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# Playing "21" with Narcotics Enforcement: A Response to Professor Carrington

Frank O Bowman, III\*

I confess. I have been a "drug warrior." At least if the term includes serving as an Assistant United States Attorney in Miami and prosecuting, and seeking long prison terms for, narcotics traffickers. It was therefore with considerable personal interest that I listened to Professor Carrington present his assessment of this country's drug policy in the Forty-Sixth Randolph Tucker Lecture.<sup>1</sup> It is not often, after all, that one is accused of belonging to the modern equivalent of the Inquisition<sup>2</sup> or of serving a legal system whose brutality places its officials on the same moral footing as Nazi war criminals.<sup>3</sup>

Although I disagree with Professor Carrington's approach and suggested remedy, he raises important issues worthy of thoughtful debate. At the core of his speech are two questions which should not be ignored: First, is the evil of drug abuse exceeded by the costs, both human and financial, of the strategy the country has adopted to prevent drug abuse?

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1. Professor Paul D. Carrington, The Twenty First Wisdom, Forty-Sixth Annual Washington and Lee University School of Law Tucker Lecture (September 30, 1994), *m* 52 WASH. & LEE L. REV. 333 [hereinafter Carrington].

2. *Id.* at 352.

3. *Id.*

Second, assuming one were to conclude that the costs of our present policy are too high, how should the policy be changed?<sup>4</sup>

Professor Carrington's answer to the first question is an emphatic "yes." He thinks the costs of prevention are far worse than the disease. His prescription for the problem is a constitutional amendment eliminating the federal role in drug law enforcement, and by analogy to the Twenty-First Amendment to the U.S. Constitution which repealed the earlier national prohibition of alcohol, giving the states exclusive power to regulate heroin, cocaine, marijuana, tobacco, coffee, and tea.<sup>5</sup>

A careful reading of Professor Carrington's text has given rise to three categories of reflection:

First, while the argument that the cost of drug enforcement outweighs its benefits is not a frivolous one, Professor Carrington has larded that central argument with unexamined inferences, doubtful logic, questionable uses of history, persistent hyperbole, and some plain factual errors.

Second, even if one accepts the premise that the costs of criminalizing narcotics exceed the costs of unrestrained drug use, Professor Carrington's solution — individual state control — fails to solve the problem. His solution would not eliminate the principal source of the collateral harms of the drug trade: a hugely profitable, violent, national and international criminal industry. Indeed, the very interstate and international character of the drug trade places the drug problem among the categories of crime least susceptible to attack through a resurgent federalism.

Third, despite the form in which Professor Carrington has cast it, his core argument retains considerable visceral force. Much of that force, paradoxically, flows from the failure of the metaphor chosen by those who would increase law enforcement efforts against narcotics trafficking — the deeply regrettable idea of a "war on drugs."

Although I have fundamental disagreements with Professor Carrington even when his argument is reduced to its core, my purpose here is neither to defend every jot and tittle of national drug policy, nor to propose any sweeping personal vision of the place of recreational drugs in America. My ambitions are more modest. I suggest three premises: (1) Intelligent discussion of drug policy requires that we shed the image of law enforcement as warfare. (2) Instead, criminal narcotics prohibitions, penalties, and enforcement methods should be analyzed by the same standards which

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4. This paper tracks Professor Carrington's approach by taking a utilitarian perspective. I assume that substances that cause a sufficient degree of harm to their users and to society are the proper subject of government regulation or prohibition.

5. Carrington, *supra* note 1, at 340-41.

govern any other type of crime. (3) If antinarcotics policies are conceived and crafted as ordinary law enforcement measures, the result is more likely to be humane, sustainable, and successful than either utopian legalization schemes or Wagnerian blitzkriegs against the evil drug lords among us.

### I. *Clearing Away the Underbrush*

A continuing theme of Professor Carrington's remarks is that those who favor increased dedication to narcotics law enforcement overstate the harmful consequences of using those drugs.<sup>6</sup> Although there is undoubtedly some truth to this claim, making it would seem to impose an obligation to respond to alleged demagoguery in measured and reasonable tones. The first flaw in Professor Carrington's presentation is that he is plainly prepared to out-herod Herod.<sup>7</sup> So before turning to those aspects of Professor Carrington's argument which bear serious consideration, let us clear away the obstructions and diversions with which he has surrounded them.

#### A. *Coffee, Tea, and Tobacco: Plants as Red Herrings*

The first diversionary briar patch to be razed is the inclusion in Professor Carrington's proposed constitutional amendment of references to coffee, tea, and tobacco. None of these products are illegal under federal law,<sup>8</sup> and of the three substances, states regulate only tobacco, and then only its sale to minors.<sup>9</sup> There is no serious proposal at either the federal or state level to ban consumption of coffee, tea, or tobacco.

Moreover, to categorize coffee, tea, and tobacco as "mind-altering substances" is, while technically accurate, to distort that phrase beyond

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6. Professor Carrington puts it rather more strongly. At one point, he writes: Because drug law enforcement officers are often required to do such distasteful deeds, they tend to rationalize their own conduct with exaggerated beliefs about the horrors of cannabis, opiates and coca. For these reasons, the enforcement industry *is a source of disinformation about drugs that is almost as abundant as the substances themselves* and exceeds in its harmful consequences any disinformation that may have been disseminated by the tobacco industry.

*Id.* at 354 (emphasis added).

7 WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

8. Federal law does restrict the award of certain block grants for mental health and substance abuse treatment to states that have enacted legislation prohibiting the sale of tobacco to minors, 42 U.S.C. § 300x-26 (1988 & Supp. V 1993), but there is no positive federal prohibition on the sale of coffee, tea, or tobacco to any group.

9. See, e.g., ALA. CODE § 13A-12-3 (1994); COLO. REV. STAT. § 18-13-121 (Cum. Supp. 1994).

useful limits. True, the active ingredients of these products, caffeine and nicotine, are stimulants. True, both are addictive to varying degrees, caffeine mildly and nicotine extremely. But to put them in the same category as alcohol, marijuana, cocaine, and heroin seems, at first glance, either foolish or facetious.

Professor Carrington is no fool, and he obviously is aware of the profound differences between a sip of Earl Grey and a drag on a crack pipe. He is equally aware that no one is on the verge of criminalizing a cup of java and a smoke. So why are coffee, tea, and tobacco keeping house in his constitutional amendment with marijuana, cocaine, and heroin? They are there, to be frank, so that the argument in favor of the amendment can be laden with reasoning by false analogy, or to be more precise, with attempts to persuade by unexamined inference.

Professor Carrington begins his presentation with six "factual premises" held by his fictional Fremonters<sup>10</sup> which are, he says, at odds with the "mania causing widespread blindness to the facts" about opium, cocaine, and marijuana.<sup>11</sup> The first two of these premises are that the use and misuse of "mind-altering substances" are "universal" and "pre-historic."<sup>12</sup> At first blush, of course, neither the universality or antiquity of any particular strain of criminal conduct is much of an argument for legalizing it. If it were, we should be obliged to take a rather more broad-minded and tolerant view of murder,<sup>13</sup> rape,<sup>14</sup> robbery,<sup>15</sup> theft, prosti-

10. Professor Carrington posits an imaginary "State of Fremont" whose inhabitants seek abolition of federal restraints on possession and sale of marijuana, cocaine, and heroin, and who would decriminalize these substances within their borders. Carrington, *supra* note 1, at 342.

11. *Id.* at 343.

12. *Id.* at 343-44.

13. Those Fremonters who accept the literal truth of the Bible know that the third human being in God's creation, Cain, promptly and efficiently killed the fourth, Abel. *Genesis* 4:8. Those who prefer a Darwinian view of human origins are aware of the school of anthropological thought which holds that the aggressive, indeed homicidal, character of *homo sapiens* has been integral to our evolutionary success. See, e.g., RICHARD B. LEE & IVAN DEVORE, *MAN THE HUNTER* (1968).

14. From the Roman soldiery among the Sabine women to the rape camps of the Bosnian Serbs, human males have been forcing themselves on women with depressing regularity. See TITUS LIVIUS, *THE HISTORY OF ROME* 23-24 (George Baker trans., 1836); John F. Burns, *150 Muslims Say Serbs Raped Them in Bosnia*, N.Y. TIMES, Oct. 3, 1992, § 1, at 5.

15. Even the most cherished Christian parable of decent behavior, the story of the Good Samaritan, is the tale of how the despised Samaritan succors a Jew who has been beaten,

tution,<sup>16</sup> and cheating the tax collector, all of which have ancient and dishonorable pedigrees. But by including tea, coffee, and tobacco among the "mind-altering substances," Professor Carrington subtly alters this obviously untenable position. Their inclusion allows Professor Carrington to do three things.

First, it allows him to broaden his claim of universal use of "mind-altering substances" far beyond anything which could be sustained by considering the true subjects of the dispute: marijuana, cocaine, and heroin.<sup>17</sup>

Second, without ever saying so directly, Professor Carrington invites us to apply that most basic of legal norms: Like things should be treated alike. Because almost everyone drinks coffee or tea legally and with no ill effects, we are invited to conclude that the same treatment should be extended to the other "natural" mind-altering substances — marijuana, cocaine, and heroin. The obvious problem is that coffee and tea are not "like" marijuana, cocaine, and heroin. To include coffee and tea in the same category with illegal drugs is to commit an error of degree so large that it amounts to an error of kind. Thus, the legal norm on which we are impliedly invited to rely is irrelevant.

Third, including tobacco allows Professor Carrington to invite another misleading *sub rosa* comparison. His third "factual premise" is that, of his six selected substances, tobacco is the most dangerous to physical health.<sup>18</sup>

stripped, and left for dead by robbers. *Luke 10:29-37*

16. Whether the "oldest profession" really is may be debatable, but that men and women have been exchanging sex for money since time out of mind is not.

17 For example, Professor Carrington writes: "Because the human appetite for mind-alteration is wide-spread, in 1994, there must be several billion users of the so-called Protestant drug, caffeine, which is extracted from the tea leaf or the coffee bean. In addition, there may be a billion users of the tobacco leaf." Carrington, *supra* note 1, at 343.

18. *Id.* at 345. Whether long-term tobacco use really is worse for one's health than long-term use of marijuana, cocaine, or heroin is not at all clear. Serious researchers in the area recognize both that the nature of the ill effects of tobacco has only recently become well understood after many years of study and that comparable data for long-term use of marijuana, cocaine, and heroin is not available. See Steven Jonas, *The U.S. Drug Problem and the U.S. Drug Culture: A Public Health Solution*, in *THE DRUG LEGALIZATION DEBATE* 161, 164 (James A. Inciardi ed., 1991) (epidemiological data on heroin, cocaine, and marijuana is much more rare than for alcohol and tobacco); LESTER GRINSPOON & JAMES B. BAKALAR, *COCAINE: A DRUG AND ITS SOCIAL EVOLUTION* 145 (rev ed. 1985) ("The physiological effects of chronic administration of large doses of cocaine have never been studied systematically in human beings."). The existing evidence regarding marijuana, for example, is that it causes equal or greater damage to the respiratory system than does tobacco. James A. Inciardi & Duane C. McBride, *The Case Against Legalization*, in *THE*

His fourth premise is that tobacco is the most addictive of the chosen six.<sup>19</sup> Even assuming his third and fourth premises to be true, neither of these observations is relevant to a discussion of the legalization of marijuana, cocaine, and heroin, unless there is some lesson to be drawn from contrasting the legal status of tobacco to that of the three illegal drugs. Curiously, Professor Carrington never spells out what that lesson should be. I suggest that the lesson we are being invited to draw is this: Since we know that tobacco is (a) addictive, (b) harmful, and (c) legal, the federal government should be barred from prohibiting or regulating the use of marijuana, cocaine, and heroin because they are no more addictive and arguably less harmful than tobacco. There are a number of difficulties with this suggestion; I will amplify on only two of the most salient.

The first difficulty is that, once again, Professor Carrington has us comparing apples with oranges. Marijuana, cocaine, and heroin are banned in part, no doubt, because they are to varying degrees addictive, and in part, no doubt, because they have long term deleterious health effects. However, at least as important to the rationale for their prohibition is that they are intoxicants. They are disapproved because they really do "alter the mind." They significantly affect the user's ability to perceive the physical world accurately and his ability to formulate rational responses to

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DRUG LEGALIZATION DEBATE 45, 49-50 (James A. Inciardi ed., 1991). Crack cocaine is linked to a plethora of problems: pulmonary disorders, seizures, strokes, hypertension, paranoia, hallucinations, etc. STEVEN R. BELENKO, CRACK AND THE EVOLUTION OF ANTI-DRUG POLICY 34-41 (1993). In 1991, there were over 100,000 cocaine related medical emergencies reported to the Drug Abuse Warning Network system. James A. Inciardi, *Against Legalization of Drugs*, in *LEGALIZE IT?* 169 n.3 (1993).

19 Carrington, *supra* note 1, at 346. I have found no credible authority to support this claim. The truth appears to be both uncertain and complex. On the one hand, tobacco was long classified as habit-forming, causing psychological dependence, but nonaddictive. Only fairly recently have medical investigations confirmed physical and biochemical changes occurring in some tobacco smokers as a result of withdrawal. JOHN KAPLAN, THE HARDEST DRUG: HEROIN AND PUBLIC POLICY 17 (1983). On the other hand, daily use of heroin for as little as 10-14 days appears to create a physical dependence which causes withdrawal symptoms on cessation of the drug. *Id.* at 27; DAVID T. COURTWRIGHT, DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940 47-48 (1982). One author maintains that cocaine is the most addictive drug in the world. JOHN C. FLYNN, COCAINE: AN IN-DEPTH LOOK AT THE FACTS, SCIENCE, HISTORY AND FUTURE OF THE WORLD'S MOST ADDICTIVE DRUG 12-16 (1991). Another author has reviewed clinical studies and concluded that "approximately 10 per cent of those who begin to use cocaine 'recreationally' will go on to serious, heavy, chronic, compulsive use." Inciardi, in *LEGALIZE IT?*, *supra* note 18, at 169. One survey of the medical literature characterizes cigarette tobacco, heroin, and "crack" as "obligatory addictive drug[s]." Jonas, *supra* note 18, at 162. Which of the three is the "most" addictive is susceptible to lengthy argument, but probably not to proof.

what he perceives.<sup>20</sup> Regardless of whether one thinks society in general, or the federal government in particular, has any proper concern with such matters, these concerns do matter greatly to those who oppose drugs. To put it more plainly, marijuana, cocaine, and heroin are banned at least as much because they intoxicate as because they kill. Tobacco is simply not an intoxicant.<sup>21</sup> Thus, while tobacco is both addictive and harmful, it no more belongs in a category called "mind-altering drugs" than do tea and coffee.

Second, though tobacco is not a "mind-altering drug," it may not be irrelevant to a discussion of what to do about marijuana, cocaine, and heroin that a substance as dangerous as tobacco is legal. That we ban marijuana, for instance, while paying a federal crop subsidy to producers of a product that contributes to the deaths of some 419,000 Americans annually<sup>22</sup> is a paradox. But to note a paradox is not the same thing as making an argument. Professor Carrington describes the paradox well enough, and he tells us his solution — a constitutional amendment. He is notably silent, however, on the principle of logic, public policy, or sound constitution-making that leads from the paradox to the amendment.

Even accepting Professor Carrington's characterization of tobacco as a greater evil than hard drugs,<sup>23</sup> it is unclear why the entrenched presence of one great evil obliges us to accept any lesser evil which may thereafter threaten. Moreover, a principle of general application which resolves the paradox of legal tobacco and illegal drugs requires either (a) the prohibition of tobacco or (b) the legalization of any substance which is less harmful to health than tobacco (regardless of whether the substance has effects on the central nervous system equal to or greater than nicotine). Professor Carrington obviously is not advocating prohibition of tobacco. On the

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20. For a careful and dispassionate description of the intoxicating effects of heroin, for example, see KAPLAN, *supra* note 19, at 22-25. For a similar description of the effects of cocaine, see FLYNN, *supra* note 19, at 47-67.

21. I use the terms "intoxicant" or "intoxicate" in their ordinary senses, not as medical or toxicological terms of art. For example, II WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 1185 (1993), defines "intoxicate" as "to excite or stupefy by alcoholic drinks or a narcotic esp. to the point where physical and mental control is markedly diminished." The MODEL PENAL CODE defines "intoxication" as "[a] disturbance of mental or physical capacities resulting from the introduction of substances into the body " MODEL PENAL CODE § 2.08(5)(a) (1985).

22. Wayne Hearn, *Emptying the World's Ashtrays: International Medical Community May Support Smoking Cessation Policy*, AM. MED. NEWS, Oct. 3, 1994, at 13, 14 (quoting statistics from World Health Organization, CDC, Judith Mackay, MD).

23. See Carrington, *supra* note 1, at 345-46 (discussing dangers of tobacco).



other hand, given the demonstrated lethality of tobacco and the plethora of substances less lethal than smoking cigarettes, honest application of principle (b) would require dismantling the Food and Drug Administration right along with the DEA.

Professor Carrington would, I am sure, protest that he intends no change so sweeping, that the only presently banned substances his constitutional amendment would touch are marijuana, cocaine, and opium derivatives. The question, however, is why only these? If the federal government is to be stripped of jurisdiction over marijuana, cocaine, and heroin because they are less harmful to health than tobacco, why should the same treatment not be accorded to methamphetamine ("speed"), barbiturates, "angel dust," LSD, "Ecstasy," and the whole pharmacopeia of mind-altering substances which may warp your thinking, but which will not cause cancer?

*B. Through a Glass Very Darkly: Correcting Professor Carrington's Misleading Account of the History of Drugs*

The apparent answer to the puzzle of Professor Carrington's eclectic selection of drugs to be de-federalized is his characterization of these drugs as "natural" substances whose use is widespread and ancient. He writes:

The six substances that I propose to add contain the five mind-altering substances in addition to alcohol that appear in nature and have for millennia been widely used by men and women. The mind-altering effect of all of these substances can be derived without the use of any modern technology or process. Until 1914, the use of all of them was lawful in every American state.<sup>24</sup>

Professor Carrington goes on to paint a picture of a world in which post-1914 America is an aberrant island of Calvinist prudery on the great historical canvas of a happily, and organically, stoned humanity—Roman banqueters munching the period equivalent of magic brownies. Medieval Arab tokers. Cheerful Incan peasants and their even cheerier llamas. Sigmund Freud. Industrious, opium-smoking Chinese coolies. Sherlock Holmes. Laudanum-swilling housewives. And even a coked-up Ulysses

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24. *Id.* at 341. In 1914, the Harrison Act was passed imposing federal regulation on a number of substances. Harrison Act, ch. 1, 38 Stat. 785 (1914). In fact, as we will see later, the assertion that use of marijuana, cocaine, and heroin "was lawful in every American state" before 1914 is wrong. States began regulating the use of these substances as early as the 1870s. *Infra* notes 72-76 and accompanying text.

S. Grant. It is an interesting portrait, with enough elements of truth to lend it verisimilitude. It is, however, a notable distortion of history

Consider the claims that the substances to be de-federalized are "natural" and their use and abuse by humans "ancient." It is true that marijuana, coca, and opium poppies are all plants. It is equally true that the intoxicating effect of marijuana is produced by smoking or eating it without chemical alteration of the plant. But although marijuana may be natural enough and may have been known to various civilizations for a long time, its use in American and European culture is a very recent phenomenon. It has no significant tenure in the United States before this century<sup>25</sup> As for those derivatives of the coca plant and the opium poppy which are the core of America's drug problem, they are neither natural nor ancient. One cannot throw the mantle of "nature" over cocaine and heroin simply because their vegetable antecedents have narcotic or analgesic properties. The debate that embroils America is not about coca leaves or opium resin. What concerns us are the drugs in actual use — cocaine and heroin — and these are products of modern organic chemistry vastly different in purity, chemical composition, and effect than anything found in nature.

Cocaine is derived from the coca bush, *Erythroxylum coca*, a plant indigenous to Peru, Bolivia, and Ecuador.<sup>26</sup> Thus, the plant was necessarily unknown to European civilization until roughly 1533, the year Francisco Pizarro conquered Peru.<sup>27</sup> For the next three centuries, there were some

25. STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 44-45 (1993).

In 1919, during congressional hearings on federal drug control policy, Dr. William Jay Schiefflin of New York testified that cannabis was "used only to a slight extent in this country." *Importation and Use of Opium: Hearings Before the House Comm. on Ways and Means*, 61st Cong., 3d Sess. 7 (1919).

See also *People v Dillon*, 668 P.2d 697 (Cal. 1983). Defendants were charged with robbing marijuana cultivators of their plants. The defendants contended that standing crops could not be the subject of a robbery. *Id.* at 704. In the course of rejecting defendants' argument, the California Supreme Court discussed the 1872 California larceny statute which included standing crops among the proper subjects of larceny.

Had the Legislature anticipated in 1872 that the meteoric rise in popularity and hence in value of an illicit plant would lead to violent confrontations between black market cultivators and armed bandits, we have no doubt it would have explicitly applied the rule to robbery as well.

*Id.* at 706.

26. 3 BRITANNICA MICROPAEDIA 417 (15th ed. 1993).

27. Some references to coca leaf chewing by indigenous South Americans appear in early correspondence from the conquistadores. See, for example, the rather dismissive

references to coca and its properties in European botanical literature, but the plant itself was essentially unknown either to medical science or to seekers of pleasure.<sup>28</sup> Active medical experimentation with coca does not seem to have begun until the 1850s, and recreational use in Europe and North America came still later.<sup>29</sup> The principal active alkaloid of the coca plant, cocaine, was not isolated until 1860.<sup>30</sup> "Crack," a smokable form of cocaine that produces faster and more intense highs,<sup>31</sup> did not appear for human consumption in the United States until the 1980s.<sup>32</sup>

Opium is the dried, milky exudate obtained from the unripe seedpods of the poppy plant.<sup>33</sup> The method for isolating opium's principal alkaloid, morphine, was discovered by the German chemist, F W Serturmer, in 1803<sup>34</sup> and was first published in 1817.<sup>35</sup> Heroin, or diacetylmorphine, which is four to eight times as potent as morphine, was not developed until 1874;<sup>36</sup> it was not given the name "heroin" or tested on human subjects until 1898.<sup>37</sup> Moreover, the most efficacious, and among addicts ultimately most common, method of introducing morphine and heroin into the human

remarks of Pedro Cieza de Leon, who traveled and soldiered in South America from 1532 to 1550. Letter of Pedro Cieza, *quoted in* GRINSPOON & BAKALAR, *supra* note 18, at 17-18. For a general discussion of the conquest of Peru, see HAMMOND INNES, *THE CONQUISTADORS* (2d ed. 1986).

28. GRINSPOON & BAKALAR, *supra* note 18, at 18-19 FLYNN, *supra* note 19, at 19-21.

29. GRINSPOON & BAKALAR, *supra* note 18, at 18-24, 37-38.

30. *Id.* at 19. The chemical formula of cocaine was first determined in 1862 by Wilhelm Lossen. *Id.*

31. Crack is cocaine in its form as a base manufactured by heating powdered cocaine hydrochloride with baking soda, ammonia, or powdered amphetamine. BELENKO, *supra* note 18, at 3.

32. *Id.* at 4-6.

33. KAPLAN, *supra* note 19, at 5. Opium has been recognized for several thousand years and originally was consumed by drinking it in various liquids. *Id.* The device most associated with opium, the pipe, was not commonly employed as a delivery mechanism until after the discovery of America, whose native inhabitants were found using pipes to smoke tobacco. *Id.* Opium smoking apparently began in Asia around the end of the 17th century BRIAN INGLIS, *THE OPIUM WAR* 14-15 (1976).

34. KAPLAN, *supra* note 19, at 5; ARNOLD S. TREBACH, *THE HEROIN SOLUTION* 38 (1982).

35. COURTWRIGHT, *supra* note 19, at 45.

36. TREBACH, *supra* note 34, at 39

37. 5 BRITANNICA MICROPAEDIA 883 (15th ed. 1993). Heroin was pioneered by the Bayer Company and was first used as an analgesic, but was soon abandoned when its undesirable side-effects, principally rapid addiction, became clear. *Id.* See also TREBACH, *supra* note 34, at 39-40 (1982).

body, the hypodermic syringe, was not introduced into the United States until 1856<sup>38</sup> and did not come into widespread use in the United States until after the Civil War.<sup>39</sup>

To suggest that an addict's use of a hypodermic syringe to inject himself with heroin is "natural" because heroin comes from the opium poppy which is a plant is roughly the same as saying that the Brooklyn Bridge is a natural phenomenon because steel comes from iron ore which is a rock.<sup>40</sup> In fact, both the syringe full of heroin and the Brooklyn Bridge are products of late nineteenth century human technology, no less remote from "nature" because they are old hat to us today

The truth about the history of marijuana, cocaine, and the opiate derivatives is that the only period during which these drugs were widely and legally available to Americans and Europeans without prescription began around the mid-1800s and was coming to a close at, or very shortly after, the turn of the century. Even in this narrow historical window, the reality was far more complex, and far less *laissez faire*, than Professor Carrington's pointillist portrait.

A full history of drugs in America and Europe in the nineteenth century would require far more space than the confines of this discussion permit,<sup>41</sup> but a few illustrative points should suffice.

(1) During the 1800s, marijuana smoking was confined to a minuscule percentage of the population of the United States and Northern Europe.<sup>42</sup>

(2) Cocaine was in vogue both as a general purpose medicine and recreational stimulant between about 1880 and 1910.<sup>43</sup> It was in 1884, for example, that Sigmund Freud wrote his first monograph on cocaine.<sup>44</sup> Freud made a number of claims for cocaine, among them that it was a cure for morphine addiction. In a mere three years, Freud's enthusiasm for the

38. COURTWRIGHT, *supra* note 19, at 46. Two of the earliest American treatises on the subject of hypodermic injection were ANTOINE RUPPNER, *HYPODERMIC INJECTIONS IN THE TREATMENT OF NEURALGIA, RHEUMATISM, GOUT AND OTHER DISEASES* (1865) and ROBERTS BARTHOLOW, *MANUAL OF HYPODERMIC MEDICATION* (1st ed. 1869).

39. COURTWRIGHT, *supra* note 19, at 46; BARTHOLOW, *supra* note 38, at 18.

40. The Brooklyn Bridge was designed by John Augustus Roebling and built between 1869 and 1883. It was the first bridge to use steel for cable wire. 2 *BRITANNICA MICROPAEDIA* 551 (15th ed. 1993).

41. For extensive treatment of the subject, see generally COURTWRIGHT, *supra* note 19, and FLYNN, *supra* note 19, at 17-31.

42. DUKE & GROSS, *supra* note 25, at 44-45.

43. See generally GRINSPOON & BAKALAR, *supra* note 18, at 21-41.

44. SIGMUND FREUD, *ON COCA* (1884).

drug had waned. In July 1887, he wrote the last of his cocaine papers, *Craving For and Fear of Cocaine*.<sup>45</sup> In it, he conceded that cocaine should not be used to treat morphine addicts because the resulting addiction to cocaine that might ensue is "a far more dangerous enemy to health than morphine," producing quick physical and mental deterioration, paranoia, and hallucinations.<sup>46</sup>

The shifts in Freud's position on cocaine, and even his lingering ambivalence toward it, are emblematic of the real nineteenth century experience with cocaine.<sup>47</sup> Consider yet another example chosen by

45. GRINSPOON & BAKALAR, *supra* note 18, at 33.

46. Sigmund Freud, *Craving for and Fear of Cocaine*, quoted and discussed in GRINSPOON & BAKALAR, *supra* note 18, at 33. Freud himself apparently suffered no ill effects from cocaine, and he continued to maintain that only morphine addicts were so weak-willed that they would be susceptible to cocaine addiction. *Id.* at 33-34.

47. The other famous nineteenth century historical figure that Professor Carrington associates with cocaine use on the job is, incredibly, General Ulysses S. Grant. Professor Carrington writes that his Fremonters "suspect that Ulysses S. Grant fought the Civil War under the influence of cocaine." Carrington, *supra* note 1, at 347. So far as I am aware, Professor Carrington is the first person in the 130 years since Appomattox to make this claim. It is unsupported even by the source upon which he relies, DUKE & GROSS, *supra* note 25, at 5. Duke and Gross write that, "Ulysses S. Grant was apparently a user of both morphine and cocaine, as well as alcohol and tobacco." *Id.* They in turn cite RONALD K. SIEGEL, *INTOXICATION: LIFE IN PURSUIT OF ARTIFICIAL PARADISE* 262-65 (1989). Siegel makes no reference whatsoever to cocaine use by General Grant during the Civil War.

The facts are these: General Grant did "use" cocaine, beginning in October 1884, when Dr. John H. Douglas applied several preparations containing cocaine as topical anesthetics to deaden the pain in the cancerous throat lesions which would kill the ex-President in July 1885. RICHARD GOLDHURST, *MANY ARE THE HEARTS: THE AGONY AND THE TRIUMPH OF ULYSSES S. GRANT* 142-45, 186 (1975); SIEGEL, *supra*, at 263. Siegel alleges that General Grant also was given coca derivatives orally by his physicians in the months before his death. SIEGEL, *supra*, at 264. In addition, General Grant received morphine as an analgesic on the day before he died, GOLDHURST, *supra*, at 228, and perhaps in the period immediately before his death. SIEGEL, *supra*, at 264. The allegation that General Grant fought the war which ended twenty years before his heroic struggle with cancer "under the influence of" cocaine is absurd.

Moreover, the Civil War career of General Grant proves precisely the reverse of what Professor Carrington presumably intends to imply about the acceptability to Americans in the middle of the nineteenth century of using intoxicants on the job. Even in that hard-drinking age, the report, never substantiated, that Grant had been drinking alcohol in the period following the taking of Fort Donelson in 1862 contributed to his being removed from command. WILLIAM S. MCFEELY, *GRANT: A BIOGRAPHY* 103-06, 109 (1980). The lobbying of Grant's friends and Lincoln's need for generals who were not afraid of a fight returned Grant to command. *Id.* at 108-10. Later the same year, the rumor that Grant had been drinking during the Battle of Shiloh, combined with the unprecedented casualties of that battle, once again cast Grant into disfavor. GENE SMITH, *LEE AND GRANT* 122 (1984);

Professor Carrington of the attitudes of the time, Sir Arthur Conan Doyle's fictional detective, Sherlock Holmes. Professor Carrington writes, "Victorians were not shocked that Sherlock Holmes used [cocaine] to solve crimes."<sup>48</sup> To the contrary, that quintessential Victorian, Dr. John H. Watson, took a very dim view of Holmes's cocaine use. In *The Sign of the Four*, Dr. Watson observes Holmes injecting himself and protests vehemently. Holmes responds:

"Perhaps you are right, Watson," he said. "I suppose that its influence is physically a bad one. I find it, however, so transcendently stimulating and clarifying to the mind that its secondary action is a matter of small moment."

"But consider!" I said earnestly. "Count the cost! Your brain may, as you say, be roused and excited, but it is a pathological and morbid process which involves increased tissue-change and may at least leave a permanent weakness. You know, too, what a black reaction comes upon you. Surely the game is hardly worth the candle. Why should you, for a mere passing pleasure, risk the loss of those great powers with which you have been endowed? Remember that I speak not only as one comrade to another but as a medical man"<sup>49</sup>

McFEELY, *supra*, at 115. Only the urging of his friend William Tecumseh Sherman kept Grant from resigning his commission. *Id.* at 118-21.

For the Civil War generation, drink and drugs taken on duty were seen, not as tolerable foibles, but as the likely causes of failure. After the Union Army suffered defeat at Chickamauga, its commander, General William S. Rosecrans was accused in the newspapers of "eating opium and a great many other things." Letter of Mary A. Palmer, *quoted in* CHARLES ROYSTER, *THE DESTRUCTIVE WAR* 239-240 (1991).

48. Carrington, *supra* note 1, at 344. Of course, as any Holmes aficionado knows, Holmes only used cocaine *when he had no crimes to solve*; he injected the "seven-per-cent solution" to stave off ennui between cases. See ARTHUR CONAN DOYLE, *The Sign of the Four*, in *THE COMPLETE SHERLOCK HOLMES* 89-90 (Doubleday & Co. 1930) [hereinafter *COMPLETE HOLMES*]. See also *The Yellow Face*, in *COMPLETE HOLMES*, *supra*, at 351.

49. *COMPLETE HOLMES*, *supra* note 48, at 89. *The Sign of the Four* was first published in LIPINCOTT'S MONTHLY MAGAZINE in February 1890. 1 *THE ANNOTATED SHERLOCK HOLMES* 13 (William S. Baring-Gould ed., 1967) [hereinafter *ANNOTATED HOLMES*]. Dr. Watson's disapproval of Holmes's drug use continued. In *The Adventure of the Missing Three-Quarter*, first published in 1904 (2 *ANNOTATED HOLMES*, *supra*, at 475) as part of the series which became the book, *THE RETURN OF SHERLOCK HOLMES* (1 *ANNOTATED HOLMES*, *supra*, at 16), Watson claims to have "gradually weaned him from that drug mania which had threatened once to check his remarkable career." *COMPLETE HOLMES*, *supra* note 48, at 622. But Watson admitted that "[t]he fiend was not dead but sleeping." *Id.*

The creator of Holmes and Watson, Sir Arthur Conan Doyle, was himself a physician, *ANNOTATED HOLMES*, *supra*, at 5-6, and practiced for a period as an ophthalmologist. GRINSPOON & BAKALAR, *supra* note 18, at 36. Because the principal legitimate use for cocaine, as a local surgical anesthetic particularly useful in optical surgery, was discovered

(3) The Holmes stories provide a clue to Victorian attitudes toward opiates, as well. In *The Adventure of the Man With the Twisted Lip*, Watson goes to an opium den in search of an addicted friend. Watson describes how his friend began using opium and then observes:

He found, as so many more have done, that the practice is easier to attain than to get rid of, and for many years he continued to be a slave to the drug, an object of mingled horror and pity to his friends and relatives. I can see him now, with yellow, pasty face, drooping lids, and pin-point pupils, all huddled in a chair, the wreck and ruin of a noble man.<sup>50</sup>

The obvious disgust in Watson's tone reflects the sordid British experience with opium in the nineteenth century. This experience included the Opium War of 1840-42, an episode which casts light on both European and Chinese attitudes towards drug consumption. In the late 1700s, British traders seeking to solve the dual problems of making the Indian province of Bengal profitable and of finding a product the Chinese would trade for their silk, spices, and tea<sup>51</sup> fostered the cultivation of opium in India and the shipment of opium to a growing population of opium smokers in China.<sup>52</sup>

The Chinese, for their part, did not welcome the drug. The import of opium into China was prohibited on penalty "not only [of] loss of life to the guilty person, but extirpation of his family, and the confiscation of the ship or vessel that imports it, which is immediately burnt."<sup>53</sup> In 1839, the Chinese made a concerted effort to suppress the opium trade, seizing and destroying over 20,000 chests of opium belonging to British and American traders.<sup>54</sup>

In response, British forces bombarded and invaded coastal areas of China. After two years of intermittent warfare, the Treaty of Nanking was

and widely publicized in medical journals in 1884, Conan Doyle would have been familiar with its properties. *Id.* at 22-23.

50. COMPLETE HOLMES, *supra* note 48, at 229.

51. THE OPIUM WAR 4-6 (Foreign Languages Press, Peking 1976). This book is authored by members of the history departments of Fudan University and Shanghai Teachers' University. Though laden with anti-Western rhetoric and the obligatory quotes from Chairman Mao and Lenin, the facts it recites are not inconsistent with western sources. *See id.* at 7 (quoting Lenin); *see also* INGLIS, *supra* note 33, at 225.

52. INGLIS, *supra* note 33, at 13-82. Ironically, one of the principal early architects of the opium trade in Bengal, Sir Robert Clive, became an addict and died of an overdose of laudanum, which is a medicinal preparation containing opium. *Id.* at 21.

53. *Id.* at 28.

54. THE OPIUM WAR, *supra* note 51, at 29.

signed.<sup>55</sup> Back home, the British public was aware that its government was engaged in as discreditable an example of mercantilist imperialism as the period had to offer. Even Lord Melbourne, who was prime minister at the outbreak of the Opium War,<sup>56</sup> expressed to Parliament during the debate over China policy his concern and regret that "a system should exist which, in the eyes of the world, identified the government of this country in some degree with the propagation of the evils arising from the use of opium."<sup>57</sup> *The Times* was less restrained. After the treaty was signed, it editorialized that Britain should get out of the opium trade. Some moral compensation was owed China, the editors wrote, "for pillaging her towns and slaughtering her citizens in a quarrel which could never have arisen if we had not been guilty of an international crime."<sup>58</sup>

(4) In the first half of the nineteenth century, the use of opiates was low in America and was confined primarily to medicinal prescription by physicians until around the Civil War.<sup>59</sup> Thereafter, the United States experienced a rapid surge in opiate use stemming from three sources. First, doctors created a class of morphine addicts by administering the drug with the hypodermic syringe.<sup>60</sup> Indeed, the leading cause of addiction to both opium and morphine throughout the nineteenth century was administration by physicians.<sup>61</sup> The second group of users were opium smokers, who were disproportionately immigrants and primarily Chinese.<sup>62</sup> The third category of opiate users in late nineteenth century America were consumers of patent medicines. In the decades following the Civil War, entrepreneurs and quacks peddled a cornucopia of tonics and patent medicines. The purveyors of these elixirs made striking claims for their curative and invigorating powers. Many of these elixirs contained opiates,

55. Among the fruits of the treaty was British occupation under a long-term lease agreement of the island of Hong Kong. *Id.* at 90-91.

56. INGLIS, *supra* note 33, at 182.

57. *Id.* at 229-30.

58. *Id.*

59. COURTWRIGHT, *supra* note 19, at 45-46.

60. *Id.* at 46-47. Such addicts tended to be middle- to upper-middle-class women being treated in the home for various ailments. *Id.* at 36-42. Also represented among morphine addicts of the period were Civil War veterans who became addicted while receiving treatment for wounds. *Id.* at 54-55.

61. *Id.* at 42.

62. Expatriate Chinese workers used opium as a means of forgetting their isolation and loneliness. American employers often used its sale to eat up Chinese workers' wages and so maintain them in virtual serfdom. *Id.* at 63-64, 67-70.



cocaine, or alcohol in varying quantities and combinations. Coca-Cola, for example, began as one of these tonics.

Professor Carrington is, of course, correct that Coca-Cola originally contained cocaine. Invented in 1886 by John Styth Pemberton, a Georgia pharmacist,<sup>63</sup> the preparation was advertised as a "sovereign remedy" and a refreshing drink.<sup>64</sup> But by the time the federal Pure Food and Drug Act was passed in 1906, the Coca-Cola Company had already removed the cocaine.<sup>65</sup> That it did so is a testament to a notable evolution in public and medical opinion toward both cocaine and opiates which was occurring around the turn of the century. Doctors began to discover that undesirable side effects (primary among them rapid addiction) accompanied the genuinely remarkable, and medically useful, palliative effects of cocaine and the opiates. Doctors often made the unpleasant discovery of the addictive properties of cocaine and morphine when they themselves were hooked.<sup>66</sup>

For example, Professor Carrington alludes to "[o]ne of the founders of the Johns Hopkins University Medical School [who] used the opiate morphine all his adult life."<sup>67</sup> Presumably, Professor Carrington means to imply that drug addiction caused neither public embarrassment nor occupational impairment to this prominent physician. The truth was far otherwise. Dr. William Halsted of Johns Hopkins, who invented nerve block anesthesia, became addicted to *cocaine* at the time of his first anesthesia experiments in 1884.<sup>68</sup> This caused a "confused and unworthy period of medical practice,"<sup>69</sup> followed by a year-long stay in a hospital and a curative sailing cruise, followed by still more hospitalization. Although this protracted course of treatment apparently cured him of the cocaine habit, he emerged addicted to morphine, a habit against which he struggled

63. GRINSPOON & BAKALAR, *supra* note 18, at 27.

64. E. J. Kahn, *The Universal Drunk*, NEW YORKER, Feb. 21, 1959, at 39, 50 and Feb. 28, 1959, at 35, 36.

65. GRINSPOON & BAKALAR, *supra* note 18, at 28.

66. Physicians of the period are thought to have abused cocaine and the opiates more than any other occupational group. *Id.* at 31. In 1901, it was estimated that 30% of the cocaine addicts in the United States were doctors or dentists. George W. Norris, *A Case of Cocain Habit of Ten Months' Duration Treated by Complete and Immediate Withdrawal of the Drug*, 1 PHILADELPHIA MED. J. 304, 304 (1901).

67. Carrington, *supra* note 1, at 333.

68. FLYNN, *supra* note 19, at 24-26. See also GRINSPOON & BAKALAR, *supra* note 18, at 31.

69. Wilder Penfield, *Halsted of Johns Hopkins*, 210 J. AM. MED. ASS'N 2214, 2215 (1969). See generally *id.* at 2214-18.

unsuccessfully for the rest of his life. The fact of his morphine habit was not disclosed until 1969, forty-seven years after his death.<sup>70</sup>

By the 1890s, physicians' observations of the travails of their colleagues and patients led to a swelling chorus of calls for professional self-restraint and governmental regulation of opiates, cocaine, and other drugs. Within the medical professions, indiscriminate prescription of morphine for a plethora of ills dwindled.<sup>71</sup> Simultaneously, states and municipalities began to respond by imposing various restrictions on the use and sale of narcotics. As early as 1875, San Francisco passed an ordinance banning opium smoking.<sup>72</sup> In the last decade of the nineteenth century, many states and localities passed laws designed to curb the abuse of cocaine and opiates.<sup>73</sup> By 1915, twenty-seven states had statutes prohibiting or regulating the practice of opium smoking.<sup>74</sup> As of 1914, forty-six states had laws controlling the sale of cocaine.<sup>75</sup> Between 1895 and 1915, the majority of states and many municipalities enacted legislation prohibiting the sale of both opiates and cocaine except to those with a valid prescription.<sup>76</sup>

The states found that their individual efforts at regulation were ineffective because they were piecemeal.<sup>77</sup> Consequently, Congress passed several pieces of federal legislation, beginning with the Pure Food and Drug Act of 1906, which imposed labeling requirements for patent and other medicines.<sup>78</sup> Although the tonics and patent medicines had always made sweeping claims of effectiveness, they usually did not offer the customer a description of their contents. Once consumers discovered that the active ingredients of their favorite elixirs included cocaine or opiates, sales fell dramatically in response to increasing medical condemnation of nonmedical use of these substances.<sup>79</sup>

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70. GRINSPOON & BAKALAR, *supra* note 18, at 31. See also KAPLAN, *supra* note 19, at 136-37 (discussing Dr. Halsted's addiction).

71. COURTWRIGHT, *supra* note 19, at 53-54.

72. *Id.* at 78. Ohio passed a law against smoking opium in 1885. *Ohio Laws: 1885-1887*, 82:49, February 6, 1885. The Ohio law is discussed in DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 91 & n.1 (expanded ed. 1987).

73. MUSTO, *supra* note 72, at 8-9.

74. COURTWRIGHT, *supra* note 19, at 79. Grinspoon and Bakalar place the number of states regulating opiates by 1914 at 29. GRINSPOON & BAKALAR, *supra* note 18, at 40.

75. GRINSPOON & BAKALAR, *supra* note 18, at 40.

76. COURTWRIGHT, *supra* note 19, at 53.

77. MUSTO, *supra* note 72, at 9-10.

78. *Id.* at 10. See also COURTWRIGHT, *supra* note 19, at 58.

79. COURTWRIGHT, *supra* note 19, at 58-59, 114.

In 1914, the Harrison Act inaugurated the modern era of increasing federal control over the manufacture and sale of narcotic drugs. What Professor Carrington does not mention about the Harrison Act and the other regulatory measures of the period is that, by any reasonable statistical measure, they worked. The most thorough study of American opiate addiction concludes that in the period of 1900 through 1914, there were never more than 313,000 opiate addicts in America<sup>80</sup> and that by 1920 the figure had dropped precipitously to a number somewhere between 104,933<sup>81</sup> and roughly 210,000.<sup>82</sup> Another source reports that between 1914 and 1940, the number of opiate and cocaine addicts dropped by an estimated eighty percent.<sup>83</sup> From the point at which the new laws took hold until the 1960s, illicit use of opiates, cocaine,<sup>84</sup> and marijuana<sup>85</sup> remained very low<sup>86</sup>. Although some recreational drug use persisted in the fifty years after the Harrison Act (principally on the fringes of the socio-economic underclass),<sup>87</sup> the combination of increased medical knowledge, decreased availability, social disapprobation, and legal prohibition kept drug use sufficiently uncommon that it was barely perceptible as a public concern.<sup>88</sup> Only in the late 1960s,<sup>89</sup> did the

80. *Id.* at 28.

81. *Id.* at 12.

82. *Id.* at 34.

83. Robert E. Peterson, *Legalization: The Myth Exposed*, in *SEARCHING FOR ALTERNATIVES: DRUG CONTROL POLICY IN THE UNITED STATES* 324 (Melvin B. Krauss & Edward P. Lazear eds., 1991) [hereinafter *SEARCHING FOR ALTERNATIVES*]. Peterson says that the number of persons addicted to the opiates and cocaine dropped from over 250,000 in 1914 to 50,000 in 1940. *Id.* at 333.

84. DUKE & GROSS, *supra* note 25, at 67-68; GRINSPON & BAKALAR, *supra* note 18, at 43.

85. "Marijuana was never very popular in the general population [of the United States] until the late 1960's." DUKE & GROSS, *supra* note 25, at 45.

86. MUSTO, *supra* note 72, at 251-53. "The use of illegal drugs increased astoundingly in the 1960's. Drugs thought safely interred with the past, marihuana and heroin, rapidly resurfaced at the same time that new drugs such as LSD materialized and obtained tremendous popularity among young people." *Id.* at 253.

87. See, e.g., COURTWRIGHT, *supra* note 19, at 113-26.

88. In the years after World War I, "[f]rom being easily available and commonly used, heroin, morphine, and cocaine almost faded out of nonmedical situations: when someone was caught with drugs, the event elicited headlines and comment." MUSTO, *supra* note 72, at 251.

89. One source estimates that between 1965 and 1970, the number of active heroin addicts in the United States grew from about 68,000 to roughly 500,000. DAVID J. BELLIS, *HEROIN AND POLITICIANS: THE FAILURE OF PUBLIC POLICY TO CONTROL ADDICTION IN AMERICA* 19 (1981).

incidence of use of these substances begin to increase to a level which caused national concern.<sup>90</sup>

In sum, the nineteenth and early twentieth century experience of Europe and America with the powerful coca and opium derivatives its science had created fell into five phases: discovery, excitement, abuse, disillusionment, and prohibition, all crammed into a few short decades. At the end of the day, Professor Carrington's effort to give the use of cocaine, heroin, and marijuana deep historical roots in the United States does not wash. Widespread recreational abuse of these three drugs by Americans is a problem of the last third of the twentieth century. Its causes are subject to endless debate, but they certainly include the convergence of three particular circumstances. First, modern chemistry could create the drugs. Second, in this century, international travel and trade exploded and provided virtually limitless opportunities to smuggle the drugs from countries where their vegetable precursors are grown. Third, America transformed from a predominantly rural country, in which every community had multiple formal and informal mechanisms of social control, to an urban, fluid, increasingly atomized society with fewer shared values and fewer nonlegal mechanisms for transmitting and enforcing the values we share.

If, as Professor Carrington would have us do, we are to eliminate federal regulation of cocaine, the opiates, and marijuana, the decision to do so should be based on a clear-eyed assessment of the world as it is, and not on nostalgia for a past which never was.

## II. *Back to the Future: The Twenty-First Amendment Revisited*

If the view of the past through Professor Carrington's glass is distorted, what of his vision of the future?<sup>91</sup> Let us take an imaginary peek into an

90. The perception that drug usage of all types was a comparative novelty is expressed in a number of American and British court opinions of the 1970s and 1980s. See, e.g., *People v Dillon*, 668 P.2d 697 (Cal. 1983) (marijuana); see also *State v Hall*, 214 N.W.2d 205, 213 (Iowa 1974) (LeGrand, J., dissenting) (discussing rules regarding effect of alcohol intoxication in criminal cases and concluding that different rules should apply to "modern hallucinatory drugs" which had only recently come into common use); *Director of Public Prosecutions v Majewski*, [1976] 2 All E.R. 142, 159 (noting that, in contrast to drunkenness, intoxication with hallucinatory drugs had been until recently "comparatively unknown").

91. It is important to recall that Professor Carrington wants state control of drug laws, not merely as a matter of federalism, but in order that his "Fremont" (and other like-minded states) can adopt a series of measures legalizing the private consumption of marijuana, cocaine, and heroin by all competent adults. He would have the state ensure a supply of these drugs at public stores at prices low enough to undercut illegal suppliers. Carrington, *supra*

imaginary Fremont. The year is 1999. The Twenty-Eighth Amendment denying the federal government jurisdiction over marijuana, coca derivatives, and the opiates was ratified in July 1996. The State of Fremont was one of only three states that legalized marijuana, cocaine, and heroin. Ten other jurisdictions legalized marijuana. In the bill that legalized marijuana, cocaine, and heroin, the Fremont legislature resolved to ensure a supply of these drugs at public stores at prices low enough to undercut illegal suppliers.<sup>92</sup>

The first problem Fremont faced was supply. The state's climate was unsuited for the cultivation of poppies or coca plants, but was ideal for marijuana. Marijuana farms sprouted like mushrooms (although psychoactive mushrooms themselves remained illegal). The legislature decided that marijuana could be distributed by anyone holding a state liquor license, so competing brands of *cannabis sativa* could be found in the cigarette machines of every bar and liquor emporium in the state. Prices dropped.

Marijuana remained illegal for those under the age of twenty-one. The prohibition had precisely the same effect as maintaining the legal drinking age at twenty-one. The number of high school and underage college students using marijuana climbed rapidly<sup>93</sup> toward parity with the number using alcohol: eighty-six percent among college students<sup>94</sup> and roughly sixty percent among twelfth graders.<sup>95</sup> Among young adults over twenty-one, the trend was even more pronounced. Some Fremonters expressed surprise, but those who had opposed legalization pointed out that a similar increase had occurred in Alaska after the state effectively decriminalized the private consumption of marijuana by adults.<sup>96</sup> The trend so disturbed Alaskans that

note 1, at 354-55.

92. *Id.*

93. In 1993, 15.5% of high school seniors reported using marijuana in the last month. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1993 329 (1993) [hereinafter SOURCEBOOK 1993]. Among college students, monthly marijuana usage for seniors was 14.2%. *Id.* at 330.

94. *Id.* at 330-31. The 86% figure represents use of marijuana by college students within the last twelve months. In 1993, 72% of college students used alcohol within the last month.

95. *Id.* at 334. Among twelfth graders, 58.8% report ever having used liquor within the past year; 63.5% have drunk beer within the past year. In another survey, 51% of high school seniors reported drinking alcohol in the past month. *Id.* at 329.

96. In *Ravin v State*, 537 P.2d 494 (Alaska 1975), the Alaska Supreme Court found that the state's ban on the consumption of marijuana by adults in their homes was a violation of the right of privacy contained in the Alaska state constitution. *Id.* at 511. In the period following the *Ravin* decision, studies found that Alaskan high school students were twice as

in 1990 they passed a statewide referendum that recriminalized cannabis.<sup>97</sup> The same pattern of liberalization, increased use, and re-toughening of drug laws has occurred in Sweden, Spain, Italy, and Great Britain.<sup>98</sup>

Fremont banned commercial advertising of marijuana, but the competing producers easily circumvented these restrictions. They advertised in medical and chiropractic publications, cultivated relationships with the news media to ensure free coverage, appeared regularly on talk radio and TV, opened "informational" addresses on the Internet, and even sponsored a regular cable television program ostensibly devoted to agricultural news. Through all these outlets, the growers competed in producing and marketing ever more potent strains of cannabis.

Fremont-grown marijuana began showing up in increasing quantities in several neighboring states which had not voted for the Twenty-Eighth Amendment and were vigorously opposed to legalization. Street dealers from Pennsylvania and North Carolina, which bordered on Fremont, would drive over weekly, fill their trunks with the popular "Pathfinder" brand, and return home stocked up for a week's business.

The illegal interstate transportation of Fremont's marijuana to Pennsylvania led to acrimonious exchanges between the two states' governors. Similar complaints from other statehouses set off a furious debate in the Fremont legislature. Some felt that the export of Fremont products was good for the local economy and should be left alone. Others took the view that Fremont's value choices should not be imposed on residents of her sister states. The debate stalled when no one could think of a solution to the problem which would not involve an expensive state regulatory scheme.

The supply problem for cocaine and heroin proved far more complex. Neither Fremont nor the other states that legalized these drugs had climates

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likely to have smoked marijuana as their peers in the lower forty-eight. Peterson, *supra* note 83, at 328.

The experience of the Netherlands is also instructive. Liberal law enforcement policies in that country have led to the creation of drug cafes in which marijuana is freely and publicly consumed. The Amsterdam cafes host an annual "Cannabis Cup," at which competing brands of marijuana are "taste tested." See *Marijuana*, YALE HERALD, Dec. 2, 1994, at 16.

97 The ballot initiative, which passed with 54% of the popular vote, rewrote Alaska Stat. Sec. 11.71.060 and made it a misdemeanor to "use or display" less than one-half pound of marijuana. See *Suit to Block New Pot Law Is Filed*, L.A. TIMES, Mar. 5, 1991, at A18. The validity of the initiative is under attack. See *Judge Rejects Anti-Pot Law: Ruling Backs Earlier Decisions Outlining a Right to Privacy*, ANCHORAGE DAILY NEWS, Nov. 17, 1993, at A1.

98. Peterson, *supra* note 83, at 333-35.

suitable for growing coca or poppies. Those few states with the right climate refused to allow cultivation of the vegetable precursors of drugs which they continued to ban. The only sources for cocaine and heroin in the quantities necessary to carry out the policy of liberal, low-price distribution were Colombian, Mexican, Sicilian, and East Asian criminal gangs. The governor of Fremont swallowed hard and sent his personal envoy to Cali, Colombia, and Sinaloa, Mexico.

The Cali meeting was rocky from the start. The cartel bosses recognized a marketing opportunity but saw no reason to sell their products so cheaply as to destroy the existing price structure in the majority of states (and countries) where the drugs remained illegal. They offered the Fremont State Narcotics Authority a thirty percent volume discount on cocaine and heroin, with the State of Fremont to arrange and pay for transportation. The Mexican traffickers offered a thirty-five percent discount, again with Fremont picking up the cost of transport.

Transportation was more than a minor headache. Possession and sale of marijuana and heroin remained illegal in both Colombia and Mexico. When the State Department learned that an official of an American state was negotiating with Mexican and Colombian criminals to deliver shipments of substances illegal in their countries of origin, several senior Foreign Service officers had apoplectic fits. Ultimately, the Colombians bribed the government of a small Caribbean country to legalize transshipment of heroin and cocaine. Drug shipments to Fremont were smuggled out of Mexico and Colombia to this island, where they were placed on aircraft for the final journey to Fremont. Air transport was required because Fremont was landlocked and shared no common border with Mexico.

Because the purity and safety of drugs from criminal sources was necessarily unpredictable, Fremont was obliged to reprocess and repackage all of the incoming drugs. The state also set up a network of "Fremont State Narcotics Stores," staffed by state employees. The combined costs of transportation, processing, packaging, and testing raised the wholesale cost of the drugs to the state to a level not dramatically lower than the wholesale cost of the same drugs in states where they were banned. Fremont also found that maintaining stores and employees created overhead which illegal dealers did not carry

Fremont had planned to raise revenue by taxing cocaine and heroin, but found that this was impossible if the illegal market was to be undercut and prices were to be lowered far enough to remove the economic incentive for addicts to steal to maintain their habits. Indeed, Fremonters found that to keep prices that low, the state was obliged to sell heroin and cocaine at a

loss. Some of the resulting revenue drain was offset by taxing the flourishing indigenous marijuana industry, but Fremonters quickly concluded that the drug business was at best a financial wash for the state.

As with marijuana, consumption of heroin and cocaine increased. It did not reach the levels of alcohol and marijuana use, but cocaine use quadrupled, returning to the levels of the mid-1980s, when, for example, twenty percent of young adults reported cocaine use in the past year.<sup>99</sup> Use of cocaine and heroin remained illegal for those under twenty-one, but with social opprobrium removed and so many more avenues for obtaining the drugs available, usage increased.<sup>100</sup>

Fremont officials soon found that, despite the grudgingly recognized increases in consumption among Fremonters, the amounts of marijuana, cocaine, and heroin being sold through liquor stores and the Fremont narcotics outlets were sufficient to keep every man, woman, and child in the state high every day of the year. The explanation for the remarkable sales figures became clear as the state police of Pennsylvania and other adjoining states began finding cocaine and heroin along with the "Pathfinder" brand of marijuana in the trunks of sojourners returning from Fremont.

The governors of the states surrounding Fremont met and agreed on a policy of mandatory check stations on every significant highway outlet from Fremont to check the flood of heroin and cocaine.<sup>101</sup> At these stations, state police officials questioned drivers and sometimes searched all vehicles leaving Fremont. Similar stations were created at all airports receiving

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99. SOURCEBOOK 1993, *supra* note 93, at 332. The reported figure is for 1986. Reported cocaine use among young adults in 1993 was 4.7%. *Id.*

100. Any prediction of how many more people would use now illegal narcotics if they were legalized is obviously speculative. Nonetheless, it is fatuous to contend that the increased use of a substance as pleasure inducing as cocaine would not be very significant in a world where legal constraints were removed. One scholar remarks, "Knowing the animal and human evidence about the reinforcing properties of the various addicting drugs, it seems quite likely to me that as many people would smoke 'crack' cocaine as now smoke tobacco — if the legal status were the same." Avram Goldstein, *Drug Policy: Some Thoughts About Striking the Right Balance*, in SEARCHING FOR ALTERNATIVES, *supra* note 83, at 398, 400. Another expert, Dr. Herbert D. Kleber, estimates that legalizing cocaine would produce 20,000,000 addicts, a ten-fold increase. Joseph A. Califano, Jr., *It's Drugs, Stupid*, N.Y. TIMES MAGAZINE, Jan. 29, 1995, at 41.

101. Consider the efforts by jurisdictions such as the District of Columbia to ban handguns and how such efforts have been rendered futile by the easy availability of handguns in adjoining states. See, e.g., *Critics of Gun Control Don't Tell Whole Story About Washington*, USA TODAY, Dec. 9, 1994, at 10A, *Why Might Gun Crimes Decline?*, WASH. POST, July 9, 1980, at A16; Lynn Roellini, *Halberstam Slaying and Rising Crime Rate Are Worrying the Well-Off in Washington*, N.Y. TIMES, Dec. 14, 1980, § 1, at 44.



direct flights from Fremont. Fremont sued in federal court claiming violations of the Fourth Amendment and improper restrictions on interstate commerce. The case appears likely to drag through the year 2000.

Diversions of products from the Fremont market into "dry" states was not limited to retail purchases. The first indictments of officials of the Fremont State Narcotics Authority for selling heroin and cocaine to out-of-state dealers came in late 1997. The investigations began when mid-level Narcotics Authority bureaucrats began driving BMW's and buying vacation homes in the Fremont mountains. In their confessions, several of the early defendants explained that the staggering profits to be garnered by selling drugs at Fremont-subsidized prices to dealers in "dry" states made corruption irresistible. "After all," one of them said in extenuation, "I was only selling products that the law of Fremont said were perfectly legal." The second round of indictments charged North Carolina state police with accepting bribes to let drug shipments out of Fremont pass highway checkpoints.

The leakage of subsidized Fremont drugs into "dry" state markets put downward pressure on prices there. Mid-level traffickers in those states began complaining to their cartel suppliers, who responded by raising prices to Fremont's official buyers. Reformers in the Fremont legislature looking for ways to ease the strain on the state budget began searching for alternative sources of supply. They were opposed by the governor, who by this time was receiving immense campaign contributions from the "Colombian Agricultural Association" and the "Peasants and Farmers Cooperative of Sinaloa," whose lavish offices were ensconced across the street from the state capitol building.

Relations between Fremont and her neighbors continued to fray. Major traffickers in "dry" states began to purchase property in Fremont — first marijuana farms, then vacation homes, then banks. All across the country, drug investigations led to these new Fremont residents. Fremont courts began to refuse to honor out-of-state subpoenas for bank records. The governor of Fremont found an ever increasing number of defects in out-of-state extradition warrants.

Fremont, like other states, had formerly adopted the Uniform Criminal Extradition Act.<sup>102</sup> The Act required merely that the crime for which extradition was sought be a crime in the demanding state.<sup>103</sup> Under

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102. A version of this act appears in Colorado statutes as COLO. REV. STAT. § 16-19-101 to 16-19-132 (1986 & Cum. Supp. 1994).

103. See, e.g., *People v. Jackson*, 502 P.2d 1106, 1107 (Colo. 1972).

pressure from both the in-state marijuana farmers and the newly arrived cocaine and heroin magnates, the Fremont legislature amended its version of the extradition statute to require dual criminality, a concept imported from international extradition law which requires that the crime for which extradition is sought be an offense in both the demanding and the requested state.<sup>104</sup> "Dry" states tried to circumvent Fremont's efforts to give asylum to persons in the drug business by asking the federal government to arrest drug suspects in Fremont, charge them with unlawful flight to avoid prosecution,<sup>105</sup> and arrange their removal through the federal courts. Although this would have presented no problem before the Carrington Amendment,<sup>106</sup> political considerations made federal agencies deeply reluctant to insert themselves into the controversy. They were attacked by Fremont officials when they acted and by officials of the demanding states when they did not.

Outside of Fremont, there was a growing chorus calling for federal intervention in narcotics control. "Dry" state governors pleaded for federal help in policing the borders of Fremont and the other states where drugs were legal. Even those states nowhere near Fremont joined the pleas. They had found that without assistance from the DEA, the FBI, U.S. Customs, the Border Patrol, or the Coast Guard, every mile of seacoast, every foot of land border with Mexico, and every harbor and airport was an open conduit for narcotics smuggling. The President replied that, while he personally disapproved of drug use, the Twenty-Eighth Amendment had been passed to get the federal government out of the drug enforcement business. Moreover, he said, fiscal realities following the enactment of much of the Republican "Contract With America" precluded re-creating the DEA or authorizing any significant new federal expenditures.<sup>107</sup>

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104. *See, e.g.*, Treaty on Extradition Between the United States of America and Ireland, July 13, 1983, S. TREATY DOC. No. 98-19, 98th Cong., 2d Sess., 1983.

105. 18 U.S.C. § 1073 (1988).

106. The federal unlawful-flight-to-avoid-prosecution statute, 18 U.S.C. § 1073 (1988), known by its acronym "UFAP," is commonly used to employ federal law enforcement resources to apprehend state fugitives and return them to the jurisdiction where they are wanted for trial. The practice is to swear out a warrant before a federal magistrate judge charging violation of the UFAP statute, either before or after arrest, bring the fugitive before a federal magistrate judge, and then remove the fugitive to the state from which he fled pursuant to the provisions of Fed. R. Crim. P. 40. Once the fugitive is returned to the state seeking him, federal charges are dropped and the fugitive is relinquished to state custody.

107. Professor Carrington might respond that his amendment does not prohibit the federal government from assisting states in the enforcement of their own antidrug laws, or from being active in combating the importation of drugs into "dry" states, either from abroad

Some "dry" states responded by beefing up their police forces at the cost of raising taxes or cutting services. Others resigned themselves to accepting a new level of narcotics use. Meanwhile back in Fremont, though drug use was up, internecine violence among drug sellers was down. The illegal market was not entirely eliminated, however. Sale to persons under twenty-one was still illegal. Moreover, illegal dealers were willing to compete with the state on price by cutting their profit margins and on quality by selling drugs of greater strength than government doctors thought safe. In particular, there was a thriving black market in "crack," which the state was unwilling to sell, but which was much desired by consumers for its supremely euphoric effect.

When asked by the Gallup polling organization whether the experiment of the Twenty-Eighth Amendment had been a success in Fremont, the citizens of Fremont were evenly divided. The governors of the four states bordering Fremont were asked the same question, but were unable to formulate a printable response. "Juan Valdez" (not his real name), reached at his villa in Cali, Colombia, merely chuckled and took another sip of champagne.

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Other scenarios could be drawn for Professor Carrington's Fremonters, some more hospitable to his proposal, some less so. I suggest, however, that none can be conceived which, if true to the realities of economics and human nature, avoid teaching the following lessons:

(1) One cannot create a single-state market for an intensely pleasurable, fungible, and easily concealable product like recreational drugs. If such drugs are legal and cheap in one state of the United States, no earthly power,

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or from states which have legalized them. The text of the amendment seems to permit this reading. However, if the only restriction on federal "drug warriors" under the Carrington Amendment is that the crimes they prosecute must involve movement of drugs across state lines, the brave new world starts to look very much like the status quo. Many current federal drug laws do not require proof of interstate nexus, *see* 21 U.S.C. §§ 841-858 (1988 & Supp. V 1993), but in the vast majority of cases investigated by federal agencies such proof could be easily made.

The point, of course, is that if the amendment is to operate as advertised by completely eliminating the federal role in narcotics enforcement, those states that exercise their right to continue prohibitions against drugs are utterly unequipped to combat criminal organizations that penetrate them from beyond their borders. They lack both the material wherewithal to compete with the traffickers and most of the legal tools available to a sovereign power that are necessary to investigate and prosecute those who reside or flee out of state.

and certainly no power available to the governments of other states, can prevent the state where drugs are legal from becoming a major source of supply for those states where they are not.

(2) Just as surely, one cannot eliminate the collateral harms of the drug trade in a single state, or subset of states, particularly not by creating a state monopoly in any one or more of the common illegal drugs.

(a) The existence of high-priced illegal markets in other states will tend to raise prices in a "Fremont," thus retaining much of the economic incentive for users to steal to get drugs, ensuring the survival of illegal sellers willing to undercut the state monopoly, and reducing the prospect of tax revenues.

(b) Placing tons of valuable drugs in the hands of poorly paid civil servants whose job is to sell it guarantees their corruption at the hands of those who would sell the drugs in "dry" states.

(3) Although allowing a "Fremont" the freedom to permit drugs within its borders may please Fremonters and boost their sense of sovereignty and independence, it tramples on the preferences of the citizens of adjoining states who do not want drugs legalized and whose ability to exercise *their* preference is subverted by having a drug supermarket in business across the state line.

(4) In addition to the interstate conflicts created by patchwork legalization, the problems of obtaining a supply of cocaine and heroin in particular demonstrate that narcotics control is a matter with complex foreign policy ramifications. If the United States is to undertake an about-face in its approach to narcotics policy, it is the national government, not the governor of "Fremont," or Virginia, or Wyoming, that must speak for the country. This is truly one of those issues on which the Union must "become all one thing, or all the other."<sup>108</sup>

Professor Carrington made his modest proposal in an annual lecture honoring John Randolph Tucker, a secessionist and defender of the right of Southern states to maintain the "peculiar institution."<sup>109</sup> Professor Carrington is at considerable pains to disassociate the doctrine of states' rights from its historical employment as a tool of slaveholders (and later of segregation-

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108. Abraham Lincoln, *House Divided*, in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461 (Roy P. Basler ed., 1953).

109. See Carrington, *supra* note 1, at 333-37 (discussing John Randolph Tucker). The term "peculiar institution" has been used as a euphemism for slavery since before the Civil War. See, e.g., Alexander H. Stephens, Speech at Savannah, Georgia, March 21, 1861, quoted in KENNETH M. STAMPP, THE CAUSES OF THE CIVIL WAR 127 (1962); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1867 3 (1988).

ists).<sup>110</sup> Although he is correct that the historical use of states' rights arguments in the nineteenth century debates over slavery does not disqualify the doctrine as an important governmental organizing principle, I think he misses an important historical lesson. The existence of slavery led to the Civil War, not only because slavery was morally repugnant and seen to be so by the larger and more populous part of the nation but also because the existence of different answers to so central a question in different sections of the country was a constant corrosive of the ties which bound the sections into a unified nation. Drug policy is by no means on the same level of moral seriousness as human slavery, and thus differing policies from state to state are hardly likely to lead to war. But it is not frivolous to suggest that the friction which would inevitably arise between "dry" and "wet" states under a Carrington Amendment would fray the bonds of comity and mutual respect which connect the nation.

### III. "The Drug War" Abandoning a Losing Metaphor and Learning to Think Clearly About Drug Crimes

Even if one finds Professor Carrington's use of history and his vision of the future unconvincing, at the core of his argument remains the non-frivolous contention that the costs of drug enforcement outweigh its benefits — the powerful allegation that we have spent prodigiously, but have failed utterly to solve our narcotics problems. One can be deeply opposed to the recreational use of drugs and passionately convinced of their power to destroy personalities and erode communities, and yet nod in regretful agreement when Professor Carrington declaims the futility of a "war on drugs."

I have long thought that the whole idea of a "war on drugs" is a sad illustration of the dangers of governing by metaphor. The metaphor of narcotics enforcement as warfare was first invoked by those who support a policy of more enforcement resources and tougher penalties.<sup>111</sup> As Professor

110. Carrington, *supra* note 1, at 336-38.

111. Nixon was the first in a series of Presidents to invoke this term as a description for his antidrug policies. He deemed it the Government's "all-out global war on the drug menace." *Nixon Plans to Unify Drug Enforcement Agencies*, N.Y. TIMES, Mar. 29, 1973, at 26. In 1969, in a message to Congress, President Nixon called for a national attack on narcotics abuse. *President Urges a National Drive on Narcotics Use*, N.Y. TIMES, July 15, 1969, at 1. In 1971, President Nixon told Congress that drug abuse had "assumed the dimensions of a national emergency." Dana A. Schmidt, *President Orders Wider Drug Fight; Asks \$155-million*, N.Y. TIMES, June 18, 1971, at 1. See generally BELLIS, *supra* note 89, at 18-32.

Carrington and others have demonstrated, the warfare metaphor is now turned against that same policy of increased enforcement by measuring the policy against the conscious and unconscious expectations created by the metaphor. Either use is ultimately subversive of rational discussion of drug policy

For governmental crusaders against the bogeyman of the day, declaring "war" carries a multitude of useful associations. Americans believe themselves to be essentially pacific people who can be driven to war by only the vilest foe. It is a given that when Americans go to war in earnest, they win. Finally, the American way of war is massive mobilization of manpower, material, and technology<sup>112</sup> Thus, the warfare metaphor allows American policymakers to emphasize the danger of the problem to be vanquished and, where necessary, to demonize the group in opposition. It taps into the confidence that Americans united in war will not suffer defeat. Most important, it justifies mobilization and vast expenditure of public money

But just as selling public policy as war can create a powerful engine of persuasion, so can it create expectations that no peacetime domestic program can meet. Americans expect that their wars will be of limited duration. They expect that the short-term application of maximum human, industrial, and technological effort will produce a complete victory, after which the war machine will be dismantled and everyone will get to go home.<sup>113</sup> Any law enforcement initiative, whether against drugs or jaywalking, that invites measurement by that yardstick will fail.

People sell and use drugs for the same reasons they commit the other crimes in the criminal code — satisfaction of physical and psychic appetites, lust, greed — the gamut of discreditable human motivations. Until men become angels, some people will continue to break narcotics laws, in just the same way they continue to break the laws against rape, robbery, and murder. There is never "victory" in the criminal law. The bad guys never strike their colors, stack their arms, and surrender in a body so we can live happily ever after. Neither does society have the luxury of surrender. If, despite our best efforts, people keep on shoplifting, tapping the till, and sticking up 7-11's, we do not repeal the laws against theft, embezzlement, and robbery

I recognize this begs the question, at least for the moment, of whether taking and selling drugs is a social evil on par with crimes against persons or property and, therefore, the question of whether drug crimes should be

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112. See, e.g., RICK ATKINSON, *CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR* 4, 492-97 (1993) (discussing American approach to Persian Gulf War).

113. This national trait has been conspicuous following World War I, World War II, and most recently, the Persian Gulf War. *Id.* at 490-500.

crimes at all. My present point is simply that the success of any law enforcement program is measured, not by the achievement of complete success, but by the reduction of the rate of inevitable failures.

So let us beat an orderly retreat from the shot-torn fields of the rhetorical "war on drugs." The beginning of rational discussion of drug policy is agreement that enforcement of narcotics laws is no different than enforcing other criminal laws. Therefore, those who support narcotics prohibitions should stop suggesting, or even implying, that whatever new measure they happen to be promoting will be the increment of escalation that will finally result in "victory" over the drug pushers. Conversely, those who oppose the direction drug policy in America has taken should stop declaring that we have "lost" the "war on drugs" because stern enforcement measures have not eradicated the drug trade.<sup>114</sup>

Instead, the debate should consider in a pragmatic way the following considerations: the harms that drug prohibitions seek to avert; the degree to which present enforcement efforts are succeeding in averting those harms; the magnitude of the costs that can be attributed to the enforcement efforts themselves; and perhaps whether, by focusing so fixedly on enforcement, we are foregoing tools indispensable to any effort to reduce drug abuse and its related evils. The parties to the debate should proceed with humility, in the frank recognition that the most dispassionate weighing of harms and costs is unlikely to produce agreement because our powers of prediction are poor, we lack common units of measure to compare the events we can see or predict,<sup>115</sup> and our judgments about causation are, at best, open to question.

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114. See, e.g., Milton Friedman, *The War We Are Losing*, in SEARCHING FOR ALTERNATIVES, *supra* note 83, at 53-67; Patrick Murphy, *The War On Drugs Is Over (Drugs Won): What to Do Now*, WASH. POST, Dec. 4, 1994, at C3.

115. For example, what is the cure of one junkie "worth"? Or the prevention of one birth of a crack-addicted infant? Is preventing or curing the addiction of one person, or ten people, or a hundred "worth" the death of one police officer? Is the arrest and punishment of one drug dealer, or ten dealers, or a hundred "worth" the fear and anxiety caused by a single erroneous search of the home of an innocent person? Does the value of reduced domestic drug consumption outweigh the damage to relations with South American countries which an active policy of interdiction may cause? There are probably mid-Western academics willing to assign dollar values to all these events for purposes of comparison, but any effort to quantify the costs and benefits of narcotics control is doomed to failure. Because of the very same complexities which preclude neat cost-benefit comparisons, evaluating the causal relationships between societal costs and societal benefits in the area of narcotics control is also difficult. The factors which impact drug usage rates are so numerous and complex that we are not very good either at predicting the effect of particular policies on drug trafficking, or even at ascertaining in hindsight exactly what caused historical changes in sale and use patterns. This miasma of complex uncertainty neither renders narcotics policy unique nor

Despite our uncertainties, as a society we must decide. The balance of this paper is devoted to suggesting a few points on which people of good will and steady disposition who inhabit the real fifty states might agree in deciding how to think about narcotics enforcement. There is nothing particularly revolutionary about these points, except to the extent that they suggest that a drug policy conceived as ordinary law enforcement would please neither the "legalizers" nor the "drug warriors," but might well be both more just and more effective than either their theories or present reality

### *Thinking About Drug Crimes*

(1) *Drugs Are a Bummer* The first point on which I think there is broad agreement is that the use of illegal drugs, particularly cocaine and heroin, is a bad thing that the overwhelming majority of citizens would prevent if they could.<sup>116</sup> The harms caused by the use of marijuana, cocaine, and heroin include:

- (a) In the case of cocaine and heroin, death from overdose;<sup>117</sup>
- (b) Damage to the health of users;<sup>118</sup>
- (c) Damage to the health of unborn and newborn children of pregnant female users;<sup>119</sup>
- (d) Decrease in productivity and ability to perform useful work;<sup>120</sup>

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exempts us from the necessity of choosing a course. It ought, however, to engender humility

116. Even Professor Carrington does not really dispute this point. Carrington, *supra* note 1, at 341.

117. Although Professor Carrington concedes somewhat grudgingly that drugs can be bad for you, his overall portrayal of the effects of drug use on individuals is notably benign. A particularly striking example is his reference to Fremonters reading of "athletes and artists" who are seemingly unaffected by "[regular use] of cocaine." *Id.* at 347. One can only wonder if Fremonters have also read of Len Bias, John Belushi, Janis Joplin, Jimmy Hendrix, and Jim Morrison, all dead from drug overdose.

118. PHYSIOPATHOLOGY OF CANNABIS, OPIATES AND COCAINE (G.G. Nahas & C. Latour eds., 1991); BELENKO, *supra* note 18, at 33-41 (effects of crack cocaine). See also Sabeh S. Tumeh et al., *Cerebral Abnormalities in Cocaine Abusers: Demonstration by SPECT Perfusion Brain Scintigraphy*, RADIOLOGY 821-24 (1990).

119. For a discussion of the dangers of illicit drugs to both unborn and young children, see Peterson, *supra* note 83, at 337-38; Paul Taubman, *Externalities and Decriminalization of Drugs*, in SEARCHING FOR ALTERNATIVES, *supra* note 83, at 91, 97-100; Joel W. Hay, *The Harm They Do to Others: A Primer on the External Costs of Drug Abuse*, in SEARCHING FOR ALTERNATIVES, *supra* note 83, at 200, 204-13.

120. See Taubman, *supra* note 119, at 104-05. As for Professor Carrington's remark that "[Fremonters] have read stories of athletes who perform extremely difficult tasks



(e) Injuries, fatalities, and property damage from industrial and traffic accidents;<sup>121</sup>

(f) Damage to family relationships, particularly the parent-child relationship.<sup>122</sup>

(2) *Some of the Harms Caused by Drugs Result from the Fact That They Are Illegal.* Any fair minded observer will agree with Professor Carrington that a significant, if difficult to quantify, proportion of the harms caused by drugs are not harms to the user as a result of consumption. They are harms integral to the business of buying and selling drugs in an illegal market. They include:

(a) Murder, robbery, and assault of rival drug dealers or of users unable to pay drug debts;

(b) Murders of and assaults on policemen, judges, prosecutors, and witnesses;

(c) Street crime by those needing money to buy drugs;

(d) Corruption of public officials by drug dealers;<sup>123</sup>

with superb craft while regularly using cocaine," Carrington, *supra* note 1, at 347, one wonders if his Fremonters have read of Len Bias (basketball), or Dwight Gooden and Steve Howe (baseball), or Lawrence Taylor, Dexter Manley, Bruce Smith, and Richard Dent (football), all of whose professional sports careers are or once were endangered by drug use. *See An Empty Dream: Len Bias Dies at 22*, TIME, June 30, 1986, at 73 (Bias); *Doc's Second Strike*, TIME, July 11, 1994, at 63 (Gooden); *Banned*, NEWSWEEK, July 6, 1992, at 57 (Howe); William O. Johnson, *Hit for a Loss*, SPORTS ILLUSTRATED, Sept. 19, 1988, at 50 (list of NFL players suspended in 1988 season for drug abuse).

121. One study found recent marijuana use in 35% of those treated in a hospital trauma unit. Carl A. Soderstrom, et al., *Marijuana and Alcohol Use among 1023 Trauma Patients*, 123 ARCHIVES OF SURGERY 733, 734 (1988). In addition, 16.5% of those treated had both marijuana and alcohol in their systems. *Id.* at 734-35. A national study of truck driver fatalities showed that 13% died with marijuana in their systems, a percentage equal to those who died with alcohol in their systems. Cocaine was implicated in 8.5% of the truck fatalities. *See generally* NATIONAL TRANSPORTATION SAFETY BOARD, FATIGUE, ALCOHOL, DRUGS AND OTHER MEDICAL FACTORS FATAL TO DRIVERS IN HEAVY TRUCK CRASHES (1990). In a New York study, cocaine was found to have been used within 48 hours by 20% of drivers fatally injured. Peter M. Marzuk et al., *Prevalence of Recent Cocaine Use Among Motor Vehicle Fatalities in New York City*, 263 J. AM. MED. ASS'N 250, 252 (1990).

122. For example, there appears to be a correlation between cocaine use and child abuse and neglect. Peterson, *supra* note 83, at 337-38; Taubman, *supra* note 119, at 100. One of the most tragic cases I ever tried as a young Deputy District Attorney involved a criminally negligent homicide case against two parents who left their own boy and a neighbor's child outside in a running car on a cold Colorado night while they partied inside with friends on alcohol and drugs. The car had leaky exhaust seals; the parents emerged from the party, drove home, and found that both boys were dead.

123. In Miami, for example, an FBI sting operation, "Operation Court Broom,"

(e) Various financial crimes incident to concealing drug profits.

It is principally these collateral harms that legalization or decriminalization proposals seek to eliminate.

(3) *Enforcement of Drug Laws Reduces Drug Consumption.* If the narcotics law enforcement effort over the last two decades or so is viewed, not as *jihad*, but as one component of an overall crime control program, it is not at all clear that it has failed.<sup>124</sup> In the first place, although any measurements of an illegal market are necessarily suspect, there is credible evidence that consumption of illegal drugs has decreased markedly. In 1979, there were an estimated 23 million users of illegal drugs; by 1988, the figure was 14.3 million, a forty percent decrease.<sup>125</sup> During the same period, monthly cocaine use fell by fifty percent.<sup>126</sup> Between 1986 and 1993, reported monthly cocaine use among young adults dropped by eighty-three percent.<sup>127</sup> By every available measure, the use of marijuana by high school and college students and young adults has plummeted.<sup>128</sup>

uncovered a number of judges willing to sell favors to persons believed to represent drug traffickers. One judge was convicted of selling the name of a supposed informant in order that he could be murdered.

124. Professor Carrington writes that since the 1980s, "[t]he sale and use of controlled substances has remained virtually constant." Carrington, *supra* note 1, at 340. He provides no authority for this claim.

125. See generally NATIONAL INSTITUTE ON DRUG ABUSE (NIDA), U.S. DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: 1988 POPULATION ESTIMATES, (DHHS Pub. No. (ADM) 89-1636, 1989) 17-21. See also Inciardi, *in* LEGALIZE IT?, *supra* note 18, at 164 (1993) (See Fig. 1, a chart drawn from NIDA, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES, 1990, reflecting large percentage decreases in drug usage by all age groups between 1979 and 1991).

126. Inciardi, *in* LEGALIZE IT?, *supra* note 18, at 164 (see fig. 2).

127. The figure dropped from 8.2% to 1.4%. SOURCEBOOK 1993, *supra* note 93, at 332. In 1984, reported monthly use of cocaine among college students peaked at 7.6%; by 1993, the figure was 0.7%. *Id.* at 330. Cocaine use by high school seniors peaked in 1985 at 6.7%; in 1993, the figure was 1.3%. *Id.* at 329.

128. Marijuana use by teenagers peaked in 1979-80, when 60% of teenagers reported its use, but by 1992, the figure had dropped to 33%. Study by University of Michigan Institute for Social Research, reported in Pierre Thomas, *Use of Drugs By Teenagers Is Increasing*, WASH. POST, Dec. 13, 1994, at A1, A17 (showing increase to 38% in last two years). Between 1981 and 1993, the number of high school students reporting marijuana use in the last month dropped from 31.6% to 15.5%. SOURCEBOOK 1993, *supra* note 93, at 329. Between 1980 and 1993, among college students, reported marijuana use in the last month fell from 34% to 14.2%, daily marijuana use dropped from 7.2% to 1.9%. *Id.* at 330. Daily teenage marijuana use fell by 75% between 1978 and 1988. NATIONAL INSTITUTE ON DRUG ABUSE (NIDA), U.S. DEP'T OF HEALTH AND HUMAN SERVS., DRUG USE, DRINKING, AND SMOKING: NATIONAL SURVEY RESULTS FROM HIGH SCHOOL, COLLEGE,

Reduction in the use of heroin has also been a notable success of antidrug efforts.<sup>129</sup>

The foregoing statistics are generated by government and academic surveys, and it can be argued that such surveys give only a fragmentary picture of the drug market. In the past, their heavy reliance on polling easily accessible groups like high school and college students undoubtedly tended to underrepresent those population groups like the inner city poor whom experience and intuition suggest are disproportionately likely to abuse drugs.<sup>130</sup> However, this criticism has been taken into account in recent versions of the surveys, and the results show the same basic pattern of decreased usage.<sup>131</sup> Even if one assumes that these surveys continue to underreport drug abuse among certain social groups, it is a peculiar argument that dismisses the notable, if incomplete, achievements of antidrug efforts on the ground that the success has not been uniform across the social spectrum.

Moreover, if the poor, the disadvantaged, and minorities have indeed used drugs at rates significantly different than the rest of the population,<sup>132</sup> that fact may lead to a rather different conclusion than Professor Carrington would have us draw. Such a disparity would suggest not that human beings are unalterably genetically, historically, and socially disposed to use

AND YOUNG ADULTS POPULATIONS 1975-1988 57 (DHHS Pub. No. (ADM) 89-1638, 1989). Between 1986 and 1993, reported marijuana use in the last month among young adults (those between one and twelve years after high school graduation) declined from 22% to 13.4%, daily use dropped from 4.1% to 2.4%. SOURCEBOOK 1993, *supra* note 93, at 332-33.

129. See James Q. Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb. 1990, at 21-23.

130. See, e.g., Inciardi & McBride, *supra* note 18, at 45, 62-65.

131. For example, the National Institute of Drug Abuse (NIDA) has been conducting surveys of the noninstitutionalized population over the age of twelve about every other year since 1971. The data from this survey shows marijuana usage in this broader group peaked in 1979 and by 1985 was lower than it had been in 1972. Taubman, *supra* note 119, at 92. See also U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995). In this report, the Sentencing Commission gathers data from all available surveys. It concludes that "casual" cocaine use has decreased "substantially," *id.* at 46, but that the number of heavy cocaine users remained roughly constant between 1988 and 1991. *Id.*

132. In its report to Congress, the Sentencing Commission concluded that "neighborhood-level social and environmental conditions are significant factors driving drug abuse." U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 39 (Feb. 1995). The Commission also concluded that race is not a significant factor in drug use if social and environmental conditions are held constant. *Id.* at 38-40.

mind-altering substances,<sup>133</sup> but rather that drug abuse tends to occur disproportionately in the same settings that generate high levels of other types of criminal conduct. Once again, we see that drug crimes are best understood not in isolation, but in the context of the broader problem of crime control.

(4) *Enforcing Drug Laws Has Costs (Which Are Sometimes Exaggerated)*. Whether successful in reducing consumption or not, the current approach to the enforcement of narcotics laws has large tangible and intangible costs. Notably, it costs a lot of money and consumes a large chunk of police, prosecutorial, prison, and court resources. Moreover, the percentage of such resources devoted to drug crimes undeniably has increased markedly in recent years.

It is nonetheless important to understand that the magnitude and causes of the increased resource costs of drug enforcement are routinely misrepresented in debates about drug policy. Consider the often noted rise in the number of prison inmates convicted for drug offenses. In 1980, the federal prison population was 24,661,<sup>134</sup> of whom twenty-five percent were serving sentences for drug violations.<sup>135</sup> The current number is approximately 85,000, sixty-one percent of whom have been convicted of some narcotics offense.<sup>136</sup>

At the state level, prison populations also have increased significantly over the past decade or so, but drug prosecutions have made a smaller contribution to the increase than at the federal level. For example, between 1986 and 1991, the total state prison population grew from 447,852 to 704,181, an increase of fifty-seven percent.<sup>137</sup> The percentage of state inmates incarcerated for drug offenses in the same period grew from 8.6 percent to 21.3 percent.<sup>138</sup>

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133. See Carrington, *supra* note 1, at 343 ("Intoxicating effects are attractive to most men and women"), 345 (referring to "universality and timelessness" of drug use), and 348 ("[S]ome people are going to alter their minds one way or another.").

134. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1982 550 (1982) [hereinafter SOURCEBOOK 1982].

135. *Id.* at 553. This percentage is derived from Table 6.42, which was apparently created with data 90% complete.

136. Pierre Thomas, *One Out of Four Federal Prisoners Not a U.S. Citizen*, WASH. POST, Nov. 25, 1994, at A1, A18. At the close of 1993, there were 79,485 federal inmates, 60% of whom had drug convictions. SOURCEBOOK 1993, *supra* note 93, at 630.

137. SOURCEBOOK 1993, *supra* note 93, at 612.

138. *Id.* In 1991, roughly 30% of those newly incarcerated in state prisons had

These are striking numbers.<sup>139</sup> But obscured by the leap in imprisoned drug offenders is the equally dramatic increase in inmates serving time in nondrug cases. If Professor Carrington's amendment were passed today and made retroactive, freeing every federal narcotics violator, federal prisons would still hold 34,000 inmates serving nondrug sentences, eighty-three percent more than were serving such sentences in 1980. If there had been no state drug prisoners in either 1986 or 1991, the state prison population would still have risen by 144,854, or thirty-five percent during that five-year period.

This is another way in which the "war on drugs" metaphor distorts debate. It invites consideration of drug laws in isolation from contemporaneous movements in the criminal law as a whole. In fact, enhanced narcotics enforcement has not been an isolated Calvinist crusade against the pleasures of the masses. Harsher enforcement of drug laws has been only one component, albeit a prominent one, of a national movement toward tougher sanctions for all crimes.

At the federal level, the sterner approach manifested itself in the Sentencing Reform Act of 1984,<sup>140</sup> which created the United States Sentencing Commission.<sup>141</sup> The Commission drafted the Sentencing Guidelines.<sup>142</sup> The Guidelines introduced determinate sentencing, which drastically reduced the discretion of sentencing judges;<sup>143</sup> abolished parole;<sup>144</sup> required that prisoners serve eighty-five percent of their stated sentences<sup>145</sup> (in contrast to the former system under which release commonly came after roughly one-third of the stated sentence);<sup>146</sup> and set sentences high enough that only a small fraction of convicted defendants are eligible for probation.

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committed drug offenses. *Id.* at 625.

139. The jump in absolute prisoner numbers is mirrored in the rate of sentenced prisoners per 100,000 population. In 1980, the combined state and federal rate was 139 per 100,000. In 1992, the rate was 330 prisoners per 100,000 population. *Id.* at 601.

140. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-682 (1988 & Supp. V 1993)).

141. 28 U.S.C. §§ 991-998 (1988 & Supp. V 1993).

142. The guidelines are found in the UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1993).

143. U.S.S.G., ch. 1, pt. A(3), introduction cmt.

144. *Id.*

145. *Id.*

146. *Id.*

These measures increased real prison time for all categories of crimes. The Guidelines have had a particularly dramatic effect on drug sentences because of the interaction of legislative mandates, certain choices made by the Sentencing Commission,<sup>147</sup> and the determination by the Department of Justice not to nullify the guidelines system by "bargaining around" it.<sup>148</sup> Still, the Guidelines and associated reforms have resulted in more imprisonment, not just for drug traffickers, but for all those who violate federal criminal laws.<sup>149</sup>

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147 The most influential legislative choice was the setting of rather high statutory mandatory minimum sentences for drug crimes (5 and 10 years for first offenders) based on quantity of drugs possessed. 21 U.S.C. §§ 841(b)(1)(A) and (B) (1988 & Supp. V 1993). The three important choices made by the Sentencing Commission were:

- (1) to make the length of drug sentences quite long;
- (2) to tie the length of sentence directly to the quantity of narcotics possessed, distributed, or conspired about (U.S.S.G. § 2D1.1(3)); and
- (3) to give relatively little consideration to role in the offense as a mitigating factor (U.S.S.G. § 3B1.2).

The first two of these choices were necessarily heavily influenced by the legislative creation of mandatory minimums based on quantity. The legislative choice of drug quantity as the yardstick of sentence length predisposed the commission to the same unit of measurement. Setting mandatory minimum sentences of, for example, ten years for a quantity of cocaine (5 kilograms) quite small by wholesale standards forced creation of a sentencing scale which incorporated the fixed points of the mandatory minimums, and thus virtually guaranteed that sentences for anyone connected with a significant trafficking operation would be lengthy indeed. See U.S.S.G., ch. 1., pt. A(3), introduction cmt., in which the Sentencing Commission notes the effect of congressional mandates on the sentencing structure.

148. Former Attorney General Richard Thornburgh formalized this decision in his memorandum, *Plea Bargaining Under the Sentencing Reform Act* (March 13, 1989), reprinted in THOMAS W. HUTCHINSON AND DAVID YELLEN, *FEDERAL SENTENCING LAW AND PRACTICE* 622 supp. app. 12 (1989), in which he directed that federal prosecutors were to charge the most serious, readily provable crime and accept pleas to nothing less than one count of the most serious, readily provable crime. Although this may not sound revolutionary, it was an effort to dramatically limit the range of options traditionally available in plea negotiations. The policy was not honored everywhere and has been somewhat relaxed under Attorney General Reno, but the change in prosecutorial culture caused by the guidelines and the new policy was unmistakable. For an extended discussion of the evolution of the Department of Justice plea bargaining policy before and after the Thornburgh memorandum, see Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992).

149. The Guidelines have been the subject of much criticism. See, e.g., Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV L. REV. 1938 (1988).

The rise in state prison population is due primarily to a general toughening of statutes and attitudes to crime of all types. For example, in Colorado, where I was a state prosecutor between 1983 and 1987, the state legislature amended the criminal code in 1985 and doubled the length of presumptive sentences for all categories of crimes.<sup>150</sup> The new law also raised sentences for habitual offenders to unprecedented levels.<sup>151</sup> Other states have moved away from sentencing schemes that grant trial judges broad discretion and toward determinate sentencing similar to the federal guidelines.<sup>152</sup>

The trend toward "toughness" continues unabated. On September 30, 1994, the Virginia legislature voted to abolish parole, stiffen sentences for repeat and violent offenders,<sup>153</sup> create voluntary sentencing guidelines, and require that inmates serve eighty-five percent of their stated sentences.<sup>154</sup> As a consequence, the state is embarking on a \$2.2 billion prison building project,<sup>155</sup> which is the biggest in state history.<sup>156</sup>

In sum, although stepped-up narcotics law enforcement undeniably costs money and increases inmate populations, to attribute the country-wide surge

150. COLO. REV STAT. § 18-1-105(1)(a) (1986 & Cum. Supp. 1994).

151. COLO. REV STAT. § 16-13-101 (1986 & Cum. Supp. 1994) mandated a life sentence to one convicted of a fourth felony. In Colorado, "life" means forty calendar years without the possibility of parole. COLO. REV STAT. § 16-13-101(2.5) (1986 & Cum. Supp. 1994).

The cumulative effect of the increased sentences was to raise Colorado's incarceration rate from 103 prisoners per 100,000 population in 1985, to 256 per 100,000 in 1992. SOURCEBOOK 1993, *supra* note 93, at 601. In 1993, as a result of a spiraling prison population, the Colorado legislature reduced the maximum length of presumptive sentences for the four lowest categories of felonies by about 25%. COLO. REV STAT. § 18-1-1-05(1)(a)(V) (1986 & Cum. Supp. 1994). In 1994, the legislature reduced habitual criminal sentences. COLO. REV STAT. § 16-13-101 (Cum. Supp. 1994).

152. See, e.g., Minnesota Sentencing Guidelines, MINN. STAT. §§ 244.01-244.16 (1992 & Supp. 1995). For an explanation of the Minnesota guidelines, see *Introduction to the Minnesota Sentencing Guidelines*, 5 HAMLINE L. REV 293 (1982).

153. Michael Hardy & Jeff E. Schapiro, *Assembly Passes Crime Bill — and Buck*, RICHMOND TIMES-DISPATCH, Oct. 1, 1994, at A-1.

154. VA. H.B. 5001. The bill was passed on Sept. 30, 1994 and signed by the governor on Oct. 13, 1994.

155. *Surplus Sites To Be Viewed for Sales: Allen Wants To Use Proceeds for Prisons*, RICHMOND TIMES-DISPATCH, Dec. 1, 1994, at B-3.

156. Michael Hardy, *Governor Sticking to Campaign Script*, RICHMOND TIMES-DISPATCH, Dec. 5, 1994, at B-1. The recriminations about how all the prison cells required by the new plan will be paid for have already begun. See Peter Baker & Donald P. Baker, *Va. Prisons Swamped By Inmate Rise: Funds for Construction Fall Far Short of Need*, WASH. POST, Feb. 20, 1995, at D1.

in incarceration solely, or even primarily, to the "war on drugs" is inaccurate.<sup>157</sup>

Moreover, as with antinarcotics efforts, there is some evidence suggesting that toughness works against other categories of crime. Between 1980 and 1992, while the national prison population was growing from 353,167 to 847,271,<sup>158</sup> the victimization rate for personal crimes dropped by twenty-four percent, and for household crimes by thirty-two percent.<sup>159</sup> The decrease in the crime rate is not proportional to the increase in the prison population; however, one would expect to find strict proportionality only if everything else were equal, that is, if the social conditions which tend to create persons disposed to criminality remained constant throughout the period of heightened enforcement of drug and other criminal laws.

If, however, the period under examination were one in which families were under increased stress, cities were decaying, income disparities were increasing, the quality of public education was slipping, nongovernmental mechanisms of social control like churches and neighborhoods were losing their authority, and the popular culture denigrated integrity and celebrated violence, then in such a period *any* reduction in the crime rate might be hailed as a monumental success of law enforcement strategy. If you are bailing a boat with one leak and managing to keep the water level in the bilges steady, you are merely maintaining the status quo. If the same boat springs three new leaks and you bail fast enough to get the water a little lower than it was when you started, the boat may be floating no higher in the water, but you are doing yeoman service as a bailer.<sup>160</sup>

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157 Professor Carrington states that "the number of persons now in American prisons is an astonishing 1.4 million." Carrington, *supra* note 1, at 353. He cites DUKE & GROSS, *supra* note 25, at 179, as authority for this statement, but I can find no verification for it. The most recently available statistics show a total combined population in state and federal prisons of 847,271 as of December 31, 1992. SOURCEBOOK 1993, *supra* note 93, at 600. Even if one includes local jail prisoners in the calculation, in 1992 the total was only 1,289,160. *Id.* at 591, 600 (figure combines total prison population on December 31, 1992, with average jail population during 1992).

158. SOURCEBOOK 1993, *supra* note 93, at 600.

159. *Id.* at 247

160. In addition, I would suggest, albeit tentatively, that the strict enforcement of drug laws has contributed to the reduction of the levels of nondrug crimes against persons and property. Both sides of the drug legalization debate have noted the positive correlation between the commission of drug crimes and nondrug crimes. For a brief survey of some of the literature, see Inciardi, in LEGALIZE IT?, *supra* note 18, at 185-90. See also Jonas, *supra* note 18, at 169-71. If those who use and sell drugs are disproportionately likely, because of personal or socio-economic factors, to commit nondrug crimes, one would expect an increase in the incarceration of drug criminals to cause a decrease in crimes against persons and



The same disposition to attribute the consequences of a sterner approach to crime in general to the enforcement of drug laws infects Professor Carrington's discussion of intangible costs. He claims that "drug law enforcement entails frequent, even massive invasions of privacy" by police whose conduct he likens to that of the Inquisition.<sup>161</sup> This allegation of an assault on civil liberties caused by the "war on drugs" is common among those who favor legalization.<sup>162</sup> It is fair to this extent: If the law makes illegal the possession and sale of an easily concealable substance, police will often search all the places human ingenuity can devise to hide that substance.

Given the aggressive and competitive nature of good policemen, not to speak of the ease with which any person with power can lapse into authoritarianism, the mere multiplication of occasions for searching caused by the existence of drug laws is a reason for caution and concern. Although laws against marijuana, cocaine, and heroin remain, prosecutors and judges have to be on their guard against investigative zeal coupled with the human instinct to snoop. If drug enforcement critics were saying only this, I would not demur. But when one begins talking about drug enforcement as the Inquisition,<sup>163</sup> a different point is being made. The plain implication is that police are routinely exceeding constitutional limits and that the judicial system is permitting that outcome.

Perhaps Professor Carrington, in common with many commentators, deplores the retrenchment by the federal judiciary in recent years from the broadest possible construction of constitutional protections for criminal defendants. Some of the decisions embodying that retrenchment undeniably have come in narcotics cases. But to attribute the retrenchment in whole, or even in predominant part, to a judicial obsession with a "drug war" is, at best, a simplistic reading of a very complex process. For example, a reasonably dispassionate survey of the Supreme Court's constitutional jurisprudence since, say, 1980 shows a reluctance to extend additional constitutional protections to all classes of criminal defendants, not merely drug offenders.<sup>164</sup>

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property In fact, that is exactly what has happened.

161. Carrington, *supra* note 1, at 351-52.

162. See, e.g., DUKE & GROSS, *supra* note 25, at 122-45; Kevin B. Zeese, *Drug War Forever?*, in SEARCHING FOR ALTERNATIVES, *supra* note 83, at 251, 254, 260-61 (citing a number of court decisions finding particular investigative methods constitutional).

163. Carrington, *supra* note 1, at 352.

164. For example, *United States v Sokolow*, 490 U.S. 1 (1989), which authorized limited investigatory detentions of persons in airports based on their correspondence to a "drug courier profile" is obviously a narcotics case. On the other hand, the "independent

(5) *Treating Drug Crime As Ordinary Crime Means Rethinking Current Sentencing Laws.* Because narcotics enforcement is not war but police work, the sentencing structure for drug offenses should be evaluated by the same standards that are employed for other crimes. Before considering those standards and their implications, let us clear up some common misconceptions.

To begin, significant incarceration for the mere possession of personal-use quantities of narcotics is very rare, certainly for first offenders.<sup>165</sup> In the federal system, only four percent of those incarcerated for drug crimes are incarcerated for possession offenses.<sup>166</sup>

Moreover, those drug traffickers who are serving the very long federal drug sentences that courts are indisputably meting out under current law, and which Professor Carrington decries as "substantial violations of basic human rights,"<sup>167</sup> are not nickel-and-dime-bag, corner dealers. Consider the example of Mark Young, described by Professor Carrington as "in a federal prison for life without possibility of parole because he amiably introduced

source" exception to the exclusionary rule was adopted in *Nix v Williams*, 467 U.S. 431, 448-450 (1984), a homicide case. Similarly, in *Oregon v Elstad*, 470 U.S. 298, 303-18 (1985), a burglary case, the Court extended the attenuation doctrine to *Miranda* violations by allowing introduction of a properly warned confession given after the police previously had obtained an unwarned confession. One colleague has suggested that the Court began flinching from the most rigorous possible interpretation of the Fourth Amendment as long ago as the armed robbery prosecution at issue in *Warden v Hayden*, 387 U.S. 294 (1967), where the Court permitted a search for "mere evidence" during a lawful warrantless search. *Id.* at 300-01.

A more thorough demonstration of the Supreme Court's general indifference to the type of crime at issue in its constitutional jurisprudence would be the subject of another article. To test its accuracy, I can only suggest a review of any standard constitutional criminal procedure casebook or, perhaps, *Project, Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 597 (1994).

165. *But see* CAL. HEALTH & SAFETY CODE § 11550 (West 1991), which provides for a minimum mandatory 90-day jail sentence upon conviction for being "under the influence" of a "controlled substance." The law defines controlled substances to include cocaine and heroin, but not marijuana. *Id.*

166. SOURCEBOOK 1993, *supra* note 93, at 632. Based on my experience as a prosecutor, I am confident that the overwhelming majority of that 4% fall into one of two categories: (a) They were originally charged with trafficking offenses, but secured simple possession convictions through a plea bargain or (b) they were charged in jurisdictions with relatively mild drug problems under the stringent provisions of 21 U.S.C. § 844(a) (1988 & Supp. V 1993), which prescribes a minimum mandatory sentence of five years for mere possession of more than five grams of crack cocaine. The remaining balance were probably caught with the drugs in some exclusively federal enclave like a federal prison.

167 Carrington, *supra* note 1, at 353.

a friend desiring to buy marijuana to another friend able to supply his need.<sup>168</sup> In fact, Mr. Young is not serving a life sentence. A life sentence was originally imposed, but that sentence was reversed.<sup>169</sup> On resentencing, the maximum penalty the court may impose under the Guidelines is nine years.<sup>170</sup> After "good time" adjustments, Young will be out in less than eight years. Whatever his sentence, Young will not be serving it because he was the thoughtless go-between for a couple of buddies wanting a toke. In fact, Young was convicted of acting as broker for a commercial marijuana-growing operation. He put the Indiana growers in touch with New York buyers who were purchasing 100 pounds of marijuana a week. His amiability in performing this service was undoubtedly increased by the fact that he had contracted for and received between \$60,000 and \$70,000 in commissions by the time of his arrest.<sup>171</sup>

All that being said, there remains the question of whether either life or nine years is an appropriate prison term for someone convicted of selling any quantity of marijuana or of cocaine or of heroin. Precisely because narcotics prosecution is not war but law enforcement, my own view is that some drug sentences may be too long. But I reach that conclusion by a very different route than does Professor Carrington. In analyzing Mr. Young's sentence, or drug sentencing in general, we should measure the sentences meted out against the traditional rationales for punishment of any crime — deterrence, incapacitation, rehabilitation, and retribution.<sup>172</sup> The first three are utilitarian considerations to which I will return in a moment. Because Professor Carrington condemns long drug sentences as immoral, let us begin with the only explicitly moral justification for punishment: retribution or desert.<sup>173</sup>

168. *Id.*

169. The sentence was actually reversed by the Seventh Circuit twice. *United States v Young*, 997 F.2d 1204, 1212 (7th Cir. 1993); *United States v Young*, 34 F.3d 500, 506 (7th Cir. 1994).

170. The calculation is based on Young being found to have brokered the sale of 320 kilos of marijuana, yielding a Base Offense Level of 26, U.S.S.G. § 2D1.1(c), and having been assessed a three-level enhancement for a management or supervisory role, U.S.S.G. § 3B1.(b)1. See *United States v Young*, 34 F.3d 500 (7th Cir. 1994).

171. *Young*, 997 F.2d at 1206-07

172. For a succinct summary of the traditional rationales for punishment, see ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* xxvii-xxix (1976).

173. Retribution, for which a better term may be "desert" (as in "just deserts" or "he deserved what he got"), has gone in and out of vogue as a rationale for punishment. When in disfavor, the tendency is to equate retribution with "revenge," a term suggesting mean-

The very long federal sentences that Professor Carrington finds morally abhorrent are for *selling* drugs. Thus, to the extent that the criminal law imposes heavy punishment for a defendant's culpability in causing direct harms to drug users, it does so because sellers are choosing to harm others and not merely electing to bear the risk of harm to themselves.

The second term of the moral equation of drug sentencing is the very cluster of collateral harms that so distresses Professor Carrington. Consider but one: The hallmark of the illegal industry of which all drug traffickers are a part is its complete contempt for human life. As Professor Carrington himself observes, the wholesale suppliers of cocaine wiped out virtually the entire Colombian judiciary.<sup>174</sup> The Sicilian Mafia, long involved in heroin trafficking,<sup>175</sup> has carried on a similar campaign of assassination against Italian judges.<sup>176</sup> Here in America, the murderous exchanges of inner city drug gangs litter bodies across our urban centers every day.

Those who "only" sell drugs or "merely" transport them know full well the ugly nature of the industry for which they work. They know that the drug trade is run by murderers, foreign and domestic. So when the DEA arrests a legal resident Colombian, or a native-born American, in Miami "merely transporting" 150 kilos of cocaine on one leg of its journey from Bolivia to Colombia to Florida to cities along the East Coast, we should suffer no moral outrage because this "mere courier" will do twenty years.<sup>177</sup> The Colombian knows what bloody work the cartels have done in his own country. And both he and his American partners know what bloody work is done every day in America in the course of distributing their product. If the product were cornflakes and its distribution was effected by such methods, they would be complicit in countless deaths.

spirited, vindictive, and uncivilized behavior. For example, the 1972 edition of the Model Sentencing Act declares, without explanation, "Sentences should not be based upon revenge and retribution." VON HIRSCH, *supra* note 172, at 46. When retributive justice is in favor, the discussion customarily begins with Immanuel Kant's theory of deserved punishment and proceeds in terms of restoration of moral balance. *Id.* at 46-55.

Unlike the Model Sentencing Act, the Federal Sentencing Guidelines clearly do not eschew just deserts as a justification for imposing punishment. U.S.S.G. ch. 1, pt. A(3), introduction cmt.

174. Carrington, *supra* note 1, at 352. See also Michael Isikoff, *Medellin Cartel Leaders Offered U.S. a Deal: Officials Rebuffed Plan That Sought Amnesty for Ending Drug Trade, Providing Data on Leftists*, WASH. POST, July 20, 1988, at A4.

175. DUKE & GROSS, *supra* note 25, at 93-96.

176. See, e.g., Alan Cowell, *Sicily Bomb Kills Anti-Mafia Fighter and 5 Others*, N.Y. TIMES, May 24, 1992, § 1, at 9.

177 U.S.S.G. § 2D1.1(c); U.S.S.G. ch. 5, pt. A.

To my way of thinking, Professor Carrington betrays considerable moral confusion when he castigates as "brutal"<sup>178</sup> the punishments meted out to those who enlist for pecuniary gain in an industry whose ordinary business practices notoriously include slaughtering judges, policemen, competitors, unruly employees, welching customers, and, not infrequently, innocent bystanders. If some of the drug sentences mandated under the Federal Sentencing Guidelines are too long, it is not because they are morally disproportionate to the evil in which all drug traffickers are complicit. In the vast majority of cases, these people *deserve* what they get. The question is, does it make utilitarian sense to give it to them.

Let us consider, therefore, the utilitarian justifications for punishment.

(a) *Deterrence*. Do criminal penalties deter people from selling drugs? Despite endless statistical argument, nobody can *prove* whether they do or not.<sup>179</sup> As a lawyer with sixteen years experience on both sides of the criminal law, and as a person with some experience of human nature, I *believe* four (probably unprovable) things:

(1) The fear of going to prison does deter some, perhaps most, people from committing crimes, including drug crimes.

(2) Knowledge of a high probability of going to prison for a long time will deter even more people from committing even more crimes.

(3) There is a degree of severity, a length of a possible prison term, beyond which deterrence is a matter of rapidly diminishing returns.

(4) If the financial rewards of breaking the law are great enough, or the opportunities for legal self-advancement are bleak enough, no prospective penalty, however draconian, will deter everyone from breaking the law

How do these beliefs apply to the current federal sentencing regime for drug crimes? First, my own view is that by virtually guaranteeing a prison sentence to anyone convicted of a federal drug crime, the current federal sentencing structure does deter people from selling drugs.<sup>180</sup> Second, as

178. See Carrington, *supra* note 1, at 353.

179 I argue elsewhere that the historical evidence, particularly from the United States at the turn of the twentieth century and during the last several decades, supports the claim that punishment deters the use and sale of drugs. See *supra* notes 80-90 and accompanying text (turn of twentieth century) and notes 124-31 and accompanying text (recent history). It is important, however, not to confuse *evidence*, even reasonably good evidence, with conclusive *proof* of something as elusive and evanescent as the motivations of drug consumers.

180. As noted above, federal narcotics offenders are almost exclusively drug sellers. Examination of the narcotics and probation sections of the U.S.S.G. § 2D1.1(c) and § 5B1.1 reveals that only those caught selling small quantities of narcotics are even eligible for a

word penetrates the community of potential offenders that federal narcotics defendants not only are highly likely to serve some time in prison but are also highly likely to serve significant time, the deterrent effect increases.

Even if one believes as I do in the deterrent power of serious punishment, many drug sentences under the guidelines are of lengths far longer than necessary to achieve maximum deterrence. Although the precise demarcation point is obviously open to debate, my own guess (based on years of plea negotiations and discussions with cooperating defendants) is that the amount of time by which any sentence exceeds ten years real time in prison is probably wasted as a deterrent. Any adult who is not deterred by a decade in a cell is not going to be deterred by the prospect of two decades or three or four.

At the other end of the spectrum, I think the logic of deterrence requires both *some* prison time for convicted drug sellers, even first offenders, and significant sentences for sellers of commercially significant quantities. Probation, in my perhaps jaundiced view, is a bad joke. It deters no one. The prospect of rehabilitation through probationary supervision, usually chimerical in my experience, is rendered completely illusory by the lack of funds necessary for the kind of intense supervision which would offer any hope of real rehabilitation. The potential financial rewards of selling drugs are immense. Drug trafficking crimes, at least at the federal level, are crimes of greed.<sup>181</sup> People sell drugs because they can make far more money doing it than they could working at any available alternative trade. Low sentences for first-time offenders who are selling commercially significant quantities of narcotics will not deter because the painful consequences of being caught do not exceed the benefit to be gained from committing the crime. Plainly stated, the *possibility* of a year or two in a decently appointed federal prison, *if you get caught*, will do little to deter a man who can make tens or hundreds of thousands of dollars per year in the drug business.

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probationary sentence. Cases involving drug quantities which qualify for such lenient treatment are rarely brought in federal court.

181. It is certainly true that some people sell drugs to make money to support their own drug consumption, but such persons usually deal in quantities below the threshold amounts necessary to draw federal attention. There is no minimum quantity of narcotics legally necessary for federal prosecution, *see* 21 U.S.C. §§ 841-858 (1988 & Supp. V 1993), but as a practical matter, each U.S. Attorney's Office has its own informal standards aimed at focusing the office's resources on traffickers at the top of the local distribution chain. Retail sellers of small quantities are rarely swept up in the federal net; they would thus be unaffected by the Carrington Amendment.

(b) *Incapacitation.* Incapacitation as a rationale for punishment rests on the simple truth that if a criminal is in jail, he cannot commit any crimes (at least against the general population). Thus, at least for the period he is incarcerated, the public will not suffer the crimes the imprisoned criminal would have committed. Incapacitation does have some role to play in justifying lengthy prison sentences for drug offenders, but perhaps not as great a role as one might suspect.

The idea of incapacitating the criminal population is behind the current enthusiasm for "three strikes and you're out"<sup>182</sup> and similar proposals for imprisoning repeat offenders. It rests on the theory that a disproportionate percentage of violent and property crimes are committed by a relatively small group of offenders. Lock up this small group, goes the thinking, and crime will decline. Whether this is true or not for street crime, it has little application to narcotics trafficking at the wholesale level.

The difference between the two situations is that drug crime is market-driven and street crime is not. If the system incarcerates Smith, a criminal whose specialty is robbing convenience stores, a number of convenience stores Smith would have robbed had he not been caught will go unrobbed. Other criminals may rob convenience stores while Smith is in prison, but it will not be because there is a "demand" for convenience store robberies going unmet and the free criminals see an opportunity to fill Smith's market niche.

By contrast, if the system incarcerates Jones, a seller of drugs, market pressure exists to replace Jones as long as Jones's customers remain and are desirous of purchasing drugs. Whether the demand for a seller will be filled is dependent on two factors: First, the strength of the demand, i.e., how many customers there are and what prices they are willing to pay, and second, whether potential replacements for Jones perceive that the risks of selling drugs are worth the rewards.

Accordingly, while taking Jones out of circulation for a time is a good thing, the reason for giving Jones a fairly long sentence is not so much to incapacitate him as to affect the cost-benefit calculation of (i.e., deter) his prospective replacement. The same line of reasoning leads to the conclusion, which I will consider again below, that narcotics enforcement cannot be entirely a supply-side operation. Efforts to reduce demand are a necessary concomitant to stringent penalties for suppliers.

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182. See, e.g., CAL. PENAL CODE § 667-667.16 (West 1988 & Supp. 1995). See generally Nkechi Taifa, "Three-Strikes-and-You're-Out" — Mandatory Life Imprisonment for Third Time Felons, 20 U. DAYTON L. REV 717 (1995).

(c) *Rehabilitation.* Long prison sentences do not rehabilitate anyone.<sup>183</sup> On the other hand, neither do short prison sentences. Rehabilitation does not, in my view, enter the debate about federal narcotics sentencing laws.

(d) *Systemic Considerations.* All goals of any system of punishment, whether based on moral considerations or utilitarian ones, are subject to at least one universal utilitarian constraint — the community is obliged to pursue all the diverse aims of criminal justice within boundaries imposed by limited resources. We may conclude that drug dealers are morally repugnant and "deserve" to spend the rest of their lives in prison. But if we do, and if we also wish to limit the tax money spent on prisons, we may have to release from prison others whose conduct we find even more distasteful — robbers, rapists, and murderers.

Similarly, even if we decide, after reflection, that drug dealers are the criminal class most deserving of incarceration, our zeal in locking up today's drug dealers for indefinite periods is likely to preclude us from locking up tomorrow's dealers for much time at all. As Colorado recently discovered, unless one is prepared to continue an endless prison-building program, a policy of unlimited toughness is very expensive and is likely to exceed the taxpayers' fiscal tolerance.<sup>184</sup>

Treating drug crime as a law enforcement problem rather than as warfare requires a different and more tenacious definition of toughness. It requires that we abandon the illusion that imposing sentences of a "jillion" years on the criminal we catch today will eliminate the necessity of sentencing another criminal next year and the next year and the next. It requires us to decide whether we want to incarcerate one drug dealer for forty years, or four drug dealers for ten years, or eight drug dealers for five years. The current approach is to incarcerate eight dealers for forty years — and worry about the long-term costs tomorrow

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183. This is my personal belief. Skepticism about the rehabilitative power of imprisonment is common. See, e.g., CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 371-423 (1978); MORRIS R. COHEN, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987, 1009-15 (1940); RUDOLPH J. GERBER & PATRICK D. MCANANY, *Punishment: Current Survey of Philosophy and Law*, 11 *ST. LOUIS U. L.J.* 491, 525-27 (1967); JAMES Q. WILSON, *THINKING ABOUT CRIME* 185-93 (1975). Perhaps most revealingly, in its discussion of the "Basic Approach" which animated the formulation of the federal sentencing guidelines, the United States Sentencing Commission mentions "just deserts," deterrence, and incapacitation as legitimate purposes of criminal punishment, but omits any reference whatsoever to rehabilitation. U.S.S.G. ch. 1, pt. A(3), introduction cmt.

184. See *supra* note 151.



(6) *No Category of Crime Can Be Eliminated Merely Through Enforcement of the Criminal Law* The final lesson to be learned from the abandonment of the "war on drugs" metaphor is that the effort to reduce drug crimes, in common with the effort to reduce crimes against persons and property, cannot succeed unless we recognize that crime of all types is not an isolated social phenomenon to be eradicated merely by punishing criminals. This seems so self-evident as not to require comment. Yet, so disillusioned have we become at the prospect of attacking the causes of crime that a widely accepted premise in recent debates over federal anti-crime policy is that any dollar not spent on police or prisons is "social pork."<sup>185</sup> This is patent nonsense as history, logic, and experience demonstrate.

First, although history does not demonstrate that drug prohibitions are futile, it does illustrate a particular limitation of such prohibitions. As we have seen, when use of opiates and cocaine grew in the late 1800s, a program of legal prohibition and popular education reversed the trend.<sup>186</sup> Nonetheless, drug use was not eradicated completely; it remained a phenomenon among the poor and the dispossessed.<sup>187</sup> Drug use mushroomed again beginning in the 1960s.<sup>188</sup> Again, a program of increased criminal enforcement and public education has brought usage back down, *at least among those who are stakeholders in society — the middle and upper classes.*<sup>189</sup> There is simply a limit on what either the criminal law or antidrug education can achieve among those who place little value on their lives, who see few prospects for gaining a place in society, and for whom prison carries no stigma and holds no terror.

The lesson of history is reinforced by the logic of deterrence. Criminal sanctions aimed, as ours are, primarily at sellers of drugs are only effective as part of a program that seeks to raise the disincentives to replace imprisoned dealers while at the same time reducing the market demand for drugs by reducing the population of users.

185. Opponents of the 1994 Crime Bill labeled all of its components aimed at crime prevention, rather than at apprehension and punishment of offenders, as "social pork." See Helen Dewar, *GOP Crime Strategy Fails: Conservatives Pushed, Moderates Pulled Away*, WASH. POST, Aug. 27, 1994, Final Ed., at A1.

186. *Supra* notes 71-90 and accompanying text.

187. *See supra* note 87 and accompanying text.

188. *See supra* note 86.

189. *See supra* notes 124-31 and accompanying text. *See* BELENKO, *supra* note 18, at 54 ("Crack appears to have been adopted as a drug of choice among sub-populations with multiple social and behavioral problems.").

I am a prosecutor, not a social scientist. I am not competent to prescribe the precise mix of drug treatment, government intervention in the inner city, free-market capitalist economic opportunity, and personal and community spiritual regeneration that is needed to reduce drug and non-drug crime to levels that would restore our lost sense of security. What sixteen years in the trenches of the criminal law have taught me, however, is that although what I do is useful, effective within its inherent limits, and necessary, it is not sufficient. That we are discouraged over the seeming failure of efforts to eradicate the poverty and social decay which breed both drug crime and street crime does not remove the imperative of rethinking the prevention side of the crime equation and trying again.

#### *IV Conclusion*

In some ways, the "drug problem" is a convenient scapegoat for both ends of the political spectrum. On the left, decrying the "brutality" of drug laws, and their allegedly disproportionate impact on minorities, allows evasion of the hard question of whether promoting a culture that exalts individual rights and entitlements over personal responsibility and community cohesion has contributed heavily to the social disintegration in which drug use flourishes. On the right, blaming all the ills of the inner city, and increasingly of the suburbs and smaller communities, on drugs or drug dealers permits avoidance of serious discussion of the complex causes of all crime, which prominently include poverty, unequal opportunity, and social injustice.

In the drug debate, both the legalizers like Professor Carrington and the unreconstructed "drug warriors" tend to exaggerate the likely effects of their preferred nostrums. Neither legalization nor the most draconian punishments will eliminate drug abuse. Likewise, even if by some miracle all intoxicating drugs were to vanish from the earth, the social ills generally laid at the feet of drugs would remain — less virulent perhaps, but still with us.

The most notable feature of the current American public debate about drug crime and crime in general is its increasing unreality. The discussion is largely about symbolic issues such as the death penalty that have only the most tangential impact on everyday crime or everyday police work. Those closest to the workaday realities of drug law enforcement and drug treatment are rarely asked their views. The views of such professionals, when asked at all, are politely, but resolutely, ignored. The national debate has degenerated into a bidding war between left and right to see who can

propose the severest federal sentences for the largest number of crimes, irrespective of whether police, prosecutors, judges, or anyone else with expertise in the field thinks these measures are desirable.

At the end of the day, the solution to America's drug and crime problems lies, not in constitutional fixes or the utopia of Fremont, but in hard-headed, tenacious policies that punish those who break society's laws *and* that consciously seek to heal the society that produces the law-breakers.