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**THE FAILED POLITICS OF
SENTENCING REFORM:
Seriously Rethinking Federal Sentencing Policy**

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Preliminary Acknowledgments

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And I am honored to speak this evening on a panel with the extremely distinguished United States District Judges J. Spencer Letts (Central District of California) and Nancy Gertner (District of Massachusetts).

Introduction

I am going to set the stage for comprehensive sentencing reform in 2009. Drug enforcement dominates federal criminal justice activities and federal punishment. We must think and talk about drugs in a new way: honestly. We need to appreciate the consequences of lifetime criminal records for re-entry of ex-offenders into the economy, and the deep economic cost of our over-criminalization approach to public safety and health.

I will review the social, political and legislative history behind anti-crime legislation and the Sentencing Reform Act in the 1970s and 1980s. I will discuss in detail cocaine use, markets and violence. I will review the history of the 1986 mandatory minimum drug sentences. I will describe the current situation involving drugs, and critique Federal drug law enforcement and its tragic misdirection. I will argue for a new approach to Federal drug enforcement to focus on high-level international criminals who traffic in drugs. Finally, I will argue for drug “legalization,” and propose several models of what drug “legalization” might look like as a system to control, regulate and tax drug production, distribution and use.

My background

From 1979 to 1989, I was assistant counsel to the House Committee on the Judiciary’s Subcommittee on Crime responsible for Federal drug laws, gun control, money laundering, organized crime, pornography and other matters. I was a participant in the creation of the Sentencing Reform Act, and directly involved in writing the mandatory minimum sentences for drug offenses in 1986.

As a participant, I closely observed how the Executive Branch and Congress made criminal justice policy in this seminal period. I have seen how policy is often influenced by personal ambition, partisan combat and organizational expansionism, and how frequently policy-making deviates from the norms and procedures set forth in civics textbooks.

SETTING THE STAGE FOR SENTENCING REFORM IN 2009

When we discuss and work for sentencing reform, fundamentally, we are talking about politics. When we appeal for Members of Congress to have or exhibit political courage, our language is probably the most telling clue that reform will not be enacted, because it signals that the political climate is unfavorable. If we want sentencing reform, our work must be the hard work to educate the public at large to change the political climate. Educate the constituents and no courage on the part of Congress will be called for.

Drug use and Criminalization in context

About one-quarter of the nation’s prisoners are serving sentences for a drug offense or for a probation or parole violation involving the use of drugs. Right now, more than 50 percent of all sentenced Federal prisoners are serving a sentence for a drug offense. Of those other persons serving sentences for other crimes, their use or addiction to illegal drugs, or their involvement with the illegal drug trade is a factor for half to three-quarters. When we are talking about the population being sentenced to prison, we are talking about a population that is involved in crime in connection with some feature of our drug policies. If we want to effectuate sentencing reform, we must think about drug policy.

Roughly half of American adults have tried an illegal drug, and most of us know people who still use some drug or drugs illegally, although we do not know *that* they use drugs. We may know casual drug users, primarily marijuana smokers. We may know drug addicts. More likely, we know recovering drug addicts. The drug addicts' lives were or are out of control, and by that circumstance we were likely to become aware of their drug use.

Then there are the many people we know who use drugs but we don't know about it. All around us are secret illegal drug users, most of them functioning well, or if not so well, they still manage to conceal the drug-using aspect of their lives.

And there are all of the tens of millions of persons who use the large number of legal psychoactive drugs to treat epilepsy, pain, allergies, nervous disorders, anxiety, depression, and so forth. Curiously, we don't think of these people as drug users.

Yet the prosecution of adults for the possession of drugs – meaning possession of drugs for personal and private use – produces no outrage against police and prosecutors for a misuse of the criminal justice system. Given the very widespread use of drugs in the society, and the evident lack of a national consensus that drug use is wrong, our society is exhibiting enormous hypocrisy in prosecuting those who use certain drugs.

Consider that The Bible does not enjoin drug use. In one of his first miracles, Jesus created wine out of water for the wedding at Cana (John 2:1-11). Why should we be scandalized by the use of certain drugs by a celebrity, a political figure, or an ordinary citizen, and not by the use of other drugs? Why is the violation of this law so widely prosecuted and not the laws against adultery or fornication, that are grounded in biblical injunctions?

People who use drugs do not deserve to be punished or stigmatized. Consider persons with substance abuse problems listed by former HEW Secretary Joseph A. Califano, Jr. in his 2007 book, *High Society: How Substance Abuse Ravages America and What to Do About It*: What do Judy Garland, Mickey Mantle, President George W. Bush, Snoop Dogg, many mothers on welfare, Elton John, Rush Limbaugh, Natalie Cole, Jamie Lee Curtis, Don Imus, U.S. Supreme Court Justice William Rehnquist, most incarcerated felons and arrested juveniles, Janis Joplin, Frank Sinatra, Mel Gibson, millions of children and teens under twenty-one, Billy Joel, Joe Namath, Robert Downey, Jr., Robin Williams, and former First Lady Betty Ford have in common? . . . Substance abuse and addiction. (p. 1)

On page 4, Mr. Califano adds Elizabeth Taylor, Liza Minelli, Lawrence Taylor, Dwight Gooden, Eugene Fodor, Lindsay Lohan, Charlie Sheen, Paris Hilton, Tim Allen, John Belushi, Chris Farley, Marilyn Monroe, Elvis Presley, Betty Ford, Kitty Dukakis, Joan Kennedy, Cindy McCain, Congressmen Patrick Kennedy, Jim Ramstad, Mark Foley, Wilbur Mills, and Russell Long, Governor Ann Richards, Governor and Senator Harold Hughes, Mayor Marion Barry, Drew Lewis, and Michael Deaver.

None of these persons deserved to be prosecuted. The mere fact of their use of drugs – casual or excessive, infrequent or habitual, self-indulgent or self-destructive, flagrant or secretive – was *not* wrongful. Whether the drugs were “illegal” drugs, legal prescriptions or alcohol, the

mere fact of using the addictive and potentially lethal substances does not justify criminal prosecution. Hurtful or conduct dangerous to others – fighting, stealing, driving a vehicle, abusing an intimate or neglecting a child, etc. – *is* wrongful, and is not excused because of drug use.

But conduct that is dangerous to oneself is not wrongful. The law permits sky diving, mountain climbing, white water river running, auto racing, hunting, football, skiing, and fireworks on the Fourth of July. All of those activities are so dangerous that, collectively, thousands of persons are killed and maimed in those fun-seeking, pleasurable activities. But no one proposes that they be outlawed – even on the “justification” that to do so would save “just one life.”

For effective sentencing reform, we need new paradigms, new language, new arguments, and new allies in thinking about drugs. We need a new political climate. To do this, we have to stop characterizing drug users as losers, drug addicts as dangerous, and drug dealers as poisoners of youth. We have to stop talking about zero tolerance, abstinence-only and having a drug-free America. These slogans are not policies, they are not even meaningful goals, and they undermine the necessary political environment.

A social problem! A health problem! A criminal justice problem?

Over time our ideas about drugs have been shaped, not by science, not by medicine, but by law and by prejudice. We don't think of the person using powerful pain killers after a medical procedure as a drug user. We don't think of persons who treat their chronic back pain with drugs as drug users. The characterization of uses as medical uses does not exhaust the legitimate reasons for using drugs. How did it come to pass that using drugs to “feel good” came to be an illegitimate objective? What was Jesus's purpose for making wine for a wedding? The concept of “medical” use of drugs is not spelled out in The Bible or other moral codes; it is spelled out in the Controlled Substances Act.

For a century, we have improperly defined the drug problem as one that requires a criminal justice solution. Thus our “policy experts” have been narcotics detectives, police chiefs and prosecutors, not neurologists, anesthesiologists, psychiatrists, or social workers. This no longer makes sense.

Everybody loses with retribution

Our criminal justice approach to the health and social problems of poorly controlled drug use is wrecking our economy. We fill our courts and prisons with drug offenders. Year after year, the largest category of criminal arrests is drug offenses. I am not saying we are filling our prisons with marijuana users. There are only 40,000 such persons in prison. But we have added the names of millions of marijuana users to our criminal data bases.

One out of nine American men has a felony conviction. Since 1986, we have imposed more than eight million felonies for drug distribution and possession. Tens of millions of others have other felony convictions. As a result, we have created an army of unemployable fathers and mothers. When they cannot get jobs, they cannot get credit. They cannot buy a Ford, a Chevy or a Dodge. Since the 1970s inauguration of the war on drugs, the rate of growth in new car sales has been one half the rate of growth of the adult population. In the 1970s our national prison

population was a quarter million – now it approaches 2.5 million. None of America’s millions of prisoners bought a car last year. When they get out, they can’t get a job, they can’t get a loan, they can’t afford a mortgage, and they still cannot buy a new car. See “Eleven Ways the War on Drugs is Hurting Your Business”, <http://www.business-council.org/elevenways2008print.pdf>

When every sentence is a life sentence

In our use of language, we put a period at the end of the sentence. In criminal justice it is time to put a period at the end of the sentence. With lifetime criminal records, the criminal mistakes of youth become life sentences. Programs of re-entry and rehabilitation must be accompanied by putting an end to the sentence. If we do not seal criminal records some years after a former offender has “gone straight,” then we need a legal mechanism to terminate the continuing effects of the sentence.

By bringing the criminal justice system with life long criminal records to bear on all the stupid, impulsive and thoughtless behavior of the young, symbolically, we are cutting the throat of every offender. We are killing them in the world of work. We doom them and their families to a shadow world of semi-employment and semi-poverty.

No other industrial democracy has so hobbled its workforce and impoverished its people, by so widely excluding from society so many young people. We exclude them from the world of work and consumption that drives our economy. Thus we are bleeding most businesses of sales and most investors of profits.

We need important allies for sentencing reform: investors, business leaders and organized labor

We must enlist the nation’s business leadership and investors (and almost everyone with retirement savings is an investor) to make sentencing reform and criminal justice reform politically viable. The economic consequences of our infatuation with prosecution and punishment, especially for drug offenses, include shrinking sales and revenues of almost every business. The crime that inevitably flows from prohibition raises the costs of doing business. Our criminal justice policies are shrinking the return that investors realize. College and university endowments, and employee pension funds, and John Q. Citizen’s 401(k) savings are all reduced in value, and earn fewer dividends because of our war on drugs and wrong-headed criminal justice programs.

If we want to rebuild our economy, we must bring all of our potential workers and consumers back into the workplace.

HISTORY OF DRUG SENTENCING LAWS

A. The evolving politics of drugs, crime and sentencing

When I joined the House Judiciary Committee staff in 1979, marijuana decriminalization was still a feature of congressional drug reform initiatives, having been the most prominent feature of the 1973 final report of the National Commission on Marihuana and Drug Abuse.

But drug use across the population had been growing. By 1979, there were 25 million persons who were current drug users – used in the past 30 days. It was the high point of the epidemic. One in ten high school seniors was getting stoned every day.

In May 1980, a number of parents organized the National Federation of Parents for Drug Free Youth. The national reaction to drug use was part of the conservative tide in 1980 when Ronald Reagan defeated Jimmy Carter and the Republicans took control of the U.S. Senate.

In early 1981, as part of cutting domestic spending, OMB proposed a minuscule reduction of DEA funding. Democrats attacked the Administration.

Reduction in marijuana demand, and increasing maritime interdiction of marijuana led the Colombian traffickers to expand their cocaine exports. Cocaine powder violence escalated. There were shootouts in south Florida, and the metaphor of war to describe the counter narcotics effort was re-adopted by Democrats in Congress such as Senator Joseph Biden (D-DE) and Rep. Charles Rangel (D-NY) who challenged the Administration repeatedly.

In December 1981, Congress authorized the U.S. military to assist civilian drug enforcement agencies. The meaning of the term “the war on drugs” quickly evolved from a metaphor for the urgency and importance of curtailing drug abuse, to a description of an increasingly militarized, enforcement-oriented anti-drug strategy, to ultimately become the term that encompassed both the problem and the solution. The entire phenomenon ceased being merely a public health or a criminal justice enterprise, and became “the war on drugs.”

But in nation’s capital, more than a problem of crime, and much more than a problem of public health or the tragedy of addiction and death, “the war on drugs” was an opportunity for political combat, news media coverage and advancement of ambition.

In mid-October 1982, three weeks before the election, a then-unknown Associate Attorney General, Rudy Giuliani, unveiled the first domestic spending initiative of the new Administration, an Organized Crime Drug Enforcement program that would spend about \$170 million dollars in its first year (now it is a half billion dollar per year program) and organize anti-drug enforcement efforts under local U.S. Attorney leadership.

B. Veto of the 1982 Crime Bill

In December 1982, Congress passed a crime package, a provision of which was pushed by Joe Biden that created a drug czar, but the bill was vetoed by President Reagan. House and Senate Judiciary leaders were furious and pledged that there would be no more packages of anti-crime measures to avoid the problem of losing two years of legislative work.

In 1983 and 1984, the crime and drug issues continued to be major issues. In 1983, President Reagan named Vice President George Bush a *de facto* drug czar as head of a South Florida anti-drug task force. Crime was a major issue used by the Conservative Opportunity Society, chaired by Rep. Newt Gingrich (R-GA), to attack “liberal” Democrats.

C. The politicized enactment of the Sentencing Reform Act of 1984

The elements of the Sentencing Reform Act of 1984 were developed during many years of consideration as part of comprehensive criminal code reform that dated from the early 1970s. It took major form in the 96th Congress when Senator Edward Kennedy (D-MA) was for two years the Senate Judiciary Committee Chairman, and he partnered with Rep. Robert F. Drinan (D-MA), Chair of the House Criminal Justice Subcommittee (former Dean, Boston College Law

School), to try to enact the criminal code revision. Although it was reported by the House Judiciary Committee late in 1980, it was not brought to the floor.

In 1983, President Reagan sent a Comprehensive Crime Control Act to the Congress. It included the Justice Department's wish list of new crimes and penalties. Many provisions had been features of the Criminal Code Revision effort that failed to pass the 96th Congress, including a version of the Sentencing Reform Act. The Comprehensive Crime Control was referred to four different House Judiciary Subcommittees.

But the process by which the Sentencing Reform Act was finally enacted in October 1984 was very unusual. On February 2, 1984, the Senate passed the Comprehensive Crime Control Act, notwithstanding the "no package" pledge of 1983. Senate Judiciary Committee Chairman Strom Thurmond was up for re-election in 1984, and had faced a strong challenge in 1978. He was 82-years old, and passage of a major anti-crime bill demonstrated his continued mastery of the political machinery. The Senate Judiciary leadership anticipated that much of the bill would come back to them as discrete bills. For example, the child pornography provisions of the comprehensive bill passed the House in November, 1983. In March, 1984, the Senate took up the House bill. P.L. 98-292 was signed by President Reagan in the Rose Garden on May 21, 1984.

Remember that the Democratic majority in the House of Representatives was at odds with President Reagan, the Republican Senate and the Republican minority in the House over many issues. Appropriations bills were major battlegrounds. (The principal scandal of the Reagan Administration, the illegal sale of arms to Iran to finance one side of the civil war in Nicaragua, was undertaken to evade a couple of House Appropriations bill amendments collectively called the Boland amendment.)

The Rules of the House reserve a parliamentary device to protect the minority, the privilege to offer a motion to recommit a bill with instructions, at the conclusion of debate on a bill prior to final passage. It is limited to ten minutes of debate – 5 minutes on each side. (House Rule XVI (4), 99th Cong., 1987). Such motion is essentially a privileged motion to amend the bill, unrestricted by the rule of germaneness and other rules.

In the typical 1980s scenario, near the conclusion of House consideration of an Appropriations bill, the Ranking Minority Member of the Appropriations Committee used the motion to recommit to amend the bill to reduce all the appropriations by some fraction, such as two percent. The motion was typically defeated on a party line vote, and the bill as otherwise amended was ready for a vote on final passage.

The federal fiscal year runs from October 1 to September 30. The Constitution prohibits any expenditure without an appropriation. If there is no appropriation for it, a federal agency must stop working. It cannot pay employees or contractors. It is legally out of business.

If, a few days before the end of September, any of the then thirteen Appropriations bills that fund the activities of the federal government had not cleared the House and Senate, the Congress would typically pass a specialized appropriations law called a Continuing Resolution (C.R.) to permit federal agencies which did not yet have a permanent appropriation for the new

fiscal year to temporarily continue to operate and spend until the permanent appropriation is enacted. In theory, the Continuing Resolution simply permitted spending at the same rate as the prior year for some short period.

In September 1984, with a major election a few weeks away, the Appropriations process was bogged down, and Congress needed to pass a C.R. In a politically sophisticated move orchestrated by Rep. Dan Lungren (R-CA), when it came time for the Republicans to offer their motion to recommit with instructions, instead of moving to cut spending, they moved to add the entire text of the Senate-passed Comprehensive Crime Control Act of 1984. Eighty-nine vulnerable Democratic Members of Congress, afraid that they might not have the opportunity to vote for crime legislation (then being finished by the subcommittees of the House Judiciary Committee) in time for their campaign for re-election, voted for the Republican motion to commit. The entire crime package, including the Sentencing Reform Act, passed the House after a total of ten minutes of debate.

That night the leaders of the House and Senate Judiciary Committees met in the office of Senate President Pro Tem Strom Thurmond (R-SC), under the guidance of Appropriations Subcommittee Chairs, to hash out an agreement on the Comprehensive Crime Control Act, as part of a conference report on the Continuing Resolution. Senator Joe Biden had already gone home and was participating by telephone from Wilmington. Many of the myriad issues that Democrats had with the Justice Department version of the Sentencing Reform Act were never addressed or were quickly compromised away. Staff was told to produce a final text that could be considered at 9 a.m. the next morning. In this pre-computer period, we worked all night using electric typewriters, scissors, and tape to cobble together the text of a final bill. The resolution of many of the issues in Sentencing Reform Act occurred in those few rushed hours.

D. Background to the 1986 Mandatory Minimums

The Democrats did not do well in 1984. President Reagan was overwhelmingly re-elected with 59 percent of the popular vote, and the electoral college votes of 49 states. Net, the Democrats lost fifteen House seats, but had a pick-up of two Senate seats. The Democrats were seriously embarrassed and angry.

The value of the drug issue for political advantage continued to grow. Democrats tried to use the president's avuncular demeanor to suggest that no one was in charge of the anti-drug effort.

First Lady Nancy Reagan spoke at 110 schools in 1984 about drug abuse. The first Just Say No Clubs were started by African-American school children in Oakland, CA in 1985. They were brought to the attention of First Lady Nancy Reagan by Tom Adams. The simple message for primary school children – “Just Say No” – that First Lady Nancy Reagan popularized was mocked in many quarters as insufficiently tough. But the value of the First Lady's adoption of the slogan was enormous. (By 1987 “Just Say No” was an exclusive project of Proctor and Gamble, Inc. with the First Lady now serving as Honorary Chairperson of the Just Say No Foundation.)

Even though drug use had been going down steadily according to the national surveys, the frightening news about drugs continued. Colombian drug traffickers were labeled “drug

lords,” and their organizations became the alliterative “Colombian cocaine cartels.”

HISTORY OF COCAINE: THE DRUG AND ITS MARKETS

A. Cocaine, Freebase and Crack

Cocaine is an alkaloid derived from the leaves of the coca bush. Cocaine is somewhat unstable. The amount of cocaine in coca leaves declines over time. But extracting cocaine from the leaf and converting it into a salt form creates a very stable compound that can be stored for a long time without degrading and is easily shipped. The salt, cocaine hydrochloride, is what we call powder cocaine. As is the case with all salts, it is water soluble. In water, the molecule breaks, and the cocaine base is freed. Dissolved in water, it can be injected as it was by the fictitious detective Sherlock Holmes.

Powder cocaine can easily be ground up and snorted into the nose where it dissolves in mucus and can be absorbed. But the surface area of the interior of the nose, while rich with blood vessels, is very small. Cocaine shrinks blood vessels. These two factors limit the ability to ingest cocaine by snorting it. As cocaine is snorted, it reduces the nose’s ability to absorb it.

To obtain pure alkaloid extracted from the salt requires precipitating it. An alkali like ammonia or lye is added and a precipitate forms. To separate the precipitate from the water, ether is commonly used to dissolve the precipitate. The cocaine base is then in an ether solution. The ether solution is extracted, and when the ether evaporates, cocaine base is left and can be heated in a pipe and inhaled. The key problem with this method is that ether is flammable and explosive. Smoking cigarettes or marijuana during the process (or using any kind of flame), or smoking the precipitate before the ether evaporates can create fires and explosions. This tragic outcome is most poignantly associated with comedian Richard Pryor who in June 1980 suffered burns over half his body from a freebase making explosion.

There is another way to release the alkaloid from the salt, but it does not remove the impurities that are in the powder cocaine that is used. By adding baking soda and water and heating the mixture, once dried, it can be heated in a pipe to vaporize the cocaine base at a relatively low temperature. This has come to be called “crack.” Those vapors of “freebase cocaine” or “base cocaine,” once inhaled, easily enter the blood through the lungs and then rapidly reach the brain creating an intense euphoric “rush.” The lungs have an enormous surface area and very large doses of cocaine vapor can be inhaled.

B. Abbreviated social history of cocaine use and distribution in the U.S.

In the late 19th century, cocaine was legal and widely used by itself and in patent medicines. Cocaine was widely used by middle class women for a “nervous” condition called neurasthenia, which would probably be called depression today. The problems of addiction and adverse mental effects from regular, heavy use were also well known.

Cocaine use was considered a serious drug abuse problem early in the 20th century. Increasingly this use was associated with African-Americans and vice. Even the negative use of cocaine in Coca-Cola was primarily associated with Negroes. For example, in 1903, the final report of the Committee on the Acquisition of the Drug Habit of the American Pharmaceutical Association reported that almost every Negro prostitute in Georgia was addicted to cocaine. By

1914, *The New York Times* was reporting on terror in the South from “the Negro cocaine fiends” (Feb. 8, 1914). Dr. Christopher Koch of Pennsylvania testified to Congress in March 1914 that, “Most of the attacks upon white women of the South are the direct result of a cocaine-crazed Negro brain.” The creation of this association of cocaine and Negroes was an explicit political tactic of the advocates for a federal drug law, finally enacted in 1914, the Harrison Narcotic Act.

By the early 1970s, the use of cocaine was not seen as a serious problem. But by the late 1970s, cocaine use had grown substantially. Cocaine paraphernalia, such as “spoons” used to snort cocaine, made of precious metals and worn around one’s neck, were fashion statements. Its use was associated with celebrity and great success in the worlds of entertainment, athletics, and business. Its use leads to feelings of pleasure, grandiosity, and often intense physical and mental energy. This was in marked contrast with the sensations associated with marijuana use such as relaxation, laughter, observation, conversation, and appetite stimulation. By the late 1970s, the popular culture had moved away from anti-war protest, rejection of traditional clothing and hair styles, or peace-oriented, alternative life styles. It was being replaced by the high energy values of competition and ambition.

Achieving success, being the best, being “number one,” became more important. Cocaine was a drug that was perfect for the new *Zeitgeist*. But once again, by the early 1980s, the adverse consequences of cocaine use were quickly becoming well known, and instead of being chic, cocaine use increasingly carried a stigma. An intense national cultural shift against illegal drug use of all kinds grew. Drug use rates fell dramatically from the 1979 peak. First Lady Nancy Reagan made youth drug prevention her signature issue. With her encouragement, by 1987 thousands of “Just Say No” Clubs were started in schools.

Federal and state law enforcement efforts against drug distribution, possession and use grew very dramatically.

C. Colombian traffickers shift from marijuana to cocaine

In the mid-1980s, enhanced interdiction had begun to discourage the maritime shipment of large quantities of marijuana from Colombia to the United States. Traffickers recognized enormous profit potential in shifting from marijuana to cocaine trafficking. Shipment of one thousand kilos of almost pure cocaine by twin-engine aircraft could be accomplished quickly and yield enormous profits very quickly, and at much less risk than sending slow boats packed with pungent marijuana slowly across the Caribbean.

Marijuana retail units of \$15 or 20 bags weighing an ounce or two-thirds (known in the 1960s and early 1970s as “lids”) or smaller bags of marijuana for sale for \$5 or \$10 per bag (“nickel bags” and “dime bags”) became much more scarce as enforcement and changes in supply resulted in both higher quality marijuana and higher prices. A market opportunity for illegal highs in the price range of \$5 or \$10 created an opportunity for crack distribution in vials.

D. Crack market dynamics

During the mid 1980s, the sale and use of crack cocaine grew very quickly. If a marijuana high lasted an hour or two, the high from the smoking of crack lasted on the order of 20 minutes, often followed by an unpleasant crash, solved by getting high again. An aphorism of the time explained, “Cocaine makes you feel like a new man. The first thing a new man wants to

do is get some cocaine.” Cocaine and crack use led to cycles of binging, which often meant frequent purchases of cocaine or crack during the day. If marijuana was purchased perhaps weekly, and heroin once or twice a day, crack addicts needed to make purchases repeatedly throughout the day. Thus it quickly needed and supported a large network of distributors.

In economically-hurting neighborhoods in many cities, crack use spread rapidly. A rapid growth in the retail crack supply quickly fueled a rapid growth in demand for crack. Crack was easily made and easily sold. An initial modest investment of a few hundred dollars in powder cocaine could very quickly be converted into several dozen vials of crack, which easily sold, and with the profits quickly re-invested, could yield profits of a few thousand dollars in a week of work.

E. Why crack markets became violent

But where to sell? An obvious place was where the buyers came looking – “the corner.” But sellers already established resisted new competitors coming to their locations. They responded, not with lawsuits for trespass, but with violence to drive the newcomers off the corner.

Or consider the case of an ambitious underling who wants to start working for himself and keep the profit – using his former boss’s connection and customers. The former employer responds to such ambition not with a law suit – after all, the underling did not execute a covenant not to compete – but with violence.

Illegal drug sellers had an extremely valuable inventory, and perhaps thousands of dollars of cash receipts at a busy location. Such markets were always at risk for robbery unless protected. Because legal security businesses could not be hired, crack sellers employed young men known for their propensity for violence.

Business dealings among drug trafficking criminals could not rely on the Uniform Commercial Code for resolution of conflicts or the courts for enforcement of judgments. In lieu of an enforceable judgment, an aggrieved buyer or seller could only resort to violence or the threat of violence.

By the mid-1980s, several hundred thousand drug users had become habituated users of crack cocaine. To afford their habits, they often resorted to crime. A common crime at the time was to break into parked cars for money, or for goods to sell. By 1986, the nighttime of many communities was punctuated by the sounds of automobile windows being shattered, car alarms blaring, and occasional gun fire.

HISTORY OF THE MANDATORY MINIMUMS OF 1986

A. The political environment leading to enactment of the 1986 Mandatory Minimums

At the end of the 1986 basketball season, the Boston Celtics were once again the NBA champions. The University of Maryland team had won the NIT championship. The star of the Maryland team was Len Bias, who was very well known in the Washington, DC television market. In June, Bias was signed by the Celtics. He flew to Boston for a ceremony at the Boston Garden. After the televised contract signing, Bias flew home. Late that night, celebrating his

entry into the top level of professional basketball, and having signed a multi-million dollar contract endorsing Reebok athletic shoes, he was drinking alcohol and snorting cocaine. He had a fatal seizure and died on June 19, 1986. A major uplifting news story was tragically transformed into a major story of shock, sadness and unfulfilled promise.

The nation was stunned by the tragedy. The inexplicable nature of the tragedy helped keep it in the news. Bias's death was followed on June 27 by the death of Cleveland Browns football star Don Rogers, two days before he was to be married. Rogers had been the MVP at the Rose Bowl in 1982, and the NFL Defensive Rookie of the Year in 1984. Almost immediately his death was linked to cocaine, and rumors about Bias's death were confirmed by an autopsy report on July 9 of cocaine induced seizures. How could such strong, gifted young men in the prime of health be killed so suddenly? Only by a terribly dangerous drug, said to be crack cocaine.

Congress was in recess for the Fourth of July, and Members of Congress heard directly from their constituents their concern about deadly drugs. The Speaker of the House, Thomas P. "Tip" O'Neill, Jr., was from Boston. He was in touch with his colleagues, as well as his constituents. Returning to Washington, in mid-July, he and the other House Democrats saw a political opportunity. The Democratic Steering and Policy Committee directed every House committee to develop legislation to be part of a comprehensive, Democratic-led anti-drug bill. Soon, there was the legislative equivalent of a land rush as every committee and every member sought media attention and political advantage with some amendment, provision or bill. On the floor, in hearing rooms, in the hallways, in the TV studios, almost every speech warned of the plague of crack cocaine.

In some committee hearings, the specter of crack cocaine was explicitly depicted as a problem of people of color. The traffickers were described as violent Jamaican or Dominicans. Crack was said to destroy the maternal instinct in users, and new mothers were reportedly abandoning their infants in public hospital nurseries as they left the maternity wards in search of drugs. Left unsaid was the implication that these mothers were Black women. Witnesses warned that the urban crack problem would spread to the suburbs, if it went unchecked.

The Speaker set mid-August, the start of the August recess as the deadline for the committees to report their finished legislation to the House. This was an extraordinarily short time frame, and it demanded haste.

Four days before the recess was to begin, led by Rep. Bill McCollum (R-FL), the Republican members of the Crime Subcommittee and a couple of Democrats wanted a "get tough," retribution-against-traffickers provision to contribute to the package. Instead of working with legislative counsel to develop a bill to print and to circulate to the Administration, the Judiciary, and the interested and affected public, the subcommittee members began drafting a bill around a table. There was no consultation with the Department of Justice, the Bureau of Prisons, etc. There was no comprehension of the length of the sentences on the part of the members of Congress, nor comprehension of the tiny quantities of drugs being selected to trigger the mandatory minimums. It went from concept to report by full Committee in four days. Even though the U.S. Sentencing Commission had been created less than two years before, and had not completed its work, Congress was writing new sentences.

The bill was enacted in October in time for the election. The bill was a success: the Democrats took the Senate in November.

As a tool to get drug defendants to plead guilty, the bill was also a success. However, as a tool to be used primarily against high-level traffickers, it has been a complete failure. The Department of Justice has focused overwhelmingly on low-level drug offenders, according to the U.S. Sentencing Commission, especially in the cocaine and crack cocaine prosecutions.

B. Historical parallels of 1951 and 1956 laws to 1986 mandatory minimum drug sentences

The 1986 enactment has a historical parallel to the 1950s. Post World War II was a time of tremendous economic and social change. The Army was integrated. Southern Democrats bolted their party in 1948. Anti-Black sentiment was growing as Black veterans and defense workers insisted on legal equality. It was “the McCarthy era.”

There were reports of rising heroin addiction, “particularly in black and Puerto Rican ghettos of northern cities,” according to the Federal Bureau of Narcotics (FBN). Harry J. Anslinger, the FBN Commissioner, repeatedly stated that the Communist Chinese government was trying to undermine U.S. capitalist society with a flood of heroin.

Typical of such times, political ambition led to the enactment of anti-drug mandatory minimum sentences. Congressman Hale Boggs (D-LA) was running for Governor of Louisiana in 1952, and was pushing the mandatory minimum drug law named for him enacted in 1951.

A few years later, Senator Price Daniel (D-TX) was running for Governor of Texas. Running as an anti-narcotics crusader, he led the Congress to enact the National Narcotics Act of 1956 with mandatory life sentences for heroin trafficking.

As applied, those laws were primarily enforced against low-level traffickers. Recognizing these laws failures and their injustice, after extensive debate, in 1970 Congress repealed the mandatory minimums for drug offenses when it enacted the Controlled Substances Act after extensive debate.

OVERVIEW OF CURRENT DRUG SITUATION

A. Public health situation

The death rate from the use of illegal drugs has increased more than three fold. Annual deaths from illegal drugs now exceed the deaths from firearms. We are not protecting drug users from the harms of drugs. After spending more than \$500 billion on anti-drug programs, drug users are now at greater risk of dying. We are failing in our first objective, which is to save lives.

High school students report that drugs are as easy to obtain now as high school students said they were in the early 1980s. We are not succeeding in keeping drugs away from students. Fortunately drug use rates for high school students have declined over the past 15 years or so. But this is not because teenagers have trouble getting drugs. And it is not at all clear that this is due to prevention programs. There are studies which show that some school based and some community-based programs are effective in reducing teenage drug use. But the most common prevention programs, such as D.A.R.E., have not been found to be effective when they are

carefully evaluated. The National Youth Anti-Drug Media campaign funded by ONDCP has also been found to be ineffective.

B. We are not hurting the drug trafficking organizations

The drug trafficking organizations have become more efficient. Compared with the 1970s, the 1980s and the 1990s the average purity of heroin and cocaine sold at retail is dramatically higher. The price per pure gram of heroin and cocaine is dramatically lower now than it was in the 1970s, the 1980s and the 1990s. Drug trafficking organizations are able to get better drugs to their customers and charge less.

C. The Federal prison population has mushroomed

In 1986, the federal prison population was about 36,000. Today, there are over 187,000 sentenced offenders, out of a total federal prison population that exceeds 206,000. Today, 99,577 offenders are serving drug sentences in federal prison, 52.2 percent of the federal prison population. For a half century, until the late 1970s, the federal prison population had fluctuated between 20,000 and 25,000 prisoners.

ONDCP estimates that total Federal anti-drug spending in FY 2009 will be \$21.744 billion.

We are spending more than ever, we are incarcerating more than ever, but more people are dying, and drugs are more available at better quality for less money. Mandatory minimums for drug offenses have failed to protect public health, to hurt drug trafficking organizations or to effectively guide the U.S. Department of Justice.

D. Criminal justice ineffectiveness

Drug trafficking violence in the United States has declined since the late 1980s spike. At one level, of course, this is good news. But this is not due to the effectiveness of our policies. This reduction in violence is primarily due to the maturation of the marketplace. The eager, rule-breaking new entrants of that time – either naive or overly ambitious – have been killed, instructed in the rules, prosecuted, or advanced to leadership. The market is relatively stable, and the rules of behavior for players in the drug market have largely been established. With fewer “unschooled” new entrants, the need for violence to enforce the rules is dramatically reduced

In another important sense, unfortunately, the reduced drug trafficking violence reflects the lack of effective, aggressive drug enforcement in the United States. The steady prosecution of many low-level traffickers does not disrupt the drug markets nor threaten the leadership of the drug trafficking organizations. If our law enforcement agencies were seriously threatening the hold of organized crime syndicates on the nation’s \$50-60 billion annual drug trade, isn’t it likely that they would resist, quite likely with violence?

Consider, by contrast, the drug trafficking organization violence in Mexico. That violence reflects not only turf battles among the criminal organizations, but the aggressive effort of the Calderon Administration to challenge the culture of corruption and impunity that has tolerated and enabled widespread illegality. The Mexican government is fighting their drug trafficking organizations’ entrenched power, and the criminal organizations are fighting back. Sadly, Calderon’s effort lacks the most important economic tools available, which is to take the criminal profits away by establishing legal control of the drug business.

E. The most powerful anti-crime force in the world

U.S. Federal law enforcement has the potential to be the most effective anti-crime force in the world. It has global reach. It has the ability to investigate money flows globally. It has unsurpassed surveillance and detection capacity. It is basically honest and highly trained. It can apprehend offenders, bring them to just and efficient courts, impose incapacitating punishments, and incarcerate serious offenders in secure, mostly well managed prisons.

But *U.S. Federal drug enforcement is largely an unorganized, hodge podge of unimportant activities*. In most Federal districts, the case selection is not based on strategic enforcement considerations. Federal enforcement reflects three realities that result in trivial outputs.

First, most cases arise from accidental seizures or are driven by informants. There are defendant-informants who are rewarded with sentence reductions and professional informants who are rewarded with cash payments. The low-level defendant informants rarely have the knowledge or sophistication to lead the investigation up to genuinely high levels. Professional informants are not going to risk the likely lethal retaliation from high level traffickers against them and their families if they were to actually attempt cases against “king pins.” DEA or ATF agents or some task force may formally be identified as the investigators, but except for only a handful of agents who are undercover, the agents depend upon their informants to bring them cases, and to arrange the conversations and transactions that constitute the evidence.

Second, almost every U.S. Attorney around the country takes on drug cases to advance their political ambitions. This political reality is tolerated. The overwhelming majority of cases are investigated and prosecuted *ad hoc*, not as part of a nationally organized and focused anti-drug enforcement strategy to target international suppliers. Congress should study whether it makes sense any longer to have local U.S. Attorneys, or whether they should have any decision-making role regarding Federal drug investigations. No Federal drug investigations should have only local or statewide impact unless they involve cases such as witness intimidation, political corruption, etc.

Third, for decades the Attorney General, the Secretary of the Treasury, the Director of the Office of National Drug Control Policy, and recently the Secretary of Homeland Security, have failed to exercise appropriate leadership to target the most important criminals. Federal anti-drug activity is scattershot. In most states, federal drug enforcement is unrelated to tackling the most serious national and international drug trafficking criminals. The leader of a drug trafficking organization in any town, or even major city, is an appropriate subject of a long state sentence, but not an appropriate target for the unique powers of Federal law enforcement.

This toleration for trivial enforcement is abetted by U.S. Senators and Members of Congress who want to see federal cases in their states and districts. But most states are not the appropriate venue for such cases. Only a few states are the bases of the nation’s most important drug trafficking operations. The nation has tolerated the allocation of law enforcement resources on the same pork barrel principles used for highway and water treatment funding. This is politically beneficial to Members of Congress. Sadly it also benefits the world’s more threatening criminals.

It is outrageous that most of America’s precious criminal justice resources are

squandered on neighborhood drug dealers who are violating state laws, not powerful and vicious criminals who operate on the global scale and threaten the integrity of states and bribe and assassinate government officials around the world with impunity. The leaders of the global drug distribution networks are extremely violent and dangerous criminals and they should be punished for their crimes of murder, terror, bribery, tax evasion, and so forth. The illegal distribution of drugs is the least of their crimes – it is simply the fantastically rich source of their funds.

F. International implications

The United States owes to its international partners a concerted attack on international criminals, *not* Federal drug enforcement that operates at the neighborhood level where large, well-equipped and well trained state and local law enforcement agencies already operate.

In Colombia, the level of violence is declining. But the cocaine traffickers have deeply infiltrated the government and the political process. The FARC is a cocaine trafficking-fueled criminal organization. Its right wing rivals, the AUC, are also financed by cocaine trafficking. The para-political scandal that involves a large fraction of the Colombian Congress indirectly links much of the government and the ruling party to the cocaine business. When drug corruption riddles the Congress, the Presidency, and the Cabinet, is it realistic to believe that the Colombian criminal justice system can effectively combat such criminals?

In Afghanistan, the Taliban and Al Qaeda are being funded with the proceeds of opium cultivation, opium trafficking, and heroin trafficking. The troops shooting and bombing American and allied forces are paid with illegal drug proceeds. *The Washington Post* recently exposed the utter mismanagement of the alternative economic development programs the U.S. has promoted in lieu of taking legal control of the opium economy (Rajiv Chandrasekaran, “U.S. Pursues a New Way To Rebuild in Afghanistan,” June 19, 2009, *The Washington Post*, p. A1). On the other hand, the government of Afghanistan is also completely integrated with the illegal drug trade. The brother of President Karzai, according to reliable press accounts, is in the illegal opium business.

However, once the drug economy is legally controlled, criminal organizations can be shut out, and America’s enemies will have their revenues dramatically reduced. The central government will become less corrupt and less alienated from rural farmers.

In Mexico, the combat against drug trafficking organizations and their internal conflicts resulted in 6200 murders last year. Projections for this year are for even more bloodshed. One solution to the bloodshed would be to return to power the political party that long accommodated the Mexican drug businesses. That would be utterly unsatisfactory. Only a system of legal regulation can end the power of the drug trafficking organizations.

CONTROL OF DRUGS: REGULATE, TAX AND CONTROL

Drug “legalization” is a control mechanism that must be included in any review of criminal justice policy

The connection between illegal drugs and crime has devastated our communities. This fact has been simultaneously talked about *ad nauseam*, and ignored scrupulously, for forty years. The latest reflection of this absurd duality was revealed in the wise and thoughtful remarks of ONCDP Director Gil Kerlikowske who endorses and encourages drug treatment in the context of

criminal justice diversion programs, such as drug courts, and almost simultaneously says that the word “legalization” is not in his vocabulary.

Drug “legalization” is the establishment of legal control over the cultivation, manufacture, distribution and use of drugs. It means using the full range of public and private legal controls: regulation, licensing, and taxation by public authorities; and insurance, professional responsibility, product liability, informed consent and the numerous controls of civil law.

Opponents of “legalization” suggest such a regime is the absence of any controls. This is view is ignorant, malicious, or at best unimaginative. In fact, the current system of prohibition has been the abdication and absence of controls on the multi-billion dollar drug market, and the abdication of protection of tens of millions of drug consumers. In one of the great legal oxymorons of our times, we call drugs “controlled substances” when they are the most uncontrolled products in the economy and the society. The goal of legalization is control.

There are two vitally important adjuncts to “drug legalization” and control. First, we need nearly universal health care. Millions of people need mental health care and don’t get it. Many drug users and drug addicts are self-medicating themselves with illegal drugs because they do not get the mental health treatment they need, nor the proper prescription medication. People with untreated mental health problems are at much greater risk of having severe drug abuse problems. In addition, we need expanded health care to make quality drug treatment more available to drug users who want it. Currently, the treatment waiting lists deter addicts from seeking treatment. The criminal justice system cannot be and must not be the primary mechanism for making drug treatment available to most Americans.

Second, we need to reinvigorate drug prevention in our culture. Current programs are ineffective. Messages of exaggerated harm designed to conform to prohibition ideology are false and do not work. “Abstinence only” as the sole goal of prevention programs is not a credible objective for the target audiences. Tobacco prevention programs have been effective without jailing smokers, or cigarette sellers. Yet the promotion of cigarette and alcohol use to the young serves to encourage all manner of drug use. Associating cigarette and alcohol use with status, glamour, sexiness, maturity, wealth and good times carries over to the now illicit drugs as well. Our current legal-illegal dichotomy undermines the coherence of drug education.

Society is strengthened when its citizens learn self-control regarding all the temptations that confront them – overeating, inactivity, unprotected promiscuous sex, as well as drugs and alcohol. It is absurd to think that the threat of criminal prosecution should be a major component of the process of learning self-control in these health matters.

Here are some thumbnail descriptions of what drug “legalization” schemes might look like for different drugs:

Marijuana. In a very limited legalization approach, marijuana cultivation could be licensed in a manner similar to the issuance of hunting licences. Hunting is a moderately dangerous sport – probably much more dangerous than growing marijuana. One easily obtains a license to hunt, often at a sporting goods store, after taking a short firearms safety course. One promises to comply with a variety of regulations that are designed to protect the environment

and public safety and that limit the amount of game that can be taken. A common limitation is that one cannot use the ordinary hunting license to go into the business of selling venison, rabbit, goose, duck and other game.

The marijuana license could be sold at plant stores or gardening centers. Licensees would pledge to comply with regulations to protect the environment and public safety. A licensee would promise to not sell marijuana, and especially not to distribute it to minors, although it could be given away or bartered. Growing sites could be inspected, as is game taken by hunters. See www.pro-control.org for an example of a Federal license. Such an approach to legalization avoids the commercialization, advertising and promotion of consumption that we see with beer, wine, spirits and tobacco.

Of course, the public may prefer also have a commercial regulation regime the resembles the alcohol control regimes in many states which generate billions of dollars in tax revenues. Such taxes can be used as tools to help control consumption, although taxation levels must be calibrated to minimize a bootleg market of untaxed cannabis.

Public premises could be licensed for on-site consumption like taverns, and subject to regulation regarding proximity to schools, hours of operation, signage, noise, traffic, and revenue collection.

Heroin. In any event, heroin would be regulated completely differently. A primary goal is to minimize the recruitment of new users. Under prohibition, recruitment of new users is a highly profitable feature of the criminal heroin market. From a public safety and public health perspective, heroin users should be brought into a regime of legal distribution available only to addicts and established users. The principle would be *addiction management*. A second goal is to assure that addicts do not become “dope sick” so that they can focus on the rest of life, not the hustle to raise money and find drugs. This would be a primary benefit to the public by eliminating the commission of most crimes by addicts seeking money to buy their heroin, overpriced by prohibition. Addiction management agencies, staffed by addiction management specialists and addiction management counselors will help heroin users leave the life of crime and disease. An addiction management counselor would help users with their emotional problems, obtaining housing and accessing health care. An addiction management physician would be authorized to prescribe heroin and other narcotics.

The heroin could be available from special clinics or pharmacies. The heroin could be packaged in pre-loaded syringes, each with a serial number. Dosage would be individually adjusted. Used syringes would have to be returned. Used syringes would be periodically DNA-tested to assure that they had not been exchanged or shared. Violations of the distribution regime would result in various sanctions to restore compliance. The goal of the sanctions would not be to throw the maintained addict out of the program, but to encourage compliance.

Another major goal is to stop the spread of disease. Providing pre-loaded syringes eliminates the need to share syringes. The experience of heroin maintenance therapy in Switzerland is that this approach will reduce disease, crime, homelessness, and improve the social relationships of the drug user.

Perhaps most importantly, if replicated globally, such a legal system of heroin

distribution would starve the world's criminal organizations of heroin revenues

Psychedelic and club drugs. These drugs are a smaller part of the illegal drug economy. They are much less tied to street crime and drug cartel crime than heroin and marijuana are. There is a concern about the power of these drugs to change personality or to cause long term psychological damage. But there is widespread, relatively safe use of such drugs. Initial use of these drugs by adults could be regulated and supervised by licensed guides. We license professionals to teach and conduct parachute jumps, mountain climbs, white water river running, and other risky activities. Persons experienced in the use of these drugs could be licensed to supervise and guide curious adults in their initial use. Such professionals would be licensed by the state and trained by professional accrediting organizations so supervise this kind of drug use. They would be required to be insured against malpractice or negligence. Users would be screened, trained and required to be warned of the risks and make knowing consent of the risks. Upon sufficient experience, users could be authorized to use these drugs solo.

Obviously different drugs should be used differently and regulated differently. Some drugs may not be amenable to these kinds of regulations. At this time, I do not have a plan for the legalization of crack and methamphetamine. Stimulant use seems to be harder to manage. There are many reports of persons who are able to control their use of such stimulants. Perhaps a hybrid type of regulation could be developed to provide cocaine and methamphetamine to users who demonstrate they do not have problems, and another kind of addiction management regime for those who are at risk of having problems in the stimulant use or addiction.

But even in the absence of a regulatory plan, we must squarely face the costs of prohibition, and the ways in which prohibition aggravates the harms to drug users of the harmful drugs they use. In the context of sentencing and the criminal justice system, we must strive to reduce the factors that increase instances of violence, theft, assault, bribery, assassination, corruption. As a matter of national security, we must manage the economic factors that currently are enriching our enemies and killing our service personnel. It may be that even if cocaine and methamphetamine addicts find their lives hard to control and miserable, society is better off providing them will legal, safer sources of those drugs in order to fight crime and terrorism.

CONCLUSION

If we rely exclusively on criminal sentences to control drug use, drug abuse, drug distribution and drug production, then our police, our courts and our prisons will be overwhelmed with drug cases, and drug-related cases, and many of our neighborhoods will be depopulated.

Drug use, *per se*, is not wrongdoing and does not deserve punishment. Punishment is an appropriate response to wrongdoing. Punishment for conduct that does not deserve punishment undermines the deterrent and justice value of punishment for wrongful conduct.

Congress needs to narrow and refocus Federal criminal justice resources on the limited areas in which Federal authority is uniquely applicable and Federal power is uniquely capable. And when there is wrongdoing, Congress needs to let judges decide how much punishment is appropriate.

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