F.2d 1485, 1507-08 (10th Cir. 1988) (construing provisions of the Comprehensive Forfeiture Act of 1984 as allowing freeze of assets needed to pay for defendant’s counsel of choice); In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 646 (4th Cir. 1988) (en banc).

\textsuperscript{96} In re Grand Jury Subpoenas, 906 F.2d 1485, 1498 (10th Cir. 1990) (concluding that attorney fee information regarding representation of instant drug defendants is not subject to the attorney-client privilege and its disclosure does not violate realtors’ clients’ right to counsel); United States v. Saccoccia, 898 F. Supp. 53, 62 (D.R.I. 1995) (concluding that the government should be allowed to depose counsel and require that they produce relevant documents for the purpose of determining the amount, form and source of payments made to counsel in connection with representation of drug defendants).

\textsuperscript{97} See In re Application of Kingsley, 802 F.2d 571 (1st Cir. 1986).
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was a large measure of law and order in Hitler’s Germany or Trujillo’s Dominican Republic. But in the long-run, the surrendering of fundamental principles in exchange for temporary peace has proven to be short-sighted. I do not say we have yet reached such a crossroads, but I do say to you that I detect considerable public apathy regarding the upholding of rights which have been cherished since this land became a constitutional republic, when it comes to those accused of drug violations. I will grant that those who sell drugs to children are not very nice people, and I do not stand here or anywhere in defense of such heinous conduct. We must remember, however, that we do not, and cannot, have one constitution for the good guys and another for the bad guys. Whenever we relax our fundamental standards to catch the latter, the net may have been stretched wide enough to include the former at some future date. I believe it is too high a price to pay, particularly in an attempt to patch the holes of an enforcement system that is not working well.

Opponents of the current regime also argue that the war on drugs has had a lopsided impact on minorities. The drug war has been a war in which non-whites are arrested and imprisoned at four to five times the rate of whites, even though the majority of drug users are white. The racial impact of prohibition is further seen when one considers that one in three African-American males are imprisoned or under penal supervision for drug offenses.

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

Proponents of the current policy argue that the harm caused by drugs is not restricted to the users. I believe they deal effectively with the so-called “libertarian” point of view that is espoused by at least a minority of respectable persons from diverse walks of life—people who say that criminal sanctions cannot, and should not, prohibit personal conduct which does no harms to others. It is not the business of government, libertarians say, to protect people from themselves. An individual should be free to engage in the private use of drugs because the right to ingest substances is part of the right to self-determination.

For starters, I note that this alleged right to self-determination rests on a constitutional foundation yet undeclared. More important, however, drug use


99. Joseph D. McNamara, The War on Drugs is Lost, NAT’L REV., Feb. 12, 1996, at 42, 43; BUREAU OF JUSTICE STATISTICS, supra note 14, at 62 (in 1993 illicit drug users were 74% white, 14% black and 9% Hispanic).

100. Id.

101. See Sweet, supra note 2, at 45; Thomas Szasz, The War on Drugs is Lost, NAT’L REV., Feb. 12, 1996, at 45, 45-47.
does cause harm to others. Proponents of the current policy point to such secondary effects as crime, accidents, and public nuisances. All those things have innocent victims quite apart from the users. Drug use also imposes various costs on society—the costs of lost productivity, and prenatal injuries. The annual external costs of cocaine and heroin use alone have been estimated at $24 billion. Moreover, public opinion is overwhelmingly against legalization. Such action would not only be unpopular but would send the wrong message, particularly to the younger age groups.

Opponents of the current policy do not dispute these costs. They dispute that prohibition is the best way to reduce them. Legalization, they say, would eliminate the criminal entrepreneur and enterprise endemic to the illegal drug black market as well as most of the negative downstream effects related thereto.

Before comparing dollar costs, it is important to consider the argument that prohibition exacts its own toll on the very concept of a free society. One does not have to embrace the libertarian argument to see a moral contradiction in our current approach to drugs. Interestingly enough, Nobel prize economist Milton Friedman said that "[T]he economic problem [of drug use] is strictly tertiary. It's a moral problem . . . What scares me is the notion of continuing on the path we're on now, which will destroy our free society." Opponents of the current policy note that very few people would today seriously argue in favor of the criminalization of tobacco or alcohol use. Nevertheless, opponents of the status quo compare the 5,000 deaths per year directly attributed to the use of illicit drugs with over 570,000 directly caused by alcohol and tobacco use. In fact "[a]lcohol is the drug most associated with many forms of violence, including domestic violence." And the direct and indirect antisocial consequences of tobacco abuse are scientifically indisputable. What, we are asked, is the morality of prohibiting drug use but not alcohol or tobacco use?

Whatever the moral argument, however, we also need to consider the social and economic costs of the current policy and ask whether the costs of an alternative policy would be as great. Opponents argue that prohibition inflates

103. Id. See also note 72, at 215.
107. The German courts have held it is unconstitutional on equal protection and privacy grounds for the government to allow the use of some intoxicants such as alcohol, while criminalizing others, such as marihuana and hashish. See Stephen Kinzer, German Court Allows Possession of Small Amounts of Marihuana, N.Y. TIMES, May 3, 1994, at A12. For a similar analysis, see LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-7 at 1325-26 (2d ed. 1988).
the price of drugs, inviting new criminals to enter the trade; it reduces the number of police officers available to deal with violent crime; it fosters the sale of adulterated, even poisonous drugs; and it contributes significantly to the transmission of HIV.  

Moreover, the black market underground economy created by prohibition allows a huge pool of economic power to be controlled and influenced by criminal elements. Competition for these funds is directly responsible for most of the so-called “drug-related violence.” Prohibition provides a case history. The murder rate not only rose with the start of Prohibition, and remained high during its existence, but in fact declined for eleven consecutive years after it ended. Similarly, the rate of assaults with firearms rose during Prohibition but declined for ten consecutive years after repeal. Whatever violence is associated with the multi-billion dollar alcohol industry today as regards the production, distribution, and sale of alcoholic beverages, it is undeniably insignificant when compared to the violence that accompanied these activities during Prohibition.  

The competitive or “turf” related drug violence is intrinsically related to prohibition and therefore it is logical to conclude that it would virtually disappear with the elimination of the black market for drugs. Economic compulsive crime, that is, crime that addicts do in order to finance an expensive habit, should also decline dramatically with the repeal of prohibition. That leaves so-called psychopharmacological crime, that is, crime induced primarily by the impact of the drug upon the body and emotions of the user. A study of this last group revealed that in only 7.5% of homicides involving any drugs was a psychopharmacological label justified, and even in these cases, the most common element was alcohol. More people die every year as a result of the war against drugs than from what we call, generically, overdosing. Milton Friedman, an advocate of legalization, has estimated that as many as 10,000 homicides a year are plausibly attributed to the drug war.  

Because the sums of money generated by the illegal drug trade are so large, prohibition has placed tremendous economic power in the hands of organized crime. This economic power is the result of both the large amounts of drug generated money and the fact that there is an unregulated market of illegal products. This power allows the corruption not only of law enforcement officers,
but also of all levels of public officials, and related politicians. The most salient example of this subversion is presently being witnessed in Colombia, with its alleged election funds scandal, in which it is claimed that President Samper's election campaign was partially financed by the Cali drug cartel.

The current policy, say its opponents, creates general contempt for the law with more serious and permanent societal costs. Both federal and state laws prohibiting drug use are frequently violated with impunity by many citizens. According to the Office of National Drug Control Policy, "here in the United States, in every state—in our cities, in our suburbs, in our rural communities . . . drugs are available to almost anyone who wants them." They could well have added to their list, "even in our jails," for even in the allegedly secure environment of our prisons, illegal drug use is rampant.

Finally, opponents point out that abandoning our current policy would free up scarce resources. In the area of crime prevention alone, 400,000 policemen as well as billions of dollars in federal and state law enforcement and penal expenditures would be available for treatment, education and "regular" criminal police work. Additionally, our court systems would be freed up to handle both the non-drug criminal docket and the socially important civil docket.

Federal tax revenues from alcohol and tobacco taxes amounted to over $38 billion in 1994. I believe it is a fair assumption that the legalization of the drugs presently proscribed would allow their taxation in substantial amounts. Certainly the revenues from their taxation would be higher than at present. The precedent for reaping public funds from the wages of sin is certainly well-established. Additionally, the presently tax-free income profits derived from the sale of illegal drugs would come into the mainstream of income taxation.

E. What Can We Learn From the Various Attempts at Drug Legalization?

We should commence by examining the re-legalization of alcohol use in this country, i.e., the repeal of Prohibition. Whatever its faults, proponents say, Prohibition showed that the law can reduce the use of dangerous substances. 

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116. See McNamara, supra note 99, at 43.
118. This assertion is based on my judicial experience.
119. Arrest for simple possession of marihuana is the fourth most common cause of arrest in the United States. Grinspoon & Bakalar, supra note 78, at 357 n.2.
120. Alcohol taxes collected by the Bureau of Alcohol, Tobacco and Firearms during Fiscal Year 1994 totaled $33.9 billion, which included $6.8 billion in domestic alcohol excise taxes and $27 billion in tax liabilities on inventories held by permittees, as well as $110.6 million in special occupational taxes from manufacturers, wholesalers, and retailers. Tax revenues from tobacco for the same period included $5.7 billion in excise taxes and an additional $2.6 million in floor stocks taxes. Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1996: Hearings on H.R. 2020 Before the Subcomm. on Treasury, Postal Service, and General Government of the Senate Comm. on Appropriations, 104th Cong. 204 (1995) (prepared statement of Ronald K. Noble, Under Secretary of Treasury for Enforcement).
121. William E. McAuliffe, Health Care Policy Issues in the Drug Abuser Treatment Field, 15 J.
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According to John C. Lewis, a former administrator of the Drug Enforcement Administration, the repeal of Prohibition resulted in a huge increase in the use of alcohol.\(^{122}\) Data substantiate Lewis's claim: from 1916-1919, per capita consumption of alcohol for the drinking age population in the United States was 1.96 gallons. It dropped to 0.90 gallons during Prohibition and increased thereafter to 1.54 gallons between 1936-1941, to 2.43 gallons by 1989.\(^{123}\) To be sure, prohibition failed to eliminate drinking entirely, and it produced a black market, but we are told to use the lessons of the Prohibition era to refine the current policy rather than throw up our hands and hopelessly assume that history can only repeat itself.

Proponents also note that the annual societal cost of tobacco and alcohol is 2.3 times that of prohibited drugs and that tobacco and alcohol cause far more deaths annually than illegal drugs. Legalization of alcohol and tobacco has thus had serious effects on society, and there is good reason to assume that the legalization of presently illegal drugs would follow the same road, nullifying any or most predicted benefits from such action.

Furthermore, say proponents, legalization would increase the supply of drugs, thus lowering their prices and putting them within the economic reach of more people.\(^{124}\) At least one observer claims that this increase will be mostly among children.\(^{125}\) Alcohol use since the end of Prohibition tends to support the conclusion that legalization will increase the use of drugs.\(^{126}\) This assertion also seems to be supported by the rate of use of tobacco (1:5) and alcohol (2:5) as well as the absolute number of users (46.3 and 105 million), which far outstrips that of prohibited drugs (1:25 and 11.5 million).

Proponents of the current policy regarding illegal drugs argue that legalization and decriminalization of drugs in other countries has failed to deal

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123. For Legalization of Drugs, supra note 59, at 109-10.

124. See Michael Grossman et al., Rational Addiction and the Effect of Price on Consumption, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES 77 (Melvyn B. Krauss & Edward P. Lazear eds., 1991) (citing study of cigarette addiction and concluding that addictive substances are very responsive to price). The conclusion with cigarettes was that a 10% decrease in price yields between 7% and 8% increase in demand. But see Jeffrey Miron, Drug Legalization and the Consumption of Drugs: An Economist's Perspective, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES 68, 73-75 (Melvyn B. Krauss & Edward P. Lazear eds., 1991) (contending that data from the Prohibition era leads to conclusion that drug legalization will cause only small increase in drug usage). The Drug Policy Foundation Advising Board found as a result of a national poll that if there is a repeal of prohibition only 9.6% of the adult population might try marijuana and 1.7% might try cocaine. See For Legalization of Drugs, supra note 59, at 107-08.


with the problems that substance abuse causes. Opponents of the current policy see these experiences in a more favorable light.

Probably the most frequently cited country in this regard is the Netherlands. Proponents of the current policy argue that the de facto decriminalization of soft drugs was the result of a lack of policy and of an overdue adaptation to existing realities rather than due to any well-considered action.127 "Drug tourists" from Germany, Belgium, Luxembourg and France flock to the Netherlands because of its permissive rules for soft drugs.128 By contrast, and cognizant as I am of the dangers inherent in making transnational comparisons, I think it is fair to say that Dutch drug policy has generally been more successful than U.S. drug policy.129 Dutch drug policy has evolved in partial opposition to the internationally-dominant ideology of prohibitionism. While fully in line with international control policies against wholesale drug trafficking, Dutch policy on drug use has sought de-escalation and normalization. Problematic drug use is accepted as an inevitable, but limited and manageable, social and public health problem of modern society. Harm reduction is the core concept; it is translated into extensive low level and non-conditional prescribing of methadone, social and medical assistance for drug users, large-scale free needle exchange programs, and the pragmatic acceptance of several "free zones" where the consumer drug market is left largely undisturbed.130

The average age of heroin addicts in the Netherlands has been increasing for almost a decade. HIV rates among addicts are dramatically lower than in the United States. Police do not waste resources on non-disruptive drug users but focus on major dealers or petty dealers who create public nuisances. The decriminalized marihuana markets are regulated in a quasi-legal fashion far more effectively and inexpensively than in the United States.131 The level of use in the Netherlands is substantially lower than in countries waging a "war on drugs", including the United States, and until recently, Germany. Among Dutch youths 17-18 years old, only 17.7% used marihuana at least once in their lives, compared to 43.7% in the United States. In fact, overall, only 4.6% of the Dutch have used marihuana at least once in the past month, compared to 16.7% in the United States.

A dramatic comparison of the results of the Dutch and American policies can be seen in comparing some statistical data between Amsterdam and Baltimore.132 Amsterdam has a population of about 700,000 and between 5,000

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132. Of course, Amsterdam and Baltimore are very different cities, with different socioeconomic
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and 7,000 addicts, which yields a rate of between 714 and 1,000 hard-core drug users per 100,000 population. Baltimore, with approximately the same population at 737,000, had at least 45,000 addicts, or 6,105 addicts per 100,000 population. In 1991, Amsterdam reported 20 residents dead from causes related to drug use, as compared to 269 reported in Baltimore.

Those who would maintain the current policy, though, point to other countries as well. For example, they note, in 1963 Great Britain instituted a policy of medical prescriptions to heroin addicts. Britain discontinued the policy in 1983 due to a 100% increase in the numbers of addicts and an increase in the crime rate, which was partially attributed thereto. Others point to the Swiss experiment in a Zurich park, which created a drug use zone. There the number of drug addicts increased from a few hundred in 1987 to over 20,000 by early 1992, of which about 20% were foreigners. In closing this experiment, the authorities claimed an unacceptable increase in use, violence, crime and health costs. For another example, Spain and Italy, which have legalized the use of cocaine and heroin, but not distribution, have the highest rates of both drug use and overdose of all European countries.

Finally, at least one of the states, Alaska, deemed its 1995 marihuana decriminalization effort to be a failure. Notwithstanding a nationwide 75% reduction in daily teenage marihuana use since 1978, in Alaska teen usage increased to twice the national average. In 1990, Alaska voted to recriminalize the use of marihuana.

But opponents of our current policy have their own examples to cite. They point to the experience of the states that decriminalized the possession of small amounts of marihuana for personal consumption in the 1970s. There was no increase in the level of marihuana use in these states. Indeed marihuana consumption declined in those states just as it did in states that retained criminal sanctions against marihuana. Similar results were experienced in the conditions. The failure of Baltimore relative to Amsterdam might be partly explained by underlying socioeconomic factors, if we assume that living in poverty makes one more likely to submit oneself to drugs. Such an assumption might be more valid, however, under our prohibition regime, since the poorest individuals are more likely to become involved in the drug trade since they get significant monetary compensation for assuming a risk premium. See supra note 57.

137. See The Committee on Drugs and the Law, A Wiser Course: Ending Drug Prohibition, 49 Record 521, 548 (1994).
Netherlands, when marihuana consumption was decriminalized in 1976, and in the Australian state of South Australia, where that action was taken in 1985.

The success of these programs has depended at least partially on law enforcement support. Unfortunately, such support is unlikely in the United States because the bureaucratic side of the law enforcement establishment has substantial economic self-interest in a $14.1 billion pie. One could cynically conclude that economic motivations put the law enforcement community and traffickers in the same boat as far as the present discussion goes (although for different reasons) - i.e., both groups are opposed to legalization.

III. A Caveat on Interpreting the Empirical Data and Obstacles to Reform

We must remember that no important ideological battle has been won solely because one side has better statistics than the other. Moreover, there are limits to our prudent reliance on statistics. What the hard sciences and the social sciences proclaim as true in one age often turns out to be untrue based on further research. Thus, we discard the policies based on those proclamations, only to find that additional research removes the scientific underpinnings for the new policies. Keep in mind, for example, that our society generally indulged alcohol consumption until fairly recently. Then the conventional medical wisdom began to counsel total abstinence, only to proclaim, even more recently, the benefits of moderate consumption, at least of red wine, in avoiding heart attacks. And before the Surgeon General's 1964 report on cigarettes, many authorities touted smoking's benefit as helpful to relieving stress. Not too long ago, sociologists and criminologists had great faith that many criminals could be rehabilitated. Thus, Congress provided very few restrictions on the criminal sentences judges could impose, in order to let parole authorities determine when inmates should be released. In the last 15 years, that whole model has been discarded.

The current policy regarding illegal drugs has apparently been set in stone by Congress without any intention of engaging in any further assessment of the issues raised by prohibition. Thus, the 1988 Anti-Drug Abuse Act, § 5011, stated that:

The Congress finds that legalization of illegal drugs, on the Federal or state level, is an unconscionable surrender in a war in which, for the
future of our country and the lives of our children, there can be no substitute for total victory.\textsuperscript{144}

This rhetoric was followed by a proclamation in § 5252-B to the effect that: "It is the declared policy of the United States to create a Drug-Free America by 1995." No one seems to have noticed the passing of this deadline without its inflexible being approximated, much less reached.

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

There are several difficult questions that are not readily answered by most proponents of legalization or criminalization, but which obviously are relevant to the problem. A non-exhaustive list includes: What forms of governmental regulation, if any, are appropriate instead of prohibition? To what degree, if any, should private distribution of drugs be permitted? As to importation, what controls are appropriate? Is a regulatory regime similar to the one now used to control alcoholic beverages appropriate for all drugs? How should a new regulatory regime treat children, adolescents or pregnant women? What kinds of prevention and treatment programs should there be and how should they be funded?\textsuperscript{145} Much has to be considered and more answers should be available.

Unfortunately, much of the public discussion of these issues has been shrouded in semi-hysteria not unlike the hysteria engendered by the McCarthy senatorial investigations about national security in the 1950s. I believe that Judge Martin Haines’ perceptive comments in an article in the New Jersey Law Journal\textsuperscript{146} are apropos:

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

Conclusion

This essay has explored the drug problem’s magnitude and costs. We

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\item[145.] See The Committee on Drugs and the Law, supra note 137, at 525.
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have seen that the current drug policy has been cost ineffective, and it will probably remain so unless we commit ourselves to a tactical shift. Moreover, the current regime in its application may be unfair, and it threatens to erode our fundamental liberties. There is no clear evidence, however, that informs us as to whether the costs of decriminalization would be greater than the costs of prohibition, and past experiments in legalization have produced conflicting results. In sum, I would advocate a prudent use of existing data, tempered by a healthy skepticism of the reliability of empirical findings. I would admonish policy-makers not to be trapped by rigidity of thought but rather to approach this issue with the open-mindedness that such a complex problem deserves.

Although we can never be certain, the evidence we do have suggests that our current approach is failing. Cautiously and carefully, we should begin to examine alternative strategies that might be more effective. Based upon my experience as a judge and the relevant authorities that are quoted herein, I reach the conclusions that follow:

First, there is a mountain of conflicting evidence and views about the proper course to be taken. This lack of consensus demonstrates the imperative need for an objective, multidisciplinary study to assess independently the facts and to recommend courses of conduct to be followed. This study should be carried out by a bipartisan commission appointed jointly by Congress and the Executive and composed of persons of unquestionable integrity and prestige. As part of this process, there must be a truly national debate about this subject to create conscience and consensus about these problems. Most important, there is a need to keep an open mind about these issues.147 We must act upon the recommendations made by such a body. Our political leadership needs the courage to let the chips fall where they may and to deal with them once fallen. A national referendum by secret ballot might also be an appropriate way of proceeding with regard to the issue of decriminalization.

Second, before any large-scale decriminalization should occur, there is a need for pilot tests of some types of limited decriminalization, probably commencing with marijuana, and obviously not including minors.148 Any such tests should ensure that in treating people differently, even for test purposes, rights to due process and equal protection are not sacrificed.149

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

Finally, pending the definitive study proposed, there should be a shift in the

148. NATIONAL RESEARCH COUNCIL, AN ANALYSIS OF MARIHUANA POLICY 16-30 (1982); NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE 458 (1973); For Legalization of Drugs, supra note 59, at 103-104 (citing REPORT OF THE INDIAN HEMP DRUGS COMMISSION OF 1894).
funding of enforcement efforts toward an intense educational campaign at all levels. The availability of funds to escalate treatment levels aimed at rehabilitation should also be greatly increased.

Epilogue

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

Are we in a balloon, floating in a dream above reality, without a notion as to where we are or where we are going?