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## **Crises of the Anti-Drug Effort, 1999**

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“... [T]he much-trumpeted ‘war on drugs,’ begun more than a decade ago, has itself hugely misfired,” wrote the editors of the *New York Times* in March 1999.<sup>1a</sup> A few weeks earlier, the nation’s top anti-drug official, “drug czar” Gen. Barry McCaffrey, admitted: “We have a failed social policy and it has to be re-evaluated.”<sup>1b</sup> At an annual cost to taxpayers of more than \$40 billion and with almost two million men and women incarcerated in the United States, the “war on drugs” has been subject to intensifying analysis and criticism. This paper reviews some of the key issues in this growing national debate about the “war on drugs.” It documents injustice, wasted public resources, outrageous racial discrimination, and threats to our historic liberties. Tragically, the most widely recognized solution to the problem — drug treatment — remains completely inadequately funded and unavailable to the vast majority of those most in need. Scientifically validated public health measures remain blocked by political opportunism and cowardice. Inevitably, efforts of compassion and reform are challenged with claims that the “wrong message” about drugs will be communicated to our children.

But change is occurring. On November 4, 1998, voters in seven states overwhelmingly approved nine initiatives that begin to reform the status quo drug policy in the U.S. Recently, many other countries -- particularly Australia, Germany, The Netherlands, Switzerland, and the United Kingdom -- have begun to debate and implement more pragmatic and compassionate drug policies.

Although this paper is necessarily limited to more recent statistics and particular examples, the depth and breadth of the problems discussed should not be underestimated. Readers are encouraged to contact organizations listed in the endnotes to obtain more in-depth reports about the national, sometimes global, nature of specific issues.

### **MANDATORY MINIMUMS: Long Sentences, No Parole for Low-Level, Nonviolent Drug Offenders**

The criminal justice system has been immensely affected by mandatory minimum sentencing laws for drug offenders, passed by Congress and state legislatures during the 1970s and 1980s. These laws require judges to sentence drug offenders — many of them first-time, nonviolent, low-level offenders — to long prison terms, often a minimum of 5, 10, or 20 years, without parole. A mandatory minimum sentence is usually triggered by the total amount of drugs with which the defendant, or the organization he is alleged to have been a part of, was involved.

**DRUG CONSPIRACY:** Mandatory minimums can also apply to anyone involved in a “drug conspiracy,” frequently resulting in profound injustices. Those prosecuted as participants in a “drug conspiracy” include low-level and naive persons who may have been only remotely involved, such as persons who drove a friend to pick up drugs or made a phone call to introduce potential drug buyers and sellers. Such “co-conspirators” are sentenced not for their conduct, but for the entire amount of drugs transacted in the “conspiracy,” which may involve dozens of people, many months or years of drug transactions, and, therefore, large amounts of illicit drugs. The large amount of drugs involved in a “conspiracy” usually trigger long mandatory prison sentences without parole — sentences that are unconscionable for minor offenders. Oddly, drug evidence rules allow for “phantom evidence” in the prosecution of “co-conspirators” because prosecutors do not physically have to produce tangible drugs as evidence in a courtroom. The breath of testimony by witnesses weighs as heavily as drugs themselves in determining the mandatory length of a defendant’s prison sentence.

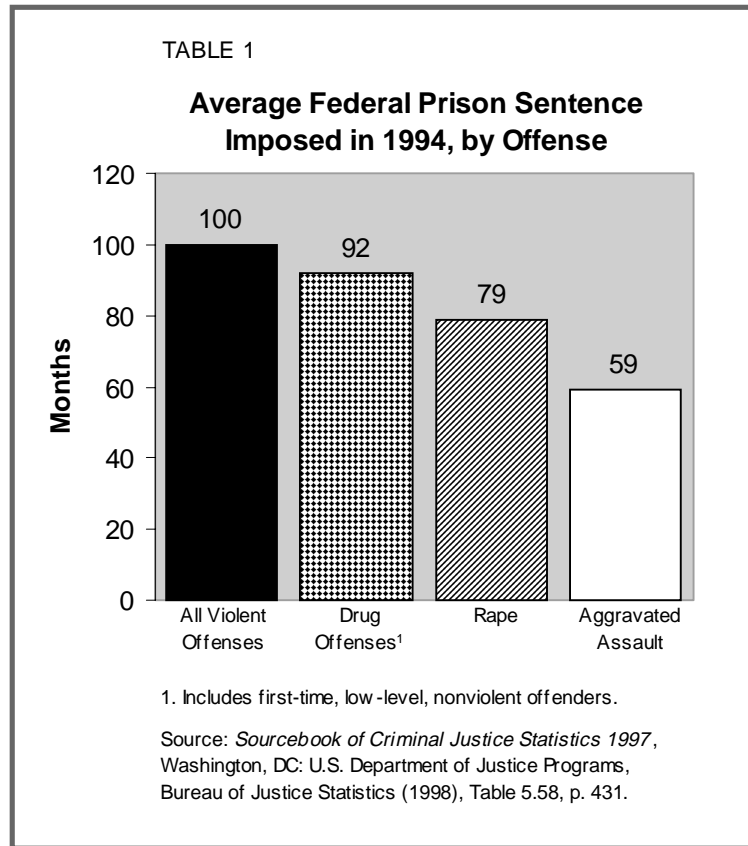
**SUBSTANTIAL ASSISTANCE:** The only way a federal drug defendant can avoid a mandatory minimum sentence is to provide “substantial assistance” to prosecutors by testifying against other drug defendants. This practice of “buying” testimony from drug defendants in exchange for something of value (many years of their freedom) has been widely criticized as unjust because it encourages exaggerated and untruthful testimony. Such perjured testimony can result in the prosecution and lengthy incarceration of innocent persons or low-level “co-conspirators,” who were implicated by defendants who have an enormous incentive to lie. Despite the damage to the integrity of the criminal justice system by the practice of giving leniency in exchange for testimony, the 10th Circuit recently upheld the practice.<sup>2</sup>

Congress enacted mandatory minimum sentences for drug offenses in 1986 and 1988 to ensure that “the Federal government’s most intense focus ought to be on major traffickers... the heads of organizations, who are responsible for creating, and delivering very large quantities of drugs.”<sup>3a</sup> Yet, in FY 1993, a typical year, only 11.2% of all drug defendants were high-level dealers.<sup>3b</sup> Ironically, the “substantial assistance” exception frequently allows major drug traffickers to earn sentences substantially shorter than the “mules” who work under them simply because the “kingpins” have more information to give prosecutors. For example, Clarence Aaron, a college student with no police record, was sentenced to life imprisonment without parole, even though there was no physical evidence against him. Drug dealers with police records, facing life sentences themselves, testified against Aaron in exchange for substantial reductions in their own sentences.<sup>4</sup>

Absurdly, mandatory minimum laws often create longer sentences for first-time, nonviolent drug offenders than for violent criminals, such as murderers and rapists. In 1998, the *Boston Globe* reported that the average sentence for first-time drug offenders given mandatory minimum sentences in Massachusetts is approximately five years, while the average sentence for those convicted of violent crimes is about four years.<sup>5</sup> More than 84% of persons serving mandatory sentences for drug charges in Massachusetts are first-time offenders. “It is difficult to believe that the possession of an ounce of cocaine or a \$20 ‘street sale’ is a more dangerous or serious offense than the rape of a ten-year-old, the burning down of a building occupied by people, or the killing of another human being while intending to cause him serious injury,” said Judge James L. Oakes, U.S. Court of Appeals for the Second Circuit.<sup>6</sup>

**JUDICIAL DISCRETION:** Mandatory minimum sentences have significantly reduced judicial discretion. Judges must impose long sentences regardless of a defendant’s minor role in a crime or other mitigating factors. In contrast, mandatory minimums have increased prosecutorial discretion because prosecutors, not judges, have the power to decide what charges to bring, to accept or deny a plea bargain, to reward or deny a defendant’s “substantial assistance,” and ultimately, to determine what the final sentence will be. Federal judges, from the bench and in resolutions adopted by every federal judicial council, have consistently criticized mandatory minimums, describing such sentences in terms such as “manifestly unjust.”

**REFORM:** Groups advocating reform of mandatory minimum laws, such as Families Against Mandatory Minimums (FAMM), have effected some changes. On July 2, 1998, Michigan Governor John Engler (R) signed measures reforming the state’s “650-lifer” law, passed in 1973, which had mandated a life sentence without parole for anyone convicted of possessing, delivering, or intending to deliver over 650 grams of cocaine or heroin.<sup>7</sup>



## **PRISON BOOM: Fueled by Drug Offenders, Prison Population Triples From 1980 to 1998**

The number of persons incarcerated has grown dramatically in the U.S., having tripled since 1980 to more than 1.8 million people in 1998, a record high.<sup>8</sup> The U.S. rate of incarceration is 6 to 10 times greater than most industrialized countries' and is second only to Russia. The number of persons on probation and parole is also at a record high -- 3.9 million at the end of 1997.<sup>9</sup>

"Drug policies constitute the single most significant factor contributing to the rise in criminal justice populations in recent years," says the Sentencing Project.<sup>10</sup> There are more than 400,000 drug offenders in state and federal prisons and local jails -- constituting 60% of federal prisoners, and 23% of state and local inmates.<sup>11</sup> The largest category of cases initiated by the criminal justice system is that of drug cases. In 1997, for example, there were 1,583,600 arrests for drug offenses compared to 717,720 arrests for all serious violent crimes (murder, rape, robbery, and aggravated assault).<sup>12</sup>

Drug and alcohol use, abuse, and addiction are implicated in the incarceration of 80% (1.4 million) of the men and women currently behind bars, including parents of 2.4 million children, according to a 1998 study by the Center on Addiction and Substance Abuse (CASA).<sup>13</sup> CASA found that \$30 billion of the \$38 billion dollars spent in 1996 to build and operate the nation's prisons and jails was spent to incarcerate substance-involved offenders.

**WOMEN:** The number of women in federal prison on drug charges has quadrupled since 1987, accounting for about two-thirds of all female federal inmates.<sup>14</sup> Some women — often young, nonviolent first offenders — go to prison for 10 to 20 years. Women are often too loyal, too afraid, or do not possess enough information to provide "substantial assistance" to prosecutors in exchange for shorter sentences. Many women who play minor roles in drug rings receive longer sentences than the men who organize, lead, and supply the operations.<sup>15</sup> For example, 28-year-old Serena Nunn, with no criminal record, was sentenced to 14 years in prison for a nonviolent offense — assisting her boyfriend in cocaine distribution. Marvin McCaleb, the leader of the large cocaine operation in which she played a minor role, received a 7-year prison sentence. McCaleb had prior convictions for manslaughter, rape and drug felonies.

**CHILDREN:** Children of incarcerated parents suffer dramatically. Judges cannot take parental status into account when sentencing mothers. More than half of all women offenders are caring for minor children, and many are pregnant, when they enter prison. The children of prisoners are forced to live with family members or become wards of the state. Separated from their mothers and moved from their homes, many children retreat into depression or rebellion, drop out of school, and get into legal trouble. Others are abused, neglected, sexually molested, or try to commit suicide. "Absolute gender equity in sentencing has turned out to be a war on children," said Minneapolis Judge James Rosenbaum.<sup>16</sup>

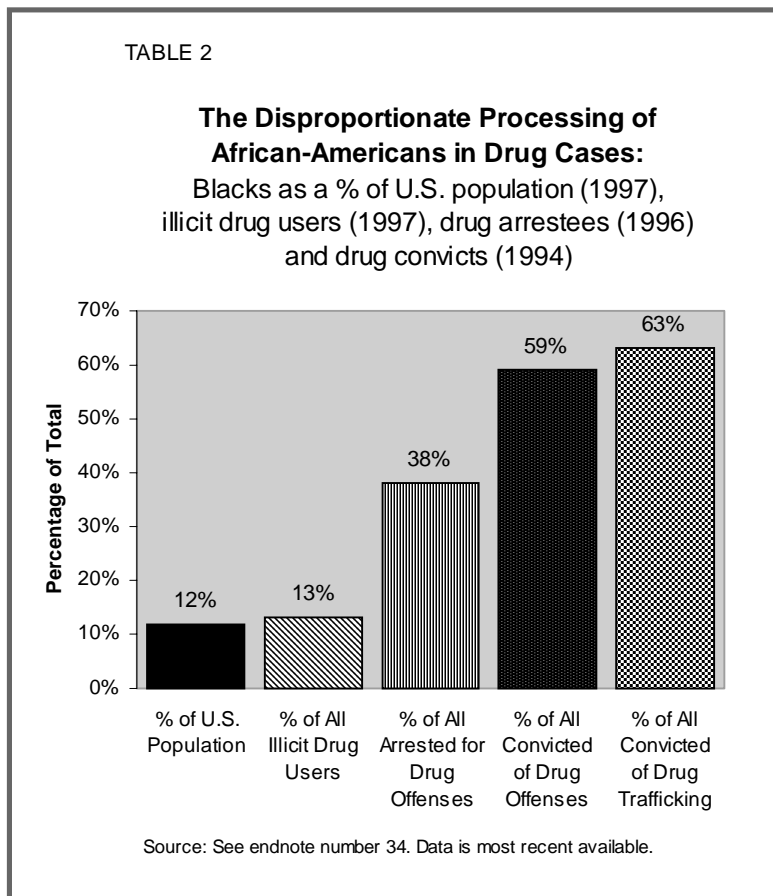
**PRISONS vs. EDUCATION:** The prison boom may have come at the expense of higher education, according to the Justice Policy Institute (JPI). 1995 was the first year in which states collectively spent more to construct prisons than to build universities. There was a nearly direct trade-off that year: Prison construction expenditures increased by \$926 million (to \$2.6 billion) while university construction funding dropped by \$954 million (to \$2.5 billion).<sup>17</sup> Recently, in New York, JPI found the increase in prison spending from 1988 to 1998 was almost equal to the decrease in spending for state and city colleges, and more blacks have entered prison than have graduated from the State University of New York system every year since 1989.<sup>18</sup> JPI made similar findings in the District of Columbia<sup>19</sup> and Maryland.<sup>20</sup>

Similarly, in California, JPI found that the funding gap between corrections and higher education became wider during Governor Pete Wilson's (R) 8-year term than under any other governor in California's history. Five times more black men are in California's prisons than in its public universities.<sup>21</sup> From 1984 to 1994, California built 21 new prisons, and only one new state university. During this time, the California prison system realized a 209% increase in funding, compared to a 15% increase in state university funding. The increased funding of prisons and decreased spending for schools prompted protests by California high school students on October 1, 1998.<sup>22</sup>

**HUMAN RIGHTS:** Recent reports by Human Rights Watch (HRW) have found that the disproportionate incarceration of African-Americans, largely due to drug prosecutions, violates international human rights treaties.<sup>23</sup> The International Convention on the Elimination of all forms of Racial Discrimination does not define discrimination as intentional conduct but as conduct that has the "purpose or effect" of restricting rights on the basis of race. New York State has violated international law by sentencing nonviolent, low-level drug offenders to long, mandatory prison sentences similar to those given to rapists and murderers, according to HRW.<sup>24</sup> Human Rights '95 has documented numerous examples of such human rights violations in its 1998 book, "Shattered Lives: Portraits From America's Drug War."<sup>25</sup>

A prison sentence is frequently a sentence to be raped, beaten, and humiliated, and to slowly go insane. A person in prison knows this inhumane existence will continue for 5, 10, 20 years or life. For example, on March 1, 1999, U.S. District Judge William W. Justice ruled that the constitutional rights of Texas inmates are routinely violated, saying that solitary confinement conditions are terrible, vulnerable prisoners are unprotected from rape and assault, and guards rely on “malicious and sadistic” excessive force to control prisoners. “[A]n offender should not--and must not--be sentenced to a term of enslavement by gangs, rape and abuse by predatory inmates, or excessive force by prison employees,” said Judge Justice.<sup>26</sup> Professor Craig Haney, an expert on prisons, testified before Judge Justice about Texas’ prisons: “The level of despair... was unparalleled in my experience.” Haney, chairman of the UC-Santa Cruz psychology department, said he saw inmates smeared with feces, urine puddles in cells and hallways, and inmates who appeared to have psychological disorders screaming and banging their heads against walls. Inmates who are kept in solitary confinement are typically kept there for all but five hours a week, and usually rely on radios to “anesthetize themselves.”<sup>27</sup>

## RACIAL DISPARITY: Drug Enforcement Disproportionately Punishes People of Color



The extraordinarily high incarceration rate in the U.S. is due largely to the profoundly greater rates of incarceration of African-Americans, particularly for drug offenses.<sup>28</sup> In 1995, the Sentencing Project reported the now well-known statistic that one-in-three black men between the ages of 20 and 29 are under correctional supervision or control.<sup>29</sup> In the nation’s capital, one-in-two black men between the ages of 18 and 35 are under correctional supervision or control.<sup>30</sup> In ten states and the District of Columbia, blacks are incarcerated at a rate more than 10 times the rate at which whites are incarcerated.<sup>31</sup> Nationally, in 1996, blacks were incarcerated at a rate 8.14 times that of whites.<sup>32</sup>

“An analysis of drug case processing reveals a pattern of system-wide racial disparity adversely affecting black and Hispanic defendants,” according to Eric E. Sterling, President of the Criminal Justice Policy Foundation.<sup>33</sup> At every level of the criminal justice system, African-Americans are treated inequitably. They are arrested more frequently, convicted more frequently, and punished more harshly than whites.

While blacks constitute about 12% of the U.S. population and 13% of drug users, they make up 38% of persons arrested for drug offenses, 59% of those convicted of drug offenses, and 63% of those convicted of drug trafficking.<sup>34</sup> In addition, blacks convicted of drug offenses get sentenced to prison at much higher rates than whites convicted of the same offenses: In 1994, 33% of the white convicts and 50% of the black convicts were sentenced to prison.<sup>35</sup> Furthermore, blacks who are sentenced to prison get longer sentences than whites sentenced to prison for the same crimes: For state drug defendants, the average maximum sentence length in 1994 was 51 months for whites and 60 months for blacks.<sup>36</sup>

**RACIAL PROFILING:** Part of the reason for the gross disparity in prosecution and punishment is the systematic profiling of racial minorities as drug traffickers. In 1998, Illinois Senators Richard Durbin (D) and Carol Mosely-Braun (D) asked the General Accounting Office to investigate U.S. Customs search practices after records showed that black women were being disproportionately targeted for drug searches at Chicago’s O’Hare airport. Such targeting of minorities for drug searches has led to numerous lawsuits in recent years.<sup>37</sup>

Police targeting minorities for drug searches in traffic stops has become so commonplace that the practice has been mockingly termed “driving while black.” For example, 76% of the motorists stopped along a 50-mile stretch of I-95 by Maryland’s Special Traffic Interdiction Force (STIF) were black, according to an Associated Press computer analysis of car searches from January through September 1995.<sup>38</sup> STIF’s six officers were white. Blacks constitute 25% of Maryland’s population, and 20% of Marylanders with driver’s licenses.

**CRACK/POWDER SENTENCING DISPARITY:** Federal crack cocaine defendants are disproportionately black. Such defendants were 88.3% African-American, 7.1% Hispanic, and only 4.1% white in FY 1993, a typical year.<sup>39</sup> Many observers blame this gross disparity on the 100-to-1 ratio of the quantities of powder cocaine versus crack cocaine that trigger federal mandatory minimum sentences.<sup>40</sup> However, 95% of federal crack defendants are low and medium level offenders. A more accurate explanation of the racial disparity is improper case selection practices by DEA and U.S. Attorneys Offices tolerated by high-level officials at the Department of Justice.<sup>41</sup>

In April 1997, the Supreme Court refused to hear a claim that the legal distinction between powder cocaine and crack cocaine is discriminatory because crack defendants are predominantly African-American.<sup>42</sup> In addition, Congress has failed to reform the sentencing disparity, despite the U.S. Sentencing Commission’s recommendation to remove the disparity and its later recommendation to reduce the disparity.<sup>43</sup>

**VOTER DISENFRANCHISEMENT:** Racially disproportionate outcomes in drug cases is a major factor in the massive disenfranchisement of black men. Approximately 1.4 million black men, 13% of black males in the U.S., have had their right to vote taken away because of felony convictions. Blacks constitute more than one-third (36%) of the approximately 3.9 million people nationwide who are temporarily or permanently unable to vote because of felony convictions. The rate of black voter disenfranchisement is seven times the national average.<sup>44</sup>

## **LAW ENFORCEMENT: Drug Policy Leads to Police Corruption, Misconduct & Militarization**

**CORRUPTION:** Across the U.S., illicit drug markets have fueled law enforcement corruption, according to a 1998 study by officials from 15 cities and the FBI.<sup>45</sup> The number of known law enforcement officers in prison increased fivefold from 1994 to 1998, according to the report. The problem was clearly illustrated in a February 16, 1999 report to Congress by the U.S. Customs Service, which concluded: “The large amount of illegal drugs that pass through U.S. Customs land, sea and air ports of entry and the enormous amount of money at the disposal of drug traffickers to corrupt law-enforcement personnel place Customs and its employees at great risk to corruption.”<sup>46</sup>

**MISCONDUCT:** Expanding police powers in the anti-drug effort has led to police misconduct. In 1998, in Houston, a young Hispanic-American, Pedro Oregon Navarro, was shot 12 times by officers, 9 times in the back from above, in a warrantless drug raid of his apartment prompted by an unregistered informant. The raid turned up no drugs. After firing the officers involved, Houston Police Chief Clarence Bradford said he had not seen “a case as egregious as this case.” However, a grand jury failed to indict the police officers involved, but a civil suit has been filed against the city.<sup>47</sup>

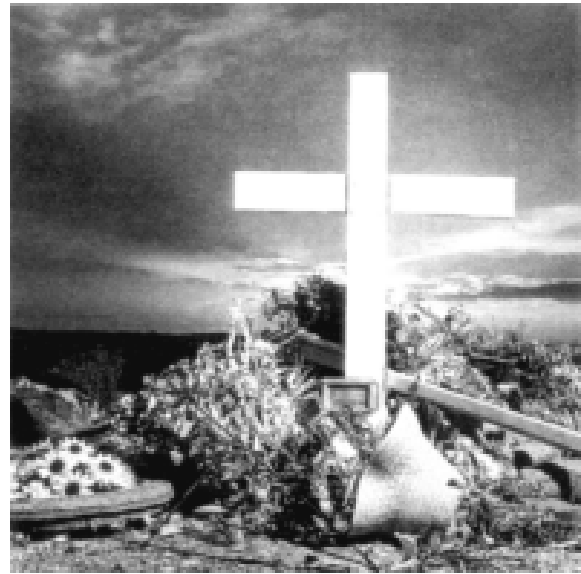
Current drug policy is usually defended foremost as a way to protect children. However, undercover drug law enforcement practices now threaten the well-being of juveniles. Recently, police have begun paying students to inform on other students, recruiting children to report their parents’ private drug use, posing as high school students to arrest adolescent drug users and sellers, and using juveniles as drug informants.<sup>48</sup> In a tragic case in Orange County, California, Chad MacDonald, a teenager who was pressured to act as drug informant in exchange for leniency regarding his own drug arrest, was murdered by attackers who accused him of being a “snitch.”<sup>49</sup>

**MILITARIZATION:** A recent study found that 89% of police departments have paramilitary S.W.A.T. teams, and 46% have been trained by active duty military personnel.<sup>50</sup> Instead of dealing with hostage-taking or terrorist incidents, the most common use of these S.W.A.T. units is serving drug-related search warrants.<sup>51</sup> In addition, the U.S. military is engaged in drug law enforcement, particularly along the U.S.-Mexico border.<sup>52</sup> “Militarization” of domestic law enforcement is dangerous because soldiers are not trained in the application of constitutional liberties, which is an important aspect of all police training. Soldiers are trained to “vaporize, not ‘Mirandize,’” noted Lawrence Korb, Assistant Secretary of Defense under Reagan. And that is what happened in May 1997, when Esequiel Hernandez, an 18-year old American, was shot to death by an anti-drug Marine patrol while herding goats near his home in Redford, Texas, along the U.S.-Mexico border.<sup>53</sup> The incident prompted numerous investigations, including a Congressional probe, which found that the Marines involved had inadequate training for such an assignment.<sup>54</sup>

## CIVIL LIBERTIES: Anti-Drug Policy Steadily Eroding Constitutional Protections

Unlike murder, theft, and most other crimes, drug “crimes” are often consensual acts without any complaining parties to assist police. In order to procure evidence of drug crimes, law enforcement officials have adopted invasive strategies, significantly curbing Constitutional protections for the innocent to be left alone.<sup>55</sup> For example, the Supreme Court ruled recently in a drug case that the Fourth Amendment’s protection against unreasonable searches and seizures does not protect guests in private homes who are not staying overnight.<sup>56</sup>

**DRUG TESTING:** Random drug testing — drug testing which is not prompted by suspected drug use — has become commonplace at schools and in the workplace. On October 5, 1998, the U.S. Supreme Court declined to hear a constitutional challenge to an Indiana school district’s policy of randomly drug testing all students who participate in extracurricular activities.<sup>57</sup> The Indiana school district’s policy was enacted shortly after a 1996 Supreme Court decision allowed drug testing of high school athletes in order to protect their safety.



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Esequiel Hernandez's grave. An anti-drug Marine patrol killed him six days after his 18th birthday. He was shot near his home.

**WIRETAPPING:** In 1997, state and federal judges authorized a record number of wiretaps: Police listened to more than 2.27 million conversations among 216,000 individuals.<sup>58</sup> The taps were placed on every type of telecommunication: ordinary and cellular phones, pagers, e-mail, and fax machines. 73% of the wiretaps were issued in drug investigations. Police wiretap requests are always approved. Only one wiretap warrant application has been denied in the past ten years.

**FORFEITURE:** Many consider the most disturbing violation of civil liberties, justified by the “war on drugs,” is the taking of money and property by law enforcement agencies without the owners being convicted, indicted, or arrested for a crime -- even if the owners are acquitted.<sup>59</sup> Eighty percent of people who have property forfeited are not charged with a crime.<sup>60</sup> Known as “civil asset forfeiture,” police are allowed to seize any assets that they claim to believe to be involved with illicit drugs.<sup>61</sup> Efforts to reform federal civil asset forfeiture have been led by U.S. Reps. Henry Hyde (R-IL) and John Conyers (D-MI), but have met with considerable resistance from the U.S. Justice Department.

Persons who have their property taken must pay a bond of 10% of the value of their seized assets (up to \$500,000 per item) to challenge the forfeiture. They must prove their innocence in court to regain their property, an unusual reversal of the “innocent until proven guilty” principle. Tragically, most people, regardless of their innocence, cannot or do not pursue the expensive, lengthy, and unpromising litigation process required to regain their forfeited property. The few who win back their property are not allowed to recover their legal fees. Financial assets are returned without interest. Nor can property owners recover for damages caused by the government’s actions or negligence. Many minor offenders do not challenge forfeitures, fearing that doing so will inspire authorities to pursue major criminal charges against them.

Shockingly, these procedures provide law enforcement with incentives to forfeit peoples’ assets because most of the proceeds are retained by the law enforcement agency, which has led to gross police abuses. In a famous case of forfeiture abuse, police in California killed millionaire Donald Scott in a bogus drug raid of his home. An investigation by Ventura County District Attorney Michael Bradbury suggested that agents hoped the raid would lead to forfeiture of Scott’s property. Bradbury indicated that forfeiting the property was a major motivating factor in the raid. The search warrant was obtained by fraud. No drugs were found on Scott’s property.

**FREEDOM OF RELIGION:** Despite our fundamental guarantee of the free exercise of religion, many people — such as members of the Native American Church, who use peyote in religious rituals, and Rastafarians, who use marijuana as a sacrament — face harassment, prosecution, and imprisonment for practicing their religion. Peyote and other plant materials used for spiritual purposes are called entheogens. For example, Rastafarian Calvin Treiber was arrested in the FBI’s “Operation Reggae North” for marijuana conspiracy and was sentenced to 29 years in prison. Treiber’s wife, Jodie Israel, was sentenced to 11 years. The couple have four young children.<sup>62</sup>

In 1990, the U.S. Supreme Court ruled that peyote use by Native Americans was no longer protected by the First Amendment. In response, Native Americans successfully lobbied Congress, which enacted the American Indian Religious Freedom Act of 1994, guaranteeing peyote use in their spiritual practices. However, only Native Americans were covered by the law, and the religious use of entheogens is still broadly prohibited in the U.S.<sup>63</sup> While federal prohibition of marijuana for medical use is often characterized as the government standing between patients and their doctors, the federal prohibition on the use of entheogens can be seen as the government standing between worshipers and their communion with God.

**FREE SPEECH:** The United Nations' International Narcotics Control Board (INCB), in its annual report on February 24, 1998, said entertainment stars and popular culture were threatening young people by glamorizing the use of illegal drugs. The report urged, "It is possible to curb the showing by public broadcasting media... of favourable images of drug abuse." Such curbing can be done through legislation or voluntary codes of practice, says the report. According to the report, the governments which are restricted from censoring drug use messages because of freedom of information and freedom of speech guarantees, such as the First Amendment to the U.S. Constitution, "may need to reconsider whether unrestricted access to and the propagation of such information are detrimental to the social and health conditions of their populations."<sup>64</sup>

### **INTERNATIONAL: U.S. Drug Policy Creates Violence, Crime, & Corruption in Foreign Countries**

In June 1998, the United Nations (U.N.) held a "drug summit," where delegates agreed to finance a \$5 billion, 10-year strategy to eradicate **all** opium poppy and cocaine plants **worldwide**.<sup>65</sup> The summit prompted worldwide protests, including a letter to the U.N. that appeared as a 2-page ad in the *New York Times* signed by more than 500 leaders from around the world. The letter stated: "We believe that the global war on drugs is now causing more harm than drug abuse itself."<sup>66</sup> Signatories of the letter included former U.N. General Secretary Javier Perez de Cuellar, former U.S. Secretary of State George Shultz, veteran broadcast journalist Walter Cronkite, and former U.S. Attorney General Nicholas Katzenbach.

**INTERDICTION:** Shortly after taking office in 1993, the Clinton Administration shifted drug policy rhetoric from the Reagan-Bush era emphasis on interdiction and foreign source control (supply reduction) to a strategy based on education and treatment (demand reduction),<sup>67</sup> but the strategy was quickly denounced by Republicans as "soft." A meaningful shift in funding never manifested, and supply reduction continues to represent about two-thirds of the national drug control budget, a proportion that has not changed in about 15 years.

The United Nations anti-drug office estimates the international illicit drug trade is a \$400 billion industry, constituting about 8% of all international trade, which is probably an exaggeration.<sup>68</sup> The U.S. has 88,633 miles of shoreline, 300 ports of entry, and more than 7,500 miles of border with Mexico and Canada. Thirteen truckloads of cocaine could meet U.S. total demand for one year.<sup>69</sup> Officials cannot keep drugs from entering most prisons, protected by armed guards, barbed-wire fences, and intense body cavity searches. In 1996, about 11% (215,499) of the loaded commercial trucks and 43% (690,589) of the empty commercial trucks entering the U.S., received a Customs search for narcotics. However, of these vehicles searched, only .006% (56) of the labor-intensive efforts resulted in narcotics seizures.<sup>70</sup> In March 1997, the General Accounting Office concluded: "Despite some successes, United States and host countries' efforts have not materially reduced the availability of drugs in the United States."<sup>71</sup>

Supply reduction efforts fail because "suppliers simply produce for the market what they would have produced anyway, plus enough extra to cover anticipated government seizures," according to RAND.<sup>72</sup> Even if foreign supplies could be effectively curbed, domestic drug production could meet demand as dealers switch to new sources and new drugs. For example, thirty years ago there was almost no U.S. marijuana production. Now, marijuana production (measured at



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Jodie Isreal with her children Laura, Tracy and Richard. Jodie is serving 11 years in prison for marijuana conspiracy charges. Jodie's husband Calvin Treiber is a Rastafarian who uses marijuana as a religious sacrament.

street value) is the largest cash crop in the United States.<sup>73</sup> Domestic production of methamphetamine, a powerful central nervous system stimulant similar to cocaine, has increased dramatically on the West Coast and in the Mid West.<sup>74</sup> Interdiction can never substantially prevent drugs from getting to market. It can, at best, raise the price charged for drugs. But, on that basis, with prices at or near historic lows, interdiction of heroin and cocaine has been an unmitigated failure.

**VIOLENCE & CORRUPTION:** Drug consumption in the U.S. fuels drug market-related crime and corruption in many foreign countries. In 1997, Mexico's highest drug official was convicted of conspiring with Mexican drug cartels. Recently, 18 people were slain together in Mexico, near the U.S. border, in a turf battle in the drug trade.<sup>75</sup>

The U.S. military has become increasingly involved in Colombian internal affairs as officials from both countries have stepped up measures to fight drugs. However, U.S. aid sent to fight drugs is used by Colombia's military to suppress political insurgents, according to the *New York Times* and the *Los Angeles Times*.<sup>76</sup> Colombia's military has an appalling record of human rights abuses. The 34-year civil war in Colombia has claimed an estimated 35,000 lives. Guerrilla groups reportedly received more than \$1 billion last year from the drug trade. The country's largest guerrilla group, with about 15,000 members, the Revolutionary Armed Forces of Colombia (FARC), reportedly maintains a close guard over clandestine airstrips, coca and poppy fields, and drug laboratories.

### **TREATMENT: Not a "Magic Bullet," but the Best Tool We Have**

Treatment for drug abusers works. It is cheaper and more effective than incarceration, and should receive more funding, according to a study released in September 1998 by the Center for Substance Abuse Treatment (CSAT).<sup>77</sup> Gen. Barry McCaffrey, director of the White House Office of National Drug Control Policy (ONDCP) agrees: Treatment "works better than locking them up." McCaffrey added, "The cycle of crime, arrest, prosecution, is tremendously expensive, compared with the expense of treatment programs."<sup>78</sup>

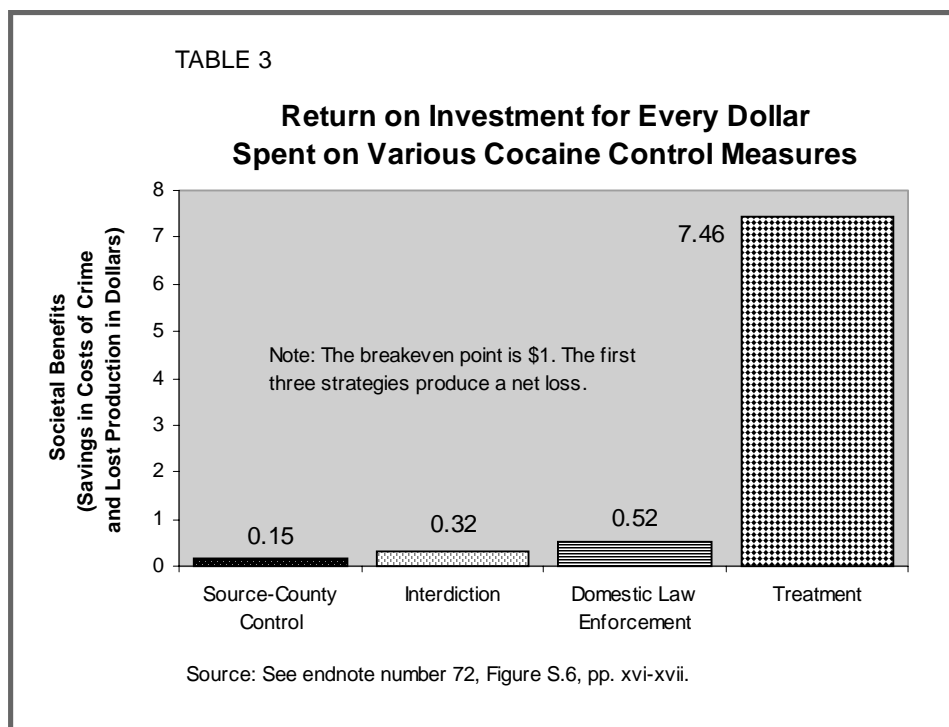
Drug treatment is the most cost-effective method of reducing cocaine consumption and related crime, according to the RAND Corporation.<sup>79</sup> RAND found that mandatory minimum sentencing for drug offenders was the least cost-effective method. According to RAND, "Treatment reduces about 10 times more serious crime than conventional enforcement and 15 times more than mandatory minimums."<sup>80</sup> RAND said that treatment was vastly more cost-effective than mandatory minimums because "most drug-related crime is economically motivated and associated with the amount of money flowing through the cocaine market. Incarceration has little effect on this flow because it suppresses drug use by driving up drug prices. In contrast, treatment removes some users from the market altogether."<sup>81</sup> In a study commissioned by ONDCP and the U.S. Army, RAND found that treatment is 20 times more cost-effective than source eradication.<sup>82</sup>

Drug and alcohol abuse are medical problems that respond to treatment roughly as well as other chronic diseases, such as diabetes, according to the public health group, Physician Leadership on National Drug Policy (PLNDP), which analyzed more than 600 studies.<sup>83</sup> The group also found that treatment is less expensive and more effective than incarcerating addicts. PLNDP is a nonpartisan group of 37 prominent physicians and public health experts, including top health officials from the Clinton, Bush, and Reagan administrations. According to PLNDP researchers, incarcerating a drug addict costs \$25,900 annually while a year of traditional outpatient drug treatment costs \$1,800, intensive outpatient care costs \$2,500, methadone treatment for heroin users costs \$3,900, and residential drug treatment program costs range from \$4,400 to \$6,800 a year.<sup>84</sup> Every dollar invested in drug treatment can save \$7 in societal and medical costs, said PLNDP member Philip Lee, M.D., former Assistant HHS Secretary for Health in the Clinton Administration.<sup>85</sup>

Addiction treatment consistently ranks in the top 10% in cost effectiveness of more than 500 health- and life-saving measures, says David C. Lewis, M.D., project director of PLNDP and editor of the *Brown University Digest of Addiction Theory and Application*. "The likelihood of requiring additional treatment within a 12-month period is generally higher for diabetes, hypertension, and asthma than for drug addiction," said Dr. Lewis.<sup>86</sup> About 90-95% of the costs of treating addicted persons is attributable not to treating addiction but to treating medical problems triggered by the addiction, said Dr. Lewis.

**TREATMENT IN PRISON:** Drug and alcohol treatment in prison will save billions of dollars and significantly reduce crime, according to a 1998 report by CASA.<sup>87</sup> It would take approximately \$6,500 per year to provide an inmate with comprehensive residential drug treatment, according to CASA. For each offender who successfully completes treatment,

CASA estimated that an economic benefit of \$68,800 in reduced crime, arrest, prosecution and incarceration costs, health care savings, and potential earnings will accrue during the first year after release. Joe Califano, Jr., CASA president and former HEW Secretary under President Carter, recommends getting rid of mandatory minimum sentences for nonviolent offenders: "For treatable alcohol and drug abusers, mandatory sentences (particularly those which require convicts to serve their entire time in prison with no parole) endanger rather than protect the public safety."<sup>88</sup>



**TREATMENT GAP:** PLNDP says that only about 15% of people who need treatment receive it. In seven states there are no methadone clinics for heroin addicts. Every U.S. methadone clinic has a waiting list. Only 5% to 20% of pregnant drug abusers can get drug treatment because of insufficient programs, inability to pay, or insufficient inpatient programs that will accept women's children, said Dr. Jeffrey Merrill, a researcher at the University of Pennsylvania.<sup>89</sup>

In state and federal prisons, the gap between available substance abuse treatment and the need for such treatment is enormous and widening. State officials estimate that 70 to 85% of inmates need some level of substance abuse treatment.<sup>90</sup> In January 1999, BJS reported that more than 75% of state and federal prisoners in 1997 had abused alcohol or drugs before their arrest. However, between 1991 and 1997, substance abuse treatment provided to state and Federal prisoners declined to less than 10% of all inmates having received such treatment since their incarceration.<sup>91</sup>

**PUBLIC MISPERCEPTION:** A march 1998 analysis of public opinion in the *Journal of the American Medical Association* (JAMA) found that Americans believe drug abusers are predominantly poor, uneducated, and minorities. In fact, the majority are white, from well-educated families, and initially employed. Dispelling those myths is vital to obtaining public commitment for drug treatment, said Richard Corlin, M.D., a Los Angeles medical professor whose son was a cocaine addict.<sup>92</sup> "Stigma is a barrier to those who would otherwise seek treatment, to doctors who would otherwise do more in treating addiction, and to legislators and public health officials who would otherwise do more to make treatment available," said Dr. Lewis.<sup>93</sup>

### **PUBLIC HEALTH APPROACH: The Future of Drug Policy?**

The most important short-term reform of the "war on drugs" is to adopt a public health focus, and leave behind the law enforcement approach. Known as "harm reduction," the public health approach seeks to minimize harms associated with drug use and drug policy.

**MEDICAL MARIJUANA:** When "drug czar" McCaffrey made his dishonest remark that "there is not a shred of scientific evidence" about marijuana's therapeutic value, there were volumes of scientific evidence (over 90 published reports) that suggest marijuana has medical efficacy.<sup>94</sup> Medical access to marijuana has been endorsed by numerous health organizations, including the American Public Health Association, the American Academy of Family Physicians, the American Society of Addiction Medicine, the British Medical Association, and the *New England Journal of Medicine*.<sup>95a</sup> In March 1999, the Institute of Medicine, in the most current and comprehensive review of marijuana's medical efficacy, concluded: "Scientific data indicate the potential therapeutic value of cannabinoid drugs for pain relief, control of nausea and vomiting, and appetite stimulation."<sup>95b</sup>

In 1970, Congress classified marijuana as a Schedule I substance, the most restrictive schedule, which defines it as having a high potential for abuse and **no medicinal value**. In 1988, in a challenge to place marijuana in Schedule II, which is slightly less restrictive, DEA Chief Administrative Law Judge Francis L. Young ruled: “Marijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis marijuana can be safely used within the supervised routine of medical care.”<sup>96</sup> Young added, “It would be unreasonable, arbitrary and capricious for the DEA to continue to stand between those sufferers and the benefits of this substance.”<sup>97</sup> Yet, DEA political appointees ignored Young’s ruling. Medical doctors in the U.S. are permitted to prescribe cocaine, amphetamines, and morphine, which are widely abused Schedule II substances, but, illogically, not marijuana. Persons who chose to use marijuana medically are arrested and harassed, or coerced into not seeking a medicine they need.



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Renee Emry, a multiple sclerosis patient who uses medical marijuana, at a protest in D.C. Ms. Emry and many other patients who use medical marijuana with a doctor’s recommendation face the constant threat of arrest and prosecution.

Between 1978 and 1997, 35 states and D.C. passed legislation recognizing marijuana’s medicinal value.<sup>98</sup> On November 4, 1996, voters in California and Arizona overwhelmingly approved initiatives to legalize medical marijuana.<sup>99</sup> However, the Arizona initiative was dismantled by the state legislature, and the California initiative is mired in legal confusion because the initiative did not address distribution of medical marijuana and federal officials undertook a massive legal assault against it. Federal officials have arrested and prosecuted patients, threatened medical doctors, and shut down city-approved medical marijuana dispensaries to circumvent the California initiative.<sup>100</sup> In November 1998, voters in Alaska, Arizona (again), Nevada, Oregon, and Washington (state) approved medical marijuana proposals. In that election, voters in Washington, D.C., and Colorado approved similar initiatives. The Colorado measure was ruled invalid just days before the election, and the D.C. initiative was subverted by Congress and is being litigated in federal court. On September 15, 1998, the U.S. House of Representatives voted 310-93 for a nonbinding anti-medical marijuana resolution.<sup>101</sup>

Medical marijuana has been characterized as a “back door” attempt to legalize marijuana for all purposes.<sup>102</sup> But, arresting and prosecuting seriously and terminally ill patients who choose to use medical marijuana better characterizes the length to which federal officials will go to defend marijuana prohibition.

A simple test of whether one should support allowing the legal use of medical marijuana is to answer the following question: “Would you approve of law enforcement officers storming into your home, arresting and incarcerating you and your loved ones, because a member of your family, suffering horrific pain from a terminal illness, such as AIDS or cancer, found relief using marijuana under a doctor’s recommendation, when they could not find relief with any other drug?”

**NEEDLE EXCHANGE:** When addicts can exchange used needles for clean ones, eliminating the need to reuse and share needles, it prevents the spread of infectious diseases, such as HIV and hepatitis B and C. This protects injection drug users, their sex partners, and their offspring. Injection drug use is linked to 40% of AIDS cases in the U.S., including 75% of babies diagnosed with HIV/AIDS. In 1995, AIDS became the leading cause of death amongst persons aged 25 to 44 years. In 1998, the Secretary of Health and Human Services found needle exchange programs effectively reduce HIV transmission while not increasing drug use rates. These findings have been made in studies by the National Commission on AIDS, the General Accounting Office, the Centers for Disease Control, the National Institutes of Health, and numerous other organizations.<sup>103</sup> In 1997, the American Medical Association, the U.S. Conference of Mayors, and numerous editorial boards of major U.S. newspapers called on Congress and the Clinton Administration to lift the ban on federal funding of needle exchange.<sup>104</sup>

However, on April 20, 1998, the Clinton Administration announced that it would not lift the ban.<sup>105</sup> A few days later, the House of Representative voted 287-140 to approve Republican-sponsored legislation that would permanently ban federal funding for needle-exchange programs.<sup>106</sup> A month earlier, the Clinton Administration’s AIDS advisory panel

issued a vote of “no confidence” in the Clinton Administration for not lifting the ban.<sup>107</sup> The chairman of that panel, Dr. R. Scott Hitt, condemned the Administration’s decision not to lift the ban, saying: “At best this is hypocrisy. . . . At worst, it’s a lie. And no matter what, it’s immoral.”<sup>108</sup>

Needle exchanges introduce addicts to drug treatment, drug counseling, health care, and compassion. “Individuals in areas with needle exchange programs have an increased likelihood of entering drug treatment programs,” concluded a National Institutes of Health Consensus Panel in 1997.<sup>109</sup> An additional benefit to society is that clean syringes cost pennies each, while the average lifetime cost of treating an HIV infected person is more than \$150,000.<sup>110</sup>

**HEROIN MAINTENANCE:** “Heroin maintenance” allows confirmed heroin addicts to obtain prescription heroin through a state-regulated pharmacy. While it maintains the addiction, it allows the addict and society to avoid the crime, disease, and devastation associated with the illegal market in heroin. No longer outside the law, addicts can “normalize” their lives as healthy and productive workers, parents, and spouses. A study published recently in the *Medical Journal of Australia* found that supplying heroin to addicts reduces the amount of crime they commit and improves their health.<sup>111</sup>

Heroin maintenance was successful in the 1920s in the U.S. prior to its prohibition,<sup>112</sup> and has been equally successful for decades in England.<sup>113</sup> In Switzerland, an experiment was set up four years ago to allow about 1,000 addicts to obtain prescription heroin at special clinics. A three year evaluation of the program in 1997 found that it substantially reduced crime and disease transmission.<sup>114</sup> A referendum on the program showed 71% of the public supported it.<sup>115</sup> In October, 1998, the Swiss parliament voted overwhelmingly to expand the program.<sup>116</sup> In 1998, the Dutch began a trial heroin maintenance program similar to that of the Swiss.<sup>117</sup> Germany is currently considering such a program.<sup>118</sup> In 1997, government-sponsored health panels in Canada and Australia recommended heroin maintenance programs.<sup>119</sup>

**MARIJUANA DECRIMINALIZATION:** Marijuana decriminalization generally means treating possession of small amounts of marijuana as a civil “violation,” similar to a traffic ticket, thereby discouraging its use while not wasting scarce public resources to arrest, prosecute, and incarcerate persons who use it. On November 4, 1998, 67% of voters in Oregon approved maintaining the 25-year-old marijuana decriminalization regime in their state, overturning a legislative attempt to stiffen penalties for marijuana possession.<sup>120</sup>

Of illicit drug users in the U.S., 80% use marijuana and 60% use marijuana only.<sup>121</sup> In 1997, there was a record number of marijuana arrests — 695,201 marijuana arrests, 87% of which were for possession.<sup>122</sup> The Marijuana Policy Project, a Washington-D.C. based nonprofit organization, estimates there are 36,800 marijuana-only offenders incarcerated in Federal and state prisons and local jails in the U.S at an annual cost of \$1.1 billion.<sup>123</sup> Many experts feel that spending criminal justice resources on the relatively benign behavior of adult marijuana smoking wastes those resources, which should be used to curb juvenile drug use and to address hard-core drug addiction. In 1998, the World Health Organization (WHO) stated in a quashed report that marijuana, even if it were consumed on the same scale as alcohol or tobacco, would probably be safer than either.<sup>124</sup>

**DUTCH POLICY:** In July 1998, “drug czar” Barry McCaffrey misrepresented the Dutch murder rate in an attempt to demonstrate that Dutch drug policy, particularly marijuana decriminalization, has been a “disaster.”<sup>125</sup> McCaffrey insisted it was 17.58 per 100,000, compared to 8.22 murders per 100,000 in the U.S., when, in fact, the Dutch rate is 1.8 per 100,000, less than one-quarter of the U.S. rate. The Netherlands permits people to buy marijuana in small amounts at “coffee shops” to regulate and control its use and sale, and to separate marijuana from the market for “harder” drugs. Compared to U.S. policy, Dutch drug policy has been successful in discouraging marijuana use: According to a study released in January 1999, 15.6% of Dutch people aged 12 and greater had used or tried marijuana, compared to 32.9% of such people in the U.S.<sup>126</sup> The study also reported that only 2.5% of persons in The Netherlands aged 12 and greater had used marijuana within the last month, compared to 5.1% of such people in the U.S. In addition, the U.S. rate of heroin use is twice the rate in The Netherlands; the U.S. rate of incarceration is eight times greater than the rate of incarceration in The Netherlands; and U.S. per capita spending on drug law enforcement is three times greater than Dutch spending.<sup>127</sup>

**GATEWAY THEORY:** Marijuana prohibition recently has been justified by a “gateway theory” that marijuana “primes” the brain for use of “harder,” addictive drugs, such as cocaine and heroin.<sup>128a</sup> Based on bogus statistical analysis, the “gateway theory” equates association with causation. But, even the staunchest defenders of the “gateway theory” admit that a biomedical or causal relationship **has not been established**.<sup>128b</sup> Many experts believe that the most likely relationship between the use of marijuana and “harder” drugs is a person’s propensity for risk-taking, which may even be exacerbated by the illicit market in marijuana, created by prohibition, which routinely exposes children and

adults to harder drugs. In its March 1999 report of marijuana's health effects, the Institute of Medicine agreed: "There is no evidence that marijuana serves as a stepping stone on the basis of its particular drug effect. . . Instead it is the legal status of marijuana that makes it a gateway drug."<sup>129</sup> In 1998, the World Health Organization stated emphatically that the "gateway theory" between adolescent marijuana use and heroin use is the least likely of all hypotheses.<sup>130</sup>

## **CONCLUSIONS: The Evidence Is In: U.S. Drug Policy Needs Substantial Reform**

All public policies should undergo a cost-benefit analysis. Photos of drug agents posing with the latest mound of drugs seized and reports on the latest roundup of drug arrestees – reminiscent of the Vietnam War's "body count" – are the standard fare of news organizations but tell us little about whether we are winning or losing the "war." A cost-benefit analysis of the "war on drugs," which is ubiquitously touted as necessary to "save our children," should measure not only the amount of drug use (particularly juvenile drug use), but the availability of drugs (particularly to children), and the price and purity of drugs.

From 1985 to 1999, the annual federal drug control appropriation increased six-fold from \$2.7 billion to about \$18 billion.<sup>131</sup> In addition, more than \$20 billion is spent on drug control annually at the state and local levels.<sup>132</sup> Yet, from 1985 to 1998, the percentage of 12th grade students that reported marijuana as "fairly easy" or "very easy" to obtain fluctuated slightly to over 90% in 1998 — fourteen years of almost universal availability.<sup>133</sup> In 1998, over half of high school seniors had tried an illegal drug.<sup>134</sup> In 1996, CASA reported that 42% of 17-year-olds consider marijuana easier to acquire than beer.<sup>135</sup> From 1981 to 1996, the average price per pure gram of cocaine fell 66% and the average purity of street heroin increased from 6.7% to 41.5%.

The Government often touts the statistic that "drug use is down 50% over the last decade."<sup>136</sup> However, juvenile drug use has increased in recent years: Past month use of any illegal drug by children aged 12-17 more than doubled from 5.3% in 1992 to 11.4% in 1997.<sup>137</sup> Annual drug-related emergency room visits increased by 60% from 1978 to 1994 and annual drug-related deaths more than quadrupled from 1976 to 1995.<sup>138</sup> Furthermore, the number of hard-core drug addicts (more than four million), those most in need of treatment, has remained relatively stable over the last decade.<sup>139</sup>

**SOFT vs. HARD OR SMART vs. STUPID?** The debate about drug policy is between policies mischaracterized as either "hard" or "soft." It is often said that anyone who suggests alternatives to "zero-tolerance" prohibition is a drug "legalizer." Such mischaracterizations are a tactic to avoid a much-needed, certainly controversial, policy review by attempting to polarize it. The hysterical response to drugs and drug users has caused immeasurable damage. It is time to frame the debate about drug policy in terms of "smart" versus "stupid" — whether a policy efficiently utilizes the appropriate resources to achieve a goal, or wastes those resources.

"Drug czar" McCaffrey consistently has said that drug policy should be based on science. But, when scientific evidence conflicts with "zero tolerance" politics, science and the facts are ignored. This has been the case with medical marijuana, drug treatment, syringe exchange, and marijuana decriminalization. The fundamental failure of current U.S. drug policy coupled with a consistent disregard of scientific evidence and human rights principles suggest that the "war on drugs" is more about moral values of a small minority or exaggerated fears, rather than rational public safety and health measures to protect the majority. According to a study in *JAMA*, 76% of Americans said they would not favor legalizing cocaine and heroin, even if they believed it would lead to less crime.<sup>140</sup>

**QUESTIONS:** Should fear and non-consensus claims to morality shape policy concerning one of the most important public health and social issues facing the U.S.? Do these claims justify taking a person's liberty and separating families?

Isn't it time for the U.S. to carefully and incrementally experiment with alternative drug policies that are compassionate and backed by scientific evidence, rather than pursue or reinvent a policy that has failed demonstrably for eight decades?

Are drug-addicted persons better served in an compassionate environment where all of our creative and intellectual resources are unleashed to help them or in an environment of strict prohibition where addicts are criminalized and pushed away from family and social supports, medical professionals, and employment — critical factors that promote recovery?

Are children and communities safer and healthier when the commerce in drugs is regulated and controlled, or when the commerce in drugs enriches violent criminals, creates an incentive to involve children in the buying and selling of dangerous products, and encourages misinformation and corruption?

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All of the facts above have been reported in **NewsBriefs**, the newsletter of the National Drug Strategy Network. Citations to **NewsBriefs** articles are included in the endnotes in the form (NB, month(s)/year, page number). **NewsBriefs** articles can be found at <www.ndsn.org>. *Drug War Facts* by Common Sense for Drug Policy (Sept. 1998) was extremely useful in my research and is highly recommended as a reference tool for persons concerned about drug policy. It is regularly updated at <www.drugsense.org/factbook/>.

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