

# Drug Policy: A Challenge of Values

Eric E. Sterling

**SUMMARY.** This paper argues that the war on drugs is based on retributive values that are illogical, burden the criminal justice system, and are ineffective in reducing drug-related harm. It examines the relation between political agendas and anti-drug legislation. It demonstrates that anti-drug policy has resulted in dramatically increased punishment and incarceration since 1970, after four decades at a level rate, especially for blacks. This paper contends that segregation was a form of nonjudicial punishment for blacks until 1970, and concludes that the war on drugs has become a punishment substitute for segregation. It argues that drug prohibition must be replaced by regulation and that devising such a system involves a complex balance of competing values. [Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2004 by The Haworth Press, Inc. All rights reserved.]

**KEYWORD.** Drug policy, politics, punishment, race discrimination, restorative justice, segregation, war on drugs

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Eric E. Sterling, JD, is President, Criminal Justice Policy Foundation, 8730 Georgia Avenue, Suite 400, Silver Spring, MD 20910-3649 (E-mail: [esterling@cjpf.org](mailto:esterling@cjpf.org)).

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*Humanitarianism consists in never sacrificing a human being to a purpose.*

–Albert Schweitzer (1875-1965), 1923  
Laureate  
Nobel Peace Prize, 1952

In 1973, Blumstein and Cohen proposed a theory of the stability of punishment. They analyzed Durkheim's thesis that crime is a "normal" attribute of healthy societies and helps to maintain social solidarity because it contributes to the "collective conscience" or "the totality of beliefs and sentiments common to average citizens of the same society." Some read Durkheim and Kai Erickson to suggest that the level of crime "will rarely fall short of or exceed the relevant optimum." Blumstein and Cohen reexamined this premise to suggest that it is not crime so much as deviance that is punished, and that it is a constancy of punishment of deviance that exists. A key element of their hypothesis is that "if behavior were to become less deviant . . . then society would respond . . . by redefining previously minor infractions as crimes, and punishing these."

This paper argues that since the seventeenth century, to be black was to be deviant in the American "collective conscience" (Higginbotham, 1996; Kennedy, 1997, pp. 29-167), and that status has been punished through slavery, through segregation, and now through the criminal justice system, especially by means of the "war on drugs."

This thesis is important for understanding the consequences of involvement of drug control in the criminal justice system, and for understanding the relevance of drug policy reform to the reforms of restorative justice.

This paper weaves two twentieth-century phenomena. "The problem of the twentieth century is the problem of the color line," said W. E. B. DuBois famously, as Judge Higginbotham notes (1996, p. xxiv), and drug prohibition.

### ***DRUG POLICY AND THE CRIMINAL JUSTICE SYSTEM***

The idea of drug use and drug trafficking has generated fear throughout American society for more than a century (Musto, 1999). A statement attributed to Timothy Leary may be apocryphal but makes the

point: “LSD (or marijuana, in some versions) is such a powerful drug, it has generated paranoia in persons who have never used it.”

In fact, drug use and drug trafficking generate many problems (Kleiman, 1992; Ray & Ksir, 1999; Goode, 1999). MacCoun and Reuter (2001) have compiled a forty-eight-item taxonomy of drug-related harms, including seventeen criminal justice harms such as increased costs, corruption of legal authorities, court congestion and delay, stigma of criminal or prison record, etc. Other harms include overdoses by users, crimes by users to get money to buy drugs, violence and corruption by the traffickers, money laundering, dysfunction in the workplace and schools by users, etc. They note that harms are distributed to users, their intimates, their employers, to neighborhoods and to society at large, as well as to dealers (pp. 106-108).

Manski, Pepper and Petrie (2001) succinctly set forth the American approach to drug control:

As traditionally conceptualized, the two prongs of drug control policy are supply reduction and demand reduction. Supply reduction is usually understood to be synonymous with enforcement of drug law prohibitions and international interdiction activities, whereas demand reduction is usually thought to encompass clinical treatment of drug abuse and addiction as well as the spectrum of activities aiming to prevent youths from using drugs (e.g., media campaigns, school-based education programs). This conceptualization is imperfect for two reasons. First, a large component of drug law enforcement focuses directly on reducing demand (e.g., apprehending and punishing users for possessing drugs). Second, the standard menu of demand-reduction activities tends to overlook (or take as given) the rich fabric of deeply ingrained social controls against illicit drug use, including legal controls. (p. 187)

Moore (2001, pp. 38-39) distinguishes four types of prevention: (1) social policies to change the environmental conditions fostering drug use (i.e., reducing poverty and racial discrimination, increasing employment, improving care of children); (2) changing the milieu of experimental users (i.e., providing after school activities, changing the views about drug use by teen subcultures); (3) supply reduction efforts to make it harder, more expensive and more dangerous to access drugs; and (4) policies to reduce the harm associated with a given level of drug use.

But Moore (2001, p. 19) argues that preventive effects of drug enforcement may be more effective and important in reducing drug use than the usually understood prevention programs.

Indeed, American society has overwhelmingly relied upon enforcement through the criminal justice system to prevent the problems caused by, associated with, and imagined to be caused by drug use as measured by dollar expenditures, personnel commitments, and persons affected (White House, 2002a, 2002b). Our approach has been ineffective in reducing drug use, saving lives, reducing crime, or hindering drug traffickers. One must ask what other purposes this failed policy serves. This paper argues that the policy not only serves the careers of politicians, but also carries forward the advantages of white privilege that existed in law before 1970 by invidiously punishing people of color (Lusane, 1991, pp. 25-53).

### ***RETRIBUTION AGAINST USERS***

Use of the criminal justice system to stop drug users is even more of a retribution-based system than the usual model. The typical sense of retribution in criminal justice is that punishment is inflicted against the perpetrator for an act that hurts an innocent person. In the “just desserts model,” if you hurt someone, you deserve to be hurt in turn. In the deterrence model, if you don’t want to be hurt, don’t hurt someone else.

But no individual, in the prosecution of a typical drug offense, is ever identified as having been hurt. It is axiomatic that the drug user is preying on society—committing crimes, taking welfare, not paying taxes, ignoring the welfare of his children, driving stoned. This presumption underlies the retributive approach.

It is also axiomatic that the drug user (and, therefore, a criminal possessor of the drug) is hurt physically, mentally, emotionally and morally by the drug use. This presumption underlies an application of the restorative justice model to drug offenses.

In the popular and scientific worlds alike, “addiction is a disease” (Lindesmith, 1965). This is an article of faith among persons in recovery, educated in the precepts of the Twelve-Step programs of Narcotics Anonymous (Narcotics Anonymous, 1987, p. 3). This concept, as in “alcoholism is a disease,” was originally developed by Dr. Benjamin Rush in 1784 (Sullum, 2003, pp. 72-74) and adopted by Alcoholics Anonymous as a metaphor for the loss of control. There are numerous

drug-related dependency disorders for which there is a description in the *Diagnostic and Statistical Manual of Disorders (DSM-IV)* of the American Psychiatric Association. In marking the twenty-fifth anniversary of the National Institute on Drug Abuse (NIDA), Director Alan Leshner wrote, “Over the last quarter century, biological and behavioral research conducted by NIDA’s intramural and extramural scientists has clearly shown that drug abuse is a preventable behavior and drug addiction is a treatable brain disease” (Leshner, 1999). One might reasonably conclude that a drug user needs treatment, not criminal prosecution.

All drug users are universally presumed to be harmed by their drug use and to be hurting others. First-time drug offenders are almost invariably considered candidates for treatment to rehabilitate them from the harms they suffer from their drug use, and to prevent further (if unspecified) harm to society. If they resist treatment or fail to complete the course of treatment as ordered by a court, then they are punished.

Repeat offenders are presumed to be the most harmed by drug use and to inflict the most harm on society. They are thus usually punished more severely for having failed prior courses of treatment or punishment (i.e., evidence of a more serious affliction with the disease).

Punishing the ill is inhumane; punishing the more seriously ill is barbaric. The punishment, always a loss of freedom and usually a term of imprisonment, compounds the hurt. Imprisonment, with an enormous psychological and social price, with heightened risk of exposure to infectious diseases, and exposure to inmate-on-inmate violence, usually exceeds the actual hurt caused by the illegal drug that is the occasion for the prosecution (Human Rights Watch, 1993; Forer, 1994, pp. 73-95).

Lost in the zeal of drug enforcement and the assembly line of the courts is the reality that drug users are ordinary citizens. Roughly three-quarters of current illegal drug users are employed full time or part time. While “alcoholism alone accounts for 500 million lost work-days each year” (White House, 2000a, p. 47), a typical consequence of a drug arrest and conviction is the loss of employment altogether.

In the course of prosecuting a drug possession offense, the prosecution, the court, the media, and even the defense counsel, presume the existence of harms inflicted by this drug user upon others. But the indictment never alleges these harms. Direct and indirect punishment that adds to the hurt experienced by the drug user is usually imposed without any evidence that the conduct being punished actually harmed anyone.

The hollowness of this presumption is revealed by the fact that there is almost never any effort to seek restitution for those who are presumed to have been harmed. In general, the retribution of drug possession prosecutions is disconnected from any infliction of harm to others by the defendant. Manski, Pepper and Petrie (2001) observe, "Sanctions against drug use are a preeminent feature of policy on illegal drugs, yet very little is known about the actual effects of these sanctions on drug use (independent of the effects of other social controls)" (2001, p. 188). However, there is a movement to provide the public the opportunity to sue participants in the drug market civilly under a model Drug Dealer Liability Act already adopted by fourteen states <<http://www.modelddla.com/>> (accessed Feb. 3, 2003).

The concept of restorative justice is a major reform of the misplaced focus on crime as an offense against the state in the offender-oriented retributive model of criminal justice. Following the impulse to heal the injured and society, a program or system of restorative justice sees the presumably injured drug offender and responds with treatment. In the simple restorative model, the justice system will be required to provide drug treatment instead of traditional punishment. The reduced loss of freedom and collateral consequences of arrest and conviction are accepted by reformers as a small price for the drug user offender to pay for such a humanizing improvement upon the retributive system. Vaillant (2001) argues that a combination of coercion and care can be effective in treating opiate addiction, following the careers of several cohorts of New York City heroin addicts. He notes that coercion does not simply mean criminal justice system control. The coercion can be voluntary, such as maintaining abstinence in order to remain employed while participating in an employee assistance program. A carrot and stick approach, not found in either the criminal justice or medical model, may be most successful.

Our drug policy is the antithesis of a restorative policy. Under the war on drugs, the death rate from illegal drug use has more than doubled in the past two decades. In 1979, 7,101 people died from drug abuse. In 1998, 20,227 people died from drug abuse. Proportionately, very few of them were minors. The drug-related death rate in 1979 was 3.2 per 100,000. In 1998, the death rate was 7.5 per 100,000 (White House, 2002a, table 20, p. 71). In the last decade the incidence of persons reporting drug use when being treated at hospital emergency departments has increased more than 60%, from 371,000 in 1990 to 602,000 in 2000 (White House, 2002a, table 21, p. 72), suggesting that drugs are more

potent, more frequently contaminated with poisons, or that prevalence is increasing.

During the 1990s, high school seniors reported that they perceived illegal drugs to be more available to them than their predecessors had reported. By 1998 the perception of easy availability reached unprecedented rates: 35.6 percent of the high school class of 1998 reported that heroin was “fairly easy” or “very easy to get,” more than any year since 1975 when the survey began; 90.4 percent of the high school class of 1998 reported that marijuana was “fairly easy” or “very easy to get,” more than any year since 1975. Since then there has been a decline in perceived easy availability—down to 29.0 percent for heroin and to 87.2 percent for marijuana reported by the class of 2001 (Johnston, O’Malley, & Bachman, 2002, table 13).

Despite the avowal of Gen. Barry McCaffrey that the Federal anti-drug program was expanding drug treatment capacity, the number of persons needing drug abuse treatment has not significantly declined (White House, 2001, table 42, p. 169).

Drug use by persons who commit crimes against persons or property is widespread. The Arrestee Drug Abuse Monitoring program (ADAM) reports for cities around the country a great range of positive urine samples for persons arrested for a variety of offenses. In most jurisdictions in 1997, for example, one-quarter to one-third of violent offenders tested positive for cocaine and one-quarter to one-half tested positive for marijuana. For property crime, there was a great deal of variation between cities in the percentage of arrestees with positive urinalyses for cocaine or marijuana—between twenty and sixty percent (ADAM, 1998).

Those who commit crimes against others must be differentiated from those who are convicted of only violating the controlled substances laws. Predatory offenders deserve an appropriate punishment and society should intervene to reduce the likelihood of re-offending. Given that many predatory offenders are not merely users of illegal drugs and alcohol but are highly dependent, one such intervention is in-prison drug treatment. Pellissier, Rhodes, Saylor, Gaes, Camp, Vanyur, and Wallace (2000) found that there were serious methodological problems in many of the evaluations of in-prison drug treatment programs, which generally claimed lower rates of recidivism. However, they found for the Federal Bureau of Prisons program that both male and female former prisoners, who had completed the BOP program, were somewhat less likely to be rearrested or to use drugs after three years, compared to those who did not participate in the program.

### **RETRIBUTION AGAINST TRAFFICKERS**

The drug user has a mixed image: sympathetically a person with the disease of addiction, and unsympathetically a thoughtless neglecter of one's family or a predatory thief for money to buy drugs, etc. In contrast, with terrorists and child molesters, drug traffickers are an archetype of the menacing offender, e.g., the mythical school-yard drug pusher, hurting everyone and society at large. But the prosecution rarely offers evidence that any individual has been hurt by the acts of trafficking committed by the accused. (At a trial, or arguing against a reduction in bail, the prosecutor invariably refers to the horrible consequences to society of drug use and the drug trade, even though no facts on this point are entered into evidence.)

### **CRIMINAL JUSTICE SYSTEM PROBLEMS**

American drug policy is a paradigmatically retributive policy. On September 1, 1973, new anti-drug laws took effect in New York State. These laws required mandatory minimum prison terms for persons convicted of selling drugs, even though Congress repealed the federal mandatory minimum sentences in the Controlled Substances Act of 1970 (P.L. 91-513, Oct. 27, 1970). The possession of one ounce, or the sale of two ounces, of heroin or cocaine, for example, now results in a prison sentence of at least fifteen years, with a maximum of life imprisonment. Parole from such sentence now results in lifetime supervision, unlike the termination of parole supervision of murder or lesser crimes, as soon as five years after release. For smaller quantities, or other drugs, there is a mandatory minimum of six years (Joint Committee on New York Drug Law Evaluation, 1977). Governor Nelson Rockefeller crusaded for these laws, in part to rebut the perception of him as a liberal—a great obstacle to winning the Republican presidential nomination (Epstein, 1990, p. 38). According to Szasz (1974), *The New York Times* (Feb. 12, 1973) quoted Gov. Rockefeller, “We, the citizens, are imprisoned by [drug] pushers. I want to put the pushers in prison so we can come out.” At the end of 2002, an organization, Dads and Mad Moms Against Drug Dealers, was petitioning New York State legislators to toughen the Rockefeller drug laws, calling drug traffickers “parasites” <[www.dammadd.org/Petition.pdf](http://www.dammadd.org/Petition.pdf)>.

Once a society accepts that some of its members are “parasites” there is no limit to the ostracism and punishment that can be justified. In

1986, without hearings, the Congress raised the maximum penalty for violating the federal Controlled Substances Act of 1970 from 20 years to life imprisonment (P.L. 99-570, sec. 1002).

Characterized as vermin, drug traffickers are worthy of extermination. On Sept. 25, 1996, Speaker of the U.S. House of Representatives Newt Gingrich (R-GA) introduced a bill, the Drug Importer Death Penalty Act of 1996, to impose the death penalty on a person who imported more than 100 doses of an illegal drug (for marijuana less than three ounces) after a conviction for drug importation (H.R. 4170, 105th Cong.). "If you sell it, we're going to kill you," he said (Abrams, 1997).

The American criminal justice system is now bedeviled by problems that flow from this system of controlling drugs. In the past twenty-five years there has been a diminution in the amount of due process afforded to an accused drug offender (Wisotsky, 1990, pp. 117-126).

Criminal court dockets are crowded with far more cases than can be properly and thoughtfully accommodated. The number of criminal cases filed per federal judge was substantially higher in the late 1990s compared to the early 1980s for 63 out of 91 districts. In 11 districts there was a decline, and in 17 districts, little change (Pastore & Maguire, 2000, table 1.69, pp. 64-66).

Prison overcrowding is aggravated by drug prohibition prosecutions. From 1974 to 1984, drug offenders made up between 25% to 30% of the federal prison population. From 1992 to the present, drug offenders have made up between 58% to 60% of the federal prison population. The total federal prison population grew from 23,566 in 1973 to 100,639 in 1997 (Pastore & Maguire, 2000, table 6.48, p. 519). The federal prison population at the beginning of 2003 is approximately 165,000 (Johnson, 2003).

About one-third of Americans believe police brutality occurs in their area according to a 1999 Gallup poll ([www.gallup.com](http://www.gallup.com)). Some of the public impression about police conduct is created by the depiction of the violence characteristic of drug raids and arrest. The execution of such raids is now a cliché of television news on the Fox television network and its syndicated program COPS. News media accompaniment of police raids was commonplace prior to 1999 (*Wilson v. Layne*, 526 U.S. 903, 1999). The door is battered down by screaming police assault teams that charge into the home terrorizing the suspects and their families, as the police ransack the premises to find guns, cash, and drugs (Skolnick & Fyfe, 1993, pp. 16, 108). Chermak (1994, p. 105) notes that some television reporters believe depictions of police drug raids have a deterrent effect on drug use.

Undercover narcotics enforcement requires the police and their informants to establish false identities and to lie to the citizenry, including the suspects. The questionable morality of such dishonesty undertaken by the state, and its consequences, were examined by Marx (1988). Such investigations often permit drug trafficking to be carried on as evidence is gathered and suspects are identified, undermining respect for the law (Marx, 1988, p. 97). A consequence of such professional deception is that even lying under oath is seen as permissible. Perjury by police officers in the enforcement of drug cases is endemic. Officers lie in their warrant applications, in their reports, in their debriefings to supervisors and prosecutors, and in their testimony (Gray, 2001, pp. 75, 111-112; Skonick & Fyfe, 1993, p. 35). Perjured testimony was commonplace in New York City, and known among the police as “testilying” (Sexton, 1994).

Racial discrimination in the justice system is exacerbated in drug enforcement. African-Americans, Africans, and Hispanics are stopped and searched at rates that exceed the rates at which white persons are stopped and searched in the hunt for drug offenders. Using race as a key factor in the decision to stop is known as racial profiling. Harris (2002) has found that racial profiling of people of color continues inexorably even though a number of studies show people of color are less likely to be carrying drugs (or weapons) than whites. Examining the hit rate in New Jersey, for example, the percentage of whites searched who have drugs is almost twice as high as the percentage of blacks (and five times the percentage of Hispanics) who have drugs (Harris, 2002, p. 80). The waste of law enforcement resources and labor, and the ineffectiveness of racial profiling, suggest that it endures to serve objectives unrelated to the detection of crime and the prosecution of offenders. One consequence of excessive focus on the interdiction of people of color is racial disparity in prosecution and punishment (Human Rights Watch, 2000).

### ***THE EXTENT OF THE DRUG PHENOMENON IN THE CRIMINAL JUSTICE SYSTEM***

One common characteristic of criminal offenders in the U.S. is that they are illegal drug users. Urinalysis of persons arrested for money-seeking street crime in major cities around the nation reveals evidence of recent use of illegal drugs at rates in the range of 51% to 80% of the arrestees (Taylor, Fitzgerald, Hunt, Reardon, & Brownstein, 2001). The general consensus of the research is that the career of of-

fending preceded the career of illegal drug use (Chaiken & Chaiken, 1990). But illegal drug use is often an aspect of outlaw lifestyle and anti-social behavior (Faupel, 1991; Hanson, Beschner, Walters, & Bovellet, 1985).

One common characteristic of criminal justice agencies in the U.S. is the extensive focus on possession and distribution of illegal drugs. Nationwide, the category, drug offenses, is the largest of any crime reported in the annual reports of the nation's arrests (known as the Uniform Crime Reports) with 1,579,566 persons arrested in 2000. There are twice as many drug arrests in a year as there are arrests for all crimes of violence (FBI, 2001, p. 216). In 1994, 31.9 percent of new prison admissions were for drug offenses, more than for property offenses (31.3%) or violent crime (18.4%) (Maguire & Pastore, 1998, table 5.49, p. 424). Since 1992, drug offenders have comprised between 58% and 60% of the Federal prison population (Pastore & Maguire, 2000, table 6.48, p. 519).

The prohibited drug trade is a retail business with revenues of more than \$60 billion annually (White House, 2002a, p. 57). This revenue is equal to the 13th largest corporation in the country, and greater than the 2001 revenues of AT&T, Boeing, or Bank of America (Fortune, 2002). The industry employs hundreds of thousands of persons. Over 300,000 persons were arrested for the prohibited manufacturing or trafficking in 2000 (FBI, 2001), a typical recent number, without any diminution in the supply of drugs, and without any increase in the retail price of drugs.

The prohibited drug trade creates and adds to disorder in low-income neighborhoods throughout the nation. Illegal drugs are very expensive (White House, 2002a, p. 81). Compulsive drug users operate in a cycle of expensive drug use and crime to pay for the drugs (Faupel, 1991).

### ***CONSEQUENCES OF PHILOSOPHY OF RETRIBUTION TOWARD DRUG USERS***

Some fourteen million Americans in 2000 used illegal drugs (including inhalants such as gasoline); 7.2 million were 26 years old, or older, 4.6 million were 18 to 25, and 2.3 million were 12 to 17 years old. Three-quarters of the illegal drug users use marijuana, and 59% of illegal drug users use marijuana exclusively (SAMHSA, 2001, p. 13). The adult marijuana users live apparently normal lives (Zimmer & Morgan, 1997). These persons consider their use of marijuana and other drugs to be beneficial and pleasant (Gottlieb, 1987). For them, the physical or

medical risks of injury are comparable to the risks of many other normal activities. American drug policy does not acknowledge any of the users' perceived benefits from using illegal drugs (White House, 2002a; Sterling, 1997a).

If traffickers can be characterized as parasites to be eradicated, how much more benign is the view of drug users? Since the early 1980s, DEA Administrators, for example, have advised Congress that America cannot "arrest its way out of the drug problem." The alternative is demand reduction. But this is not an innocent reframing of the problem as prevention, social reform, or education. Demand reduction has meant, in reality, solving the problem of the continued existence of drug users mainly through harsh punishment of them and their families. Miller (1996) draws a strong parallel between the labeling of the Jews in Germany as a social problem in the 1930s and their ever-increasing ostracism and exclusion from the economy and society, and the increasing social isolation of drug users in the United States by means of ever more elaborate legal sanctions.

In the late 1980s, Congress' anti-drug laws were designed to achieve a solution to the problem of drug users. The Anti-Drug Abuse Act of 1988 provided that any individual convicted for a Federal or state drug offense was to be ineligible for most Federal benefits (P.L. 100-690, sec. 5301). The Act also stated, "It is the declared policy of the United States Government to create a Drug-Free America by 1995," (P.L. 100-690, sec. 5251(b)). For responsible drug users, such language faintly echoes of a "final solution."

Recently, the U.S. Supreme Court upheld a provision of the Anti-Drug Abuse Act of 1988 (sec. 5101) permitting the eviction from public housing of the families of drug users (*Dep't. of Housing and Urban Development v. Rucker*, 535 U.S. 125; 122 S. Ct. 1230; 152 L. Ed. 2d 258; 2002 U.S. LEXIS 2144; 2002). Drug users, indeed persons suspected of using drugs, can be barred from visiting their parents if they live in a public housing project. The Supreme Court of Virginia concluded a man who had been ordered not to enter a public housing project could not be convicted of trespass for violating a public housing anti-drug ordinance when bringing diapers to his child because the ban upon entering formerly public street (turned over to the public housing agency to control nonresident entry) was so broad it violated First Amendment rights to expression in public places (*Commonwealth v. Hicks*, 264 Va. 48; 563 S. E. 2d 674; Va. 2002). However, the conviction was reinstated and the anti-drug ordinance was unanimously upheld by the U.S.

Supreme Court (*Virginia v. Hicks*, 539 U.S.—; 123 S. Ct. 219; 156 L. Ed. 2d 148; 2003 U.S. LEXIS 4782; 2003)

Congress permanently denied welfare (Temporary Assistance to Needy Families, or TANF) and food stamps to families when a parent has a felony drug conviction (although a state legislature may vote to opt out a state from such a denial) (P.L. 104-193, sec. 115; 42 U.S.C. 862a; August 22, 1996). And Congress denied Federal student loan aid to students with any drug convictions, even summary possession citations (P.L. 105-244, sec. 483(f); 20 U.S.C. 1091(r); October 7, 1998). None of these sanctions are applied to convicted murderers, rapists or child molesters.

A noncitizen convicted of any drug offense or regulation (other than one involving less than 30 grams of marijuana) must be barred from entry into the United States or deported from the United States, no matter when the offense took place (8 U.S.C. 1227(a)(2)(B)).

The right to vote upon a felony conviction is lost in most states. This penalty has spread through the population with the dramatic rise in drug prosecutions (Fellner & Mauer, 1998).

In drug policy, the retribution paradigm is blindly followed, even when lethal to thousands of persons. The Centers for Disease Control, the Public Health Service, the National Academy of Sciences, and the American Public Health Association have called for the distribution of sterile syringes to injection drug users to prevent the deadly spread of HIV and hepatitis (Normand, Vlahov, & Moses, 1995). But in order to avoid “sending the wrong message to youth” about drugs, the White House and the Congress refuse to fund such public health interventions (White House, 2001, pp. 56, 73). This intervention optimally would prevent 14,000 new HIV infections annually (Day, 2002, p. 11).

### ***THE RETRIBUTIVE RATIONALE FOR DRUG ENFORCEMENT***

The retributive rationale for drug enforcement rests upon a logical and moral contradiction. Drug use must be prohibited because its use leads to involuntary use and the loss to addiction of a person’s freedom. But a person who obtains and uses drugs—whether experimentally, to get “high” or even to maintain his addiction—is found to have sufficient voluntary intent to have broken the law, and thus should be deprived of his freedom and jailed. If he doesn’t give up his illegal drug use, he should either be forced to submit to treatment or submit to imprison-

ment so that he won't use drugs, which take away his freedom to make rational choices.

Drug users are presumed to be incapable of free choice, and thus are not entitled to be treated as adults. This coercion is for their own good, and the good of society—even if it cannot be shown that the particular drug user is actually harming himself; even if it cannot be shown that the particular drug user is actually harming society; even if it *can* be shown that the prohibition policy is causing significant harms to society.

The social and political desire to stigmatize illegal drug users extends to the stigmatization of seriously ill medical patients who use marijuana with their physicians' knowledge and recommendation. The government insists that there is no medical benefit that can be found in marijuana (White House, 2001, p. 56). But there is significant medical value in the constituent chemicals of marijuana (Joy, Watson, & Benson, 1999). In 1999, the Institute of Medicine of the National Academy of Sciences concluded that there was no alternative to smoking cannabis for some persons with pain or AIDS wasting (Joy, Watson, & Benson, 1999, pp. 8, 179). Dale Gieringer estimates that there are now 30,000 patients using cannabis pursuant to their physician's recommendation in California (Haleakala Times, 2002).

Public understanding of drug users as suffering from a treatable disease has been growing. In 2000, Proposition 36 passed in California to require that drug treatment be provided to arrested drug users instead of incarceration. In 2002, the initiative's sponsor, the Campaign for New Drug Policies, planned similar initiatives in Michigan, Florida, Ohio and the District of Columbia, which were opposed by the White House drug czar, and the anti-drug establishment (Forbes, 2002). Beginning with the Super Bowl in January 2002 the White House has paid for television ads that say that teenage marijuana users are supporting bombing and assassinations by international terrorists. The ostensible goal of the advertising is to discourage drug use, but the underlying goal is to stigmatize drug users as the economic supporters of terrorists. This is designed to undermine public sympathy for drug users as persons needing treatment and not deserving punishment.

### ***GROWTH OF THE RETRIBUTION AND CRIMINAL JUSTICE RESPONSE TO DRUG USE***

Drug use was rampant among American military personnel serving in Vietnam, many of whom were African-American or Latino (Baum,

1997, pp. 48). It was feared that returning personnel, twenty percent of whom were reported to be addicted to heroin, would fuel a crime wave in the U.S. Having promised to fight crime in his 1968 campaign, and responding to the connections between drug use, drug trafficking and crime, President Richard Nixon declared war on drugs in 1971 (Terkel, 1997, p. 29). Nixon made expansion of heroin treatment a major priority before the 1972 elections (Massing, 1998). After the election, these initiatives were set aside by the distraction of the Watergate scandal investigation, and Nixon's resignation in 1974.

Nixon created several new retribution-oriented, enforcement entities. The Drug Enforcement Administration, created in 1973 in the Department of Justice, became permanent.

The contemporary war on drugs commenced with the demise of the Carter Administration's policy of marijuana decriminalization in 1978 (Baum, 1997, pp. 112-136; Musto, 1999, pp. 262-267). An uninterrupted increase in spending across government levels for anti-drug efforts has ensued (White House, 1991, 2000b).

In FY 2002, there were the equivalent of over 52,000 full-time employees in the federal government working in and in support of drug enforcement, including 18,630 in the Bureau of Prisons, 8,171 in the Drug Enforcement Administration, 6,987 in the U.S. Customs Service, 5,913 in the Judiciary, 4,948 in the U.S. Coast Guard, 3,684 in the Immigration and Naturalization Service, 3,221 in the FBI, 1,742 in the U.S. Attorneys Offices, 1,634 in the U.S. Marshals Service, and 1,092 in the Bureau of Alcohol, Tobacco and Firearms. At least eleven additional agencies employed enforcement or enforcement support personnel devoted to anti-drug programs. The FY 2002 enacted federal anti-drug budget was \$18.8 billion (White House, 2002b). State and local drug enforcement spending was estimated at \$33 billion in 1996 by ONDCP Director Barry McCaffrey as reported by Blumenson and Nilsen (1998, p. 37).

Since 1982, almost every Congress has passed anti-drug laws to crack down on drug dealers and drug users. An anti-drug, anti-crime package passed in December 1982 was vetoed by President Reagan because it provided for a cabinet-level drug czar who, the Attorney General feared, would interfere with his responsibilities (Gest, 2001, pp. 48-49). In 1984 Congress passed the Comprehensive Crime Control Act of 1984, which created a presumption in favor of pretrial detention of all defendants who are charged with a drug offense carrying a sentence of more than 10 years (notwithstanding the bail provision of the Eighth Amendment) (P.L. 98-473, sec. 203, creating 18 U.S.C. 3142(e)). This affects most federal

drug defendants and the majority of federal drug offenses (21 U.S.C. 841 *et seq.*). New mandatory minimum sentences for drug offenses were also created in 1984 (Musto, 1999, pp. 273-274; P.L. 98-473, sec. 503, creating 21 U.S.C. 845A).

In 1986, in the Anti-Drug Abuse Act, Congress created many mandatory minimum prison sentences for drug offenses (P.L. 99-570, sec. 1002), notwithstanding Congress' repeal of drug mandatory minimums in 1970. In the Anti-Drug Abuse Act of 1988, the drug crimes of attempt and conspiracy were brought under the mandatory minimum sentence scheme, as well as simple possession of crack cocaine (P.L. 100-690, sec. 6470 and sec. 6371). This has resulted in the mushrooming of the Federal prison population described above.

#### ***RETRIBUTION DRUG POLICY WAS PROMOTED TO MAINTAIN WHITE PRIVILEGE***

Racism can be understood as a struggle by members of one race to maintain their privileged status vis-à-vis people of another race (Wilkins, 2001, pp. 19-20). Most white persons—who are unfailingly polite to persons of other races, who would never knowingly discriminate against a person of another race—are the beneficiaries of white privilege.

After slavery, the Durkeimian “collective conscience” in favor of white privilege did not change.

It is useful to view the twentieth century phenomenon of drug control in America overlaid on the century's relations between whites and blacks. The century begins, legally, with the Supreme Court decision of *Plessy v. Ferguson* (163 U.S. 357 (1896)) approving “separate but equal” segregation, casting white privilege in legal concrete, and framing the status of the races for two-thirds of the century. Every decade until 1970 was marked by frequent outbreaks of white violence against blacks in a struggle to maintain white privilege in the face of African-American advancement (Franklin, 1967, pp. 439-444, 479; Kennedy, 1997, pp. 41-47).

The first comprehensive federal narcotics law, the Harrison Narcotics Act, having been defeated in 1910, was enacted in 1914 after a campaign explicitly revised to exploit racial slanders (Musto, 1999, pp. 43-44, 305, 319). To the Southern Democrats dominating Congress, the unwanted expansion of federal police power became palatable when sold as the response to accounts such as, “Most of the attacks upon

white women of the South are the direct result of a cocaine-crazed Negro Brain” (Musto, 1999, p. 305).

During the “Great Depression” and the “Dust Bowl,” white families had to compete for scarce jobs with Mexican-Americans and immigrants from Mexico. If demonized, persons of Mexican descent were at a disadvantage. White labor leaders, politicians and publishers created the narrative that Mexicans were marijuana users and marijuana use caused violence. The drive to maintain white privilege helped to outlaw marijuana (Musto, 1999, pp. 219-223; Bertram, Blachman, Sharpe, & Andreas, 1996, p. 80), leading to the jailing of over eleven million persons between 1965 and 1997 (Thomas, 1998).

### ***THE MODERN ENTWINING OF RACIAL DISCRIMINATION AND THE WAR ON DRUGS***

The 1960s and 1970s were marked by dramatic change in American society, especially the legal conclusion of the bloody, century-long Civil Rights struggle. This affected crime rates. As Blumstein and Wallman note,

The marked growth in [general criminal] violence between 1965 and the early 1970s may have been, at least in part, a result of the decline in perceived legitimacy of American social and governmental authority during this turbulent period, which contained the civil rights movement and the strident opposition to the war in Vietnam. The continuing up trend from 1970 to 1980 and the decline to 1985 are largely attributable to the movement of the baby-boom generation into and then out of the high-crime ages of the late teens and early twenties . . . (Blumstein & Wallmann, 2000, p. 4)

Simultaneously, a large and powerful youth culture arose. Widespread use of marijuana and psychedelic drugs such as LSD were key parts of this “cultural revolution” (Gottlieb, 1987). Drug use among young people grew enormously (Baum, 1997, pp. 120-121; Musto, 1999, pp. 246-248).

In 1968, Richard M. Nixon ran for president pledging to restore “law and order”—a theme tailored to capture white votes. The theme was integral to his “Southern Strategy” to capture white voters who were abandoning the Democratic Party in the South because of its support of civil

rights legislation (Epstein, 1990, pp. 60-62). And whites in the north were in shock after three years of urban riots by blacks (Baum, 1997, pp. 10-12).

It was during the Nixon Administration that a four-decade stable rate of incarceration, at about 110 per 100,000, came to an end (Blumstein & Cohen, 1973). What explains this remarkable correctional transformation? By 1970, the forty-year campaign of the NAACP Legal Defense and Education Fund had successfully ended legal segregation. Blumstein and Cohen in their important paper observed "punishment takes many forms in a society" (1973, p. 201). They focused on "deviant" behavior, punished by the criminal justice system and listed processes of the justice system as forms of punishment other than imprisonment. Focusing upon the criminal justice system, they did not take into account that the "collective conscience" in America for centuries has effectively seen as blacks as "deviant" *per se*. When black persons violated the codes of segregation, they were prosecuted or more frequently punished extrajudicially. But long-standing obedience to these codes was far more restricting, degrading, and punishing—indeed dehumanizing—than any kind of probation or community corrections. Blumstein and Cohen did not evaluate segregation as a form of punishment reserved for the "deviant" status of being black, and what its abolition might mean to imprisonment rates.

But if their theory is correct, with the elimination of segregation as punishment, substitute forms of punishment would be necessary to maintain the stability of the society's response to what it finds deviant or offensive. Blumstein and Cohen anticipated shifts in society's determination of what was deviant. Looking at rising serious crime rates (violent crime rising 84.2 percent between 1960 and 1970), they suggested that perhaps society would become more lenient toward "non-victim crimes" such as drug use (1973, p. 204). But they noted that arrests for narcotics offenses increased 740.6 percent between 1960 and 1970, and 575 percent between 1965 and 1970. They predicted an adaptive response to this increase in punishment would soon be less serious punishment. And indeed, the Controlled Substances Act of 1970 had reduced simple possession from a felony to a misdemeanor. They saw the experience of the 1960s with increasing punishment of drug use leading to a reduction in penalties in 1970 as an example confirming their theory (1973, p. 206). But in a mistaken prediction, Blumstein and Cohen foresaw an imminent leveling off or decline in crime rates. But this they noted, by the logic of their theory, would be followed by the

calls for life imprisonment and mandatory minimum drug sentences, that in one instance became the Rockefeller drug laws of 1973. But if crime rates go up (as they did), “we can reasonably expect to see increasing pressure for the decriminalization of the victimless crimes,” (1973) (which was the case: marijuana possession was decriminalized by eleven states by 1979 [Kleiman, 1992, p. 434]).

The process of changing punishments in this fashion they note is implicit, intricate, continuous and complex. Drug abuse was popularly understood as a black problem, and drug use was illegal. Drugs were an ideal vehicle for new ventures in punishment and social control to maintain white privilege. Nixon’s chief of staff, H.R. Haldemann wrote in his diary, “[President Nixon] emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to” (Baum, 1997, p.13).

Nixon’s war on drugs was not only a measure to reduce crime; but also a symbolic tool to demonstrate intolerance for cultural ferment, youth protest, and black protest. By 1985 the incarceration rate had climbed to 313, by 1992 it had climbed to 505; by 1999 it had climbed to 682 per 100,000 (Pastore & Maguire, 2000, table 6.19, p. 497). The rate of white male incarceration climbed from 528 in 1985, to 990 in 1997. The rate of black male incarceration grew from 3,544 in 1985, to 6,838 in 1997 (Pastore & Maguire, 2000, table 6.20, p. 497).

For the last thirty-five years, the Republican Party has fought for the support of whites in the South, as was widely discussed in December 2002 after U.S. Senator Trent Lott (R-MS), the Republican Senate leader, endorsed Strom Thurmond’s 1948 pro-segregation, pro-lynching presidential campaign (Crespino, 2002). The South is now the base of Republican political power.

The year 1980 was potentially a breakthrough year for the Republican Party. Ronald Reagan had to recapture the South, lost by Gerald Ford to Jimmy Carter in 1976, a former Georgia governor. For his first campaign trip after winning the nomination, Reagan went to the Neshoba County Fair in Philadelphia, Mississippi, on August 3, 1980 (Kneeland, 1980). With a population of less than 25,000, Neshoba County was not the vote-rich venue of traditional campaign kick offs. In 1980, Philadelphia, MS, was known only for the nationally broadcast disappearance of three civil rights workers there in 1964. Their kidnapping and murder by county deputy sheriffs was the spark that led to passage of the 1964 Civil Rights Act (Branch, 1998). In his speech to a crowd “almost entirely of whites,” Reagan said, “I believe in states’ rights” (Kneeland,

1980). Since the eighteenth century, “states’ rights” has been the credo of the white Southern resistance to Yankee anti-slavery agitation and to Federal constitutional guarantees of civil rights to blacks (Franklin, 1967). Reagan’s speech was a prime example of the importance of white privilege as the “south pole” of the Republican political compass. Even more importantly, it was his expression of support for the legal structures that maintain white privilege.

### ***RACIAL DEVASTATION OF THE WAR ON DRUGS***

Reagan came to office freezing and cutting federal domestic spending (Walsh, 1981; UPI, 1981). His first deviation from this policy, having proposed cuts in federal law enforcement in 1981, was an escalation of the “war on drugs” in 1982. Three weeks before the mid-term congressional election, Reagan announced an enormous expansion of federal drug enforcement: hiring at least 1,200 investigators and prosecutors at an initial cost of \$160 to \$200 million, at a time when DEA’s entire Special Agent force totaled just over 1,800 agents. More spending was requested to house 1,200 to 1,500 federal prisoners. DoJ official Rudolph Giuliani denied the plan had any political motivation (Thornton, 1982).

In 1983, Reagan sent to Congress the largest package of anti-crime legislation since 1970, the Comprehensive Crime Control Act. Passed in 1984, the Act raised drug trafficking penalties (P.L. 98-473, secs. 502-503).

By 1986, the use of cocaine by the upper middle class had become *déclassé*. The Administration’s Caribbean drug interdiction program had nearly eliminated the maritime shipment of bulky marijuana from Colombia. Colombian smugglers switched to sending cocaine in aircraft that reached the American south in a matter of hours. Cocaine hydrochloride, the export product, when combined with baking soda and water, is easily cooked into crack cocaine (technically, cocaine base) on a stovetop or in a microwave oven. Crack is easily vaporized and inhaled for a rush experienced more quickly than snorting cocaine powder.

Certainly there was a *terrible* problem of crack abuse among African-Americans in the 1980s. But in 1991, 2.427 million whites reported lifetime use of crack compared to 990 thousand blacks (ADAMHA,

1992, pp. 38-39). The fact that there were a greater number of white crack users than black never entered the public consciousness.

In 1986, Congress and the news media exploited the powder cocaine death of black basketball star Len Bias to create a hysteria about black crack users and crack dealers, and pregnant black women destroying their babies while smoking crack.

Upon Bias' death, the Democrats attempted to preempt the Republican success in exploiting the public's fears about drugs. An auction house atmosphere in the Congress led to mandatory minimum penalties for importing or distributing relatively small quantities of drugs (Baum, 1997, pp. 228-230). The most infamous penalty was a mandatory prison term of five years (up to 40 years) for distributing five grams of crack cocaine or 500 grams of powder cocaine (cocaine hydrochloride), and a mandatory term of ten years (up to life imprisonment) for distributing 50 grams of crack cocaine or 5,000 grams of powder cocaine (P.L. 99-570, Oct. 27, 1986, sec. 1002). Debate over the Anti-Drug Abuse Act of 1986 was media and political fodder from July 1986 to Election Day. It must be conceded that a number of black members of Congress called for action against crack and sponsored tough anti-crack bills. A majority of the black members of the House of Representatives voted for the Act (Kennedy, 1997, p. 370).

Within a few years, it appeared that blacks were being disproportionately sentenced for the crack cocaine offense. Congress called upon the U.S. Sentencing Commission to study the impact of mandatory minimum sentences (P.L.101-647, Nov. 29, 1990, Sec. 1703). The Commission found that the disparity in sentencing harshness between white and black offenders had increased (U.S. Sentencing Commission, 1991, p. 82). Congress and the Administration did nothing to address this problem.

By 1995, no white person had been prosecuted in federal court under the 1986 crack mandatory minimums in Los Angeles and other major cities, although hundreds of blacks had been (Weikel, 1995). Another study by the U.S. Sentencing Commission (1995) found the 100-to-1 powder cocaine-crack cocaine variation seemed to have an invidious impact on black offenders. For example, 88.3 percent of the mandatory crack sentences were imposed on blacks in FY 1993. The Commission recommended changes in the guidelines (60 Fed. Reg. 25,074, May 10, 1995), but for the first time Congress voted to disapprove the Commis-

sion's proposed amendments to the sentencing guidelines (P.L. 104-38, Oct. 30, 1995).

Through the 1970s, white juvenile drug offenders outnumbered blacks but this switched by the 1980s (Snyder & Sickmund, 1995, p. 120). Even though drug and alcohol use by black youth (except for marijuana) is one-half to one-quarter the rates of use by white youth (White House, 2002a, p. 63), the black juvenile drug arrest rate is five times the white juvenile drug arrest rate (Snyder & Sickmund, 1995, p. 120).

In fiscal year 2001, only one in four new federal drug prisoners was white (U.S. Sentencing Commission, 2002, table 34, p. 69). In 1997, for all offenses, only one in four new prisoners, nationwide, was white (Pastore & Maguire, 2000, table 6.17, p. 496). In 1996, 53% of all those convicted in state courts of a drug offense were black (Pastore & Maguire, 2000, table 5.50, p. 454)—even though only 38.4% of those arrested for a drug offense that year were black (FBI, 1997). *In 1999, sixty-five percent of all black federal prisoners were serving drug sentences* (Pastore & Maguire, 2000, table 6.47, p. 519). In 1998, the average federal drug sentence was 61.8 months for white prisoners and 109.8 months for black prisoners (Pastore & Maguire, 2000, p. 427).

Black people have been disproportionately stopped and searched, arrested, convicted, and imprisoned for drug offenses. Blacks are imprisoned for drug offenses at a rate that is 8.3 times greater than the rate of white imprisonment for drug offenses (Human Rights Watch, 2000). Thus to an utterly disproportionate and unjustifiable degree blacks are denied employment, housing, credit, college admissions, college loans, and the opportunity to travel. Indeed, African-Americans are strong supporters of the current drug laws—largely because the disorder of the drug trade is concentrated in their neighborhoods in most parts of the country. Reagan's 1982 initiative, his legislative priorities, his shaping of the public debate, and his Justice Department practices, carried forward by George H. W. Bush and Bill Clinton, made the war on drugs probably the most powerful instrument to maintain white privilege over the past twenty years.

Are most of those carrying out today's war on drugs deliberately racist? Certainly not. Certainly black communities continue to demand drug and law enforcement, which historically they have not received. But those in the criminal justice system are carrying out policies that have the effect of maintaining white privilege.

The war on drugs could only have been born in 1914 by exploiting white fears and revulsion at (false) stereotypes of blacks as drug-taking

sex fiends and violent monsters. That paradigm was repeated throughout the twentieth century in the periods of drug war escalation. Curiously, the public overwhelmingly sees the war on drugs as failing (Kohut, 2001). Yet this policy persists because the white majority believes it protects them from drug trafficking blacks, Latinos and Asians. If whites were being stopped, searched, arrested, convicted, imprisoned and denied jobs, housing, credit, and voting rights because of drug offenses, at the *rates* blacks are, calls for ending the war on drugs would echo throughout the land.

### ***POLITICALLY ACCEPTABLE ALTERNATIVES TO THE "WAR ON DRUGS"***

One response to this history of failure and imprisonment is to urge that the anti-drug effort be redirected to treatment and prevention. Unfortunately, these dimensions actually offer little prospect of ameliorating the problems outlined above.

The conventional wisdom is that we need more treatment to solve the drug abuse problem. Of course, treatment means abstinence. RAND's Rydell and Everingham (1994) showed that cocaine treatment was far more cost effective than source country control, interdiction or domestic enforcement (imprisonment) policies in reducing consumption of cocaine. But using their model, even if drug treatment were to be given to every heavy user of cocaine every year, the total consumption of cocaine would be reduced, after 15 years, by only about one-third (Rydell & Everingham, 1994, p. 47). Treatment is humane and cost-effective, and it can help manage and reduce the harms (Bertram, Blachman, Sharpe, & Andreas, 1996, p. 212). But it will not rid the criminal justice system of the burden of drug cases, nor will it end the racial disparity of drug enforcement.

The other liberal hope, drug abuse prevention, is also doubtful as a solution (MacCoun & Reuter, 2001, p. 407). Despite Congress' repeated votes for effective drug abuse prevention, nationally, drug abuse prevention has been a failure. For over a decade, evaluators have repeatedly found that the nation's largest drug abuse prevention program, D.A.R.E. (Drug Abuse Resistance Education) is ineffective (Kanoff, 2003). Yet D.A.R.E. is the drug prevention program found in 80 percent of America's school districts, and is specifically written into the Federal drug abuse prevention legislation (20 U.S.C. 7116(b)(9)). In fact, the

Substance Abuse and Mental Health Services Administration identified only 41 effective school-based drug abuse prevention programs out of 718 evaluated (Kanoff, 2003). Effective programs have remained a tiny part of the nation's anti-drug effort even though they have been identified since the 1980s (Falco, 1992, pp. 36-38; Drug Strategies, 1999).

### ***A NEW DRUG POLICY?***

Instead of a war on drugs, I have advocated the management of the drug problem (Sterling, 1989; 1995; 1998). We don't call for a pollution-free America, even though air and water pollution lead to cancer and pulmonary disease. We manage those problems by regulating poisonous discharges from automobiles, businesses, and sewage treatment plants.

The economic, legal and political complexity of managing those problems is a clue to what must replace the simple (and simple-minded) approach of drug prohibition. But drug policy cannot be revised independently of refocusing our criminal justice and correctional systems (Sterling, 1998, pp. 499-502).

Lindesmith (1965) argued that the care of drug addicts, especially opiate addicts, be placed in the care of private physicians, and no longer handled as a police problem (pp. 270-273). Nadelmann (1992) in arguing for drug legalization suggests that most drug users engage in rational drug consumption. He argues "legal availability does not always connote easy availability and that restricted legal status of a drug does not always make it that difficult to obtain" (p. 109). He claims a "right of access" for adults that include a "right to possess small amounts of any drug for personal consumption" and "the right to obtain any drug from a reliable, legally regulated source." This source could be mail order, which could preclude the easy, impulsive availability of a local retail outlet, and would eliminate the role of physician as "gatekeeper." I have also argued that there is a right to use drugs, grounded in the First Amendment (Sterling, 1997a).

But the discussion of drug policy has suffered from a lack of clarity in the use of terms such as legalization. Nadelmann (1992) explicitly notes that he uses the term in a variety of ways (p. 87). I have attempted to identify these meanings and clarify terms such as "medicalization" as used by former Baltimore Mayor Kurt Schmoke, and "decriminalization" as used by the Shafer Commission (1973) (Sterling, 1995, pp. 399-406).

Drug use is too harmful to prohibit, or to legalize without controls. Only regulation of drug distribution and use can manage the problem to reduce the harms. Alcohol, estimated to cause in excess of 100,000 deaths per year, for example, is considered legal. But, without special federal, state and local licenses, most people cannot manufacture or distribute alcohol (except for small scale home brewing and wine making).

Beer, wine and whiskey are simply three forms of the same drug, yet throughout the nation, they are taxed and regulated differently. Including zoning laws, restaurant laws, restrictions on advertising, time of day restrictions, restrictions on Sunday and Election Day sales, legal alcohol is extensively regulated. Such regulations are designed to minimize alcohol abuse, to eliminate crime in the distribution of alcohol, and to raise revenue—goals that are in obvious tension.

However, proposals to regulate drugs, i.e., to legalize them, are frequently mocked as selling crack in the supermarket (even though crack is illegally sold outside many supermarkets today). But it must be acknowledged that proposals to legalize drugs have usually lacked any specificity although Neustadter (1998) has collected and analyzed those that attempt specificity.

MacCoun and Reuter (2001) have identified the different types of controls. Between pure prohibition (e.g., heroin and LSD today) and a free market (e.g., caffeine—available without restriction to children and adults), they find roughly seven intermediate forms of drug control: prohibitory prescription allowing narrow therapeutic uses (e.g., cocaine); maintenance, such as methadone or the Swiss heroin maintenance experiment; regulatory prescription (self-administered under prescription); positive license (available to any licensed adult with demonstration of capacity for safe use); negative license (available to any licensed adult who has not forfeited the privilege by some transgression); availability to any adult (e.g., alcohol); and depenalization (elimination of criminal sanctions for possession, but sale and manufacture remain illegal) (pp. 74, 311).

The principal challenge in making or fairly reviewing any proposal is to balance the inevitable harms that will result or will remain against the reductions in harms that are sought to be reduced or eliminated. This is extraordinarily difficult, but MacCoun and Reuter (2001) have written the most sophisticated critique of current drug policy, the debate around drug legalization, and various possible alternatives to prohibition, which significantly influences my conclusion.

### CONCLUSION

Any recommendation (and adoption) of a new policy must be tentative, and offered with great humility. It is truly impossible to predict with much precision how the complex market of drug users and traffickers will respond. Even the nation's most sophisticated consumer market specialists usually fail to predict the success of new offerings.

There is also no agreement on what is relevant evidence, the standards for judging it, and the placement of the burden of proof in either defending the status quo or offering a new control regime. Ultimately this will continue to sharpen as a political struggle.

Marijuana should be depenalized. Adults ought to be able to use it privately. They ought to be able to use it in their own homes, and in licensed premises and outdoors with the requirement that unconsenting persons must not be forced to inhale the smoke. They ought to be able to grow their own supply and to give it away without consideration. Parents ought to be able to initiate their teenagers in appropriate, responsible marijuana use, as they do with alcohol. A commercial distribution system, at this point, opens up the problems of advertising and promotion of use. During the 1990s I distributed a mock U.S. Treasury marijuana users license for a \$100 per year annual fee, \$200 to cultivate for one's own use (Sterling, 1998, pp. 511, 525). The case for depenalization seems compelling (MacCoun & Reuter, 2001, p. 362).

Heroin and other opiates should also be depenalized. The drugs should be available through physicians and consulting pharmacists. This is sometimes referred to as medicalization.

Hallucinogens have value and should be available from licensed leaders and to persons who are licensed to use the drugs (Sterling, 1997b). With professional licensing and a requirement of insurance to use or distribute these drugs, public and private regulatory bodies and private insurance market can develop standards to minimize risks of harm and costs.

It is premature to propose a regulated scheme to distribute cocaine and amphetamines. From a purely drug policy standpoint it would be sufficient now to make the other changes and study the evolving markets and patterns of use. But we must address the problem of cocaine illegality for "the minority poor that bear a disproportionate share of the harms of prohibition" (MacCoun & Reuter, 2001, p. 335). Penalties

should be reduced. Cocaine trafficking or use infractions should not be *per se* bars to housing, credit, employment or public benefits.

The Controlled Substances Act is an oxymoron. There are no substances more out of control in our society or economy than the prohibited “controlled substances.” The criminal justice system is one part of the regulatory structure of the environmental laws, the securities laws, and the antitrust laws. Criminal justice practitioners and theorists need to demand a reform of the drug laws to create genuine regulation and control.

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