

The Hopelessness of Drug Prohibition

*Judge James P. Gray (Ret.)**

INTRODUCTION

I am a former “drug warrior.” Although I may not have given it too much critical thought, during my time of service in the U.S. Navy JAG Corps and as a federal prosecutor in the U.S. Attorney’s Office in Los Angeles, I believed that people using and possessing illicit drugs rightfully should be in jail. In fact, I was probably raised just like you were, which was to equate cocaine and heroin with prison.

But then I was appointed as a trial court judge in Orange County, California by Governor Deukmejian at the end of 1983. Once on the bench my views slowly began to change. I began to realize that we were not doing anything positive for low-level drug offenders except churning them through the system—at great financial and human expense. I also began to realize that when we arrested drug sellers it really did not make any difference in the overall availability of drugs, because other drug dealers or potential drug dealers simply treated the situation as a new job opportunity.

If I can trace my change of thinking back to any particular epiphany, it was when I was presiding over a felony preliminary hearing calendar and was taking a plea and delivering a sentence that another judge had agreed upon for a juvenile who was being tried and sentenced as an adult. This seventeen-year-old hoodlum was pleading guilty to the offenses of assaulting and raping prostitutes and then robbing them of their money. The sentence he would be receiving, when giving him credit for some

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jail time he had already served, resulted in him being released from custody in less than two weeks.

So I listened while the young defendant provided a “factual basis” to show that he was guilty of the offenses, made sure he understood his constitutional rights and desired to waive them, and then gave him the agreed-upon sentence. All during this time he was quite respectful, of course, as most defendants are before a sentence is pronounced. But once the matter was concluded and as he was being led back into the holding cell, he gave out a “war whoop” because he was so pleased with the outcome.

At that moment I realized the truth, which is that we are spending so much of our public resources on cases involving non-violent drug offenders that we do not have enough left to effectively pursue other righteous cases like assaults, rapes, robberies, murders, and frauds. In other words, the “tougher” we get on drug crimes, literally the “softer” we get in the prosecution of everything else.

That conclusion was subsequently reinforced when I read of an investigation by the *Los Angeles Times*, which disclosed that only about forty-seven percent of all homicides between the years 1990-1994 were even prosecuted, compared with about eighty percent in the late 1960s.¹ Why was that? The answer is that we were too busy prosecuting non-violent drug offenders. So, as I began to open my eyes further to these realities, I decided to share my conclusions with as many people as I could.

As a result, on April 8, 1992, I did something quite unusual for a sitting judge. I took a half-day vacation, held a press conference in the plaza behind our courthouse, and recommended that we legalize drugs.² The press conference was successful in getting my opinions out to the public, and I have been actively involved in publicly discussing this critical issue ever since that time. In fact, the writing of this article is simply a continuation of that effort.

I. DISTINCTIONS

Most sophisticated people understand that life can be complicated, and that it is filled with distinctions. But, to our

¹ Frederic N. Tulsy & Ted Rohrlich, *Only 1 in 3 Killings in County Leads to Any Punishment*, L.A. TIMES, Dec. 1, 1996, at A1.

² I have not changed my opinion since that time, but now I use more precise terminology by recommending that we make heroin, cocaine, and marijuana available to adults in government package stores under a strictly regulated and controlled distribution program.

great detriment, for the most part neither our community nor our governments have understood, recognized, or even discussed some critically important distinctions regarding the important area of drug policy. This section discusses five of those distinctions, which are as follows:

- A. What is a Drug?
- B. Drug Harm as Opposed to Drug Money Harm
- C. The Difference between Drug Use, Misuse, Abuse, and Addiction
- D. Holding People Accountable for their Actions, Instead of What they Put into their Bodies, and
- E. Being Managers of Problems, Instead of Moralists

A. What is a Drug?

Aspirin and penicillin are drugs, but those are not what we are discussing here. For these purposes I suggest that we are discussing mind-altering and sometimes-addicting substances.

What are some of these substances? Heroin, cocaine and methamphetamines quickly come to mind. There are also other natural substances like mushrooms, peyote, and other hallucinogens, plus chemical substances like LSD, PCP, ecstasy, and various designer drugs, which also fit the description. Marijuana is also often included on that list, but some people argue that it is not physiologically addicting. But is that all? No, and here is another place where our nation's drug policy has broken down. Other highly available mind-altering and sometimes-addicting substances must also be included in our policy, such as alcohol, nicotine, and even caffeine.

I use alcohol and caffeine, and so do most other adults I know, and lots of people smoke cigarettes. So why should those substances be included in our National Drug Control Policy? I understand that they are not used as often as the others just to "separate from reality," and I am certainly not saying that we should make them illegal. But just because these drugs are legal does not mean that they cannot also produce many of the same harms as illegal drugs.

Of course, if our societal goal were to protect people from the greatest killer drug of all in this area that the user could take, then we would make tobacco illegal. Every year more than 400,000 people die in our country because they use tobacco.³ To

³ A. HYLAND ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, CIGARETTE SMOKING—ATTRIBUTABLE MORBIDITY—UNITED STATES, 2000 (2003), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5235a4.htm> (last visited Apr. 5, 2010).

his lasting credit, C. Everett Koop, the U.S. Surgeon General under President Ronald Reagan, was the first person successfully to spread the alarm about the harms of using tobacco. He used that figure to explain the extent of the danger, but found that it did not have much of an impact. Instead he analogized it to be the same as if two jumbo jets filled with passengers were to crash and burn *every day*, killing everyone aboard. That is the number of people that die each year in our country because they use tobacco.⁴

So why not make cigarettes illegal? Simply because that act would bring in the “Al Capones” and other gangsters who would quickly satisfy the demand for cigarettes, along with all of the accompanying violence, corruption, and lack of respect for the law. Fortunately, we all seem to realize that this would not be an effective “remedy,” and that it would also make criminals almost overnight out of the millions of people who are addicted to cigarettes who would continue to use them.

To the contrary, our approach to tobacco usage has been a remarkable success story. Our efforts at honest education have resulted in the material decrease of tobacco usage, and by regulating the locations in which people can smoke we have significantly reduced the irritation and harms of “second-hand smoke” to non-smokers.⁵ Probably no laws of prohibition could have ever obtained these positive results.

The second biggest killer of the users of mind-altering and sometimes-addicting drugs is alcohol. Approximately 75,000 people in our country die every year because they use this substance. They die from things like cirrhosis of the liver, alcohol hepatitis, and kidney failure.⁶ Of course, we tried to reduce those numbers by making alcohol illegal with the passage

⁴ C. Everett Koop, Address at the National Dialogue on Cancer (Dec. 2, 2000), available at <http://theoncologist.alphamedpress.org/cgi/reprint/6/3/223.pdf>. See generally U.S. Nat'l Library of Medicine, Dept. of Health & Human Services, Profiles in Science: The C. Everett Koop Papers, <http://profiles.nlm.nih.gov/qq/Views/Exhibit/narrative/tobacco.html> (last visited Apr. 5, 2010).

⁵ See CTRS. FOR DISEASE CONTROL & PREVENTION, TOTAL & PER CAPITA ADULT YEARLY CONSUMPTION OF MANUFACTURED CIGARETTES & PERCENTAGE CHANGES IN PER CAPITA CONSUMPTION, http://www.cdc.gov/tobacco/data_statistics/tables/economics/consumption/index.htm (last visited Apr. 5, 2010). See also CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L HEALTH INTERVIEW SURVEY (2008), http://www.cdc.gov/nchs/data/nhis/earlyrelease/200812_08.pdf (last visited Apr. 5, 2010); American Cancer Society, Secondhand Smoke, http://www.cancer.org/docroot/PED/content/PED_10_2X_Secondhand_Smoke-Clean_Indoor_Air.asp (last visited Apr. 5, 2010).

⁶ *Alcohol Linked to 75,000 U.S. Deaths a Year*, MSNBC.COM, June 25, 2005, <http://www.msnbc.msn.com/id/6089353/>. See also American Liver Foundation, Alcohol-Induced Liver Disease, <http://www.liverfoundation.org/education/info/alcohol/> (last visited Apr. 5, 2010).

of the Eighteenth Amendment, which went into effect in January of 1920.⁷ But, after an initial decrease in alcohol usage, by the time Alcohol Prohibition was finally repealed with the passage of the Twenty-first Amendment in 1933,⁸ alcohol usage had returned to its initial rate.⁹

Of course, during Alcohol Prohibition we also saw a significant increase in crime, violence, corruption, disrespect for the law, and death from poisoned liquor (the “bathtub gin” problem).¹⁰ In addition, we also observed firsthand the “Cardinal Rule of Prohibition,” which is “always to push the sale of the stronger stuff.” To explain, if bootleggers face the same criminal justice sanctions for selling a barrel of beer as they would for selling a barrel of whiskey, which will they sell? The answer to that question is easy. They will sell the whiskey because they can make about three to four times more money by selling the stronger stuff. That same reality exists just as strongly today, thus drug dealers push cocaine and methamphetamines upon our children, who often would prefer only to smoke marijuana or take ecstasy at dance parties.

But why should caffeine be a part of our nation’s drug policy? Is caffeine a “good drug” or a “bad drug?” Actually, caffeine is a stimulant to the central nervous system that in massive dosages can be lethal.¹¹ Caffeine can increase alertness and reduce fine motor skills. It can cause insomnia, headaches, nervousness, and dizziness. It can also constrict blood vessels, relax air passages to improve breathing, and allow some muscles to contract more easily.¹² In other words, caffeine is just a “thing,” and it can have both harmful as well as beneficial effects.

So shouldn’t the effects of caffeine on adults be studied and disseminated? As an example, are you aware that the name for Coca-Cola was not a coincidence? Cocaine was an ingredient in that product from 1886–1900.¹³ Of course, the cocaine probably had nothing to do with the flavor or the formula; it was likely only added to cause people to become addicted to the product so the manufacturer would be able to sell more Coca-Colas. But

⁷ U.S. CONST. amend. XVIII.

⁸ U.S. CONST. amend. XXI.

⁹ Mark Thornton, *Alcohol Prohibition Was a Failure*, Jul. 17, 1991, CATO INSTITUTE, http://www.cato.org/pub_display.php?pub_id=1017&full=1.

¹⁰ *Id.*

¹¹ But one would have to drink about 80 to 100 cups of coffee in a short time, not an easy thing to do—or even to contemplate.

¹² Neuroscience for Kids—Caffeine, <http://faculty.washington.edu/chudler/caff.html> (last visited Apr. 5, 2010).

¹³ David F. Musto, *Opium, Cocaine, and Marijuana in American History*, SCI. AM., July 1991, at 40, 44.

when people eventually discovered what was in it, they were so upset that the manufacturers took it out.¹⁴ And what did they replace it with? Caffeine, which was probably added for exactly the same reasons as was the cocaine.

What are the effects of caffeine upon pregnant women, or upon children, whose bodies are developing? Today, caffeine in soft drinks is aggressively marketed to young children.¹⁵ Can that be harmful to them? Mostly we do not know because our nation's drug policy has not promoted research or disseminated information in that area.

And what about the hypocrisy today as seen in our actions between "good" drugs as opposed to "bad" drugs? Our children see their parents decry the usage of drugs on the one hand, and then do not hesitate to give their teenage daughter a valium to calm her down when the "boy of her dreams" asks some other young lady to the prom. They also watch their parents have a couple of stiff drinks to "unwind" when they come home from work. And they see how President Bill Clinton's comments (with a wink) that he smoked marijuana but he "didn't inhale" have turned into a lasting national joke. In addition, they see former Vice President Al Gore as being opposed to the use of marijuana even for medical purposes, yet as being considered to have smoked marijuana regularly when he was a young newspaper reporter in the early 1970s.¹⁶ They even hear of allegations that former President George W. Bush himself used cocaine when he was younger, a discussion that he deflects by saying that the past is the past.¹⁷ Of course that did not stop Mr. Bush, when he was the Governor of Texas, from signing a 1997 bill that required anyone possessing a gram or more of cocaine, even for the first time, to serve a minimum of 180 days in jail.¹⁸ On the other hand, President Barack Obama openly admitted in one of his books that he used marijuana and cocaine when he was in high school and college.¹⁹ Yet there was no general outcry that this has made him incapable of being our nation's president because of those acts, even though hundreds of thousands of people in our

¹⁴ *Id.* at 42 (noting that the laws which were eventually put into effect outlawing the sale of cocaine without a prescription were enacted due to changing public attitude).

¹⁵ Helen Cordes, *Generation Wired*, METROACTIVE.COM, Aug. 20–26, 1998, <http://www.metroactive.com/papers/sonoma/08.20.98/caffeine-9833.html>.

¹⁶ Hendrik Hertzberg, Comment, *Gore's Greatest Bong Hits*, THE NEW YORKER, Feb. 7, 2000, at 31.

¹⁷ Nancy Gibbs, *I've Made Mistakes . . .*, CNN, Aug. 23, 1999, <http://www.cnn.com/ALLPOLITICS/time/1999/08/23/bush.html>.

¹⁸ William F. Buckley, Jr., *The Long Arm of Cocaine*, ORANGE COUNTY REG., Sept. 2, 1999, at Local News 9.

¹⁹ Lois Romano, *Effect of Obama's Candor Remains to Be Seen*, WASH. POST, Jan. 3, 2007, at A1.

country have been imprisoned for the identical conduct. As a result of all of this hypocrisy, how can people be surprised when our children do not take us or our laws in this area seriously?

A material change in our nation's drug policy would be a material change away from hypocrisy.

B. Drug Harm as Opposed to Drug Money Harm

The reality is that our attempts to rid our world of illicit drugs have indisputably failed. In other words, these drugs, dangerous as they can be, are here to stay. We should not be surprised at that fact because there has never been a civilization in the history of mankind that has not had some form of mind-altering and sometimes-addicting drugs to use, misuse, abuse, and get addicted to.

In many ways, we couldn't make these drugs more available if we tried. For example, several years ago Charles Manson was transferred from Corcoran State Prison in California to another facility because he was found to be selling illicit drugs from his prison cell.²⁰ How can this happen? The answer is that there is so much money to be made by smuggling drugs into prisons that lots of people, including prison guards, simply cannot resist the temptation of selling or smuggling small amounts of drugs for large amounts of money.²¹ So, if we cannot keep these drugs out of our prisons—and we cannot—what makes us think we can keep them off the streets of any of our towns or cities?

Without a doubt, these drugs can be dangerous. Never once have I heard of anyone saying or even implying that being a heroin addict is a good thing. But our great country is actually facing two problems in this area. One is "*drug harm*," and that is certainly a substantial problem. But the other is "*drug money harm*." I am convinced that if reasonable people would simply use their own experiences and observations to reflect upon this matter, they would be as convinced as I am that drug money harms are far more costly in every way than the drug harms ever could be.

All neutral studies in the last 100 years that have been undertaken either by government commissions or by private foundations in Great Britain, Canada, and the United States have reached that same conclusion. They all generally recommend that we go away from the criminal justice approach

²⁰ JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 42 (2001).

²¹ See, e.g., Editorial, *Drugs in Prison*, ORANGE COUNTY REG., Jan. 13, 1999, at Metro 6.

and adopt what they usually call “drug decriminalization,” because of all of the benefits that would accrue from that change. The studies expressly make this recommendation “even if that approach would result in increased drug usage.”²²

Over the years, I have sentenced several burglars who, at the time of sentencing, told me variations of the following: “Your Honor, three months ago I realized that I was a cocaine addict with a \$200-per-day habit. So I went to a drug treatment facility and asked for some help. They had me fill out a bunch of forms, and then they told me to come back in six months, because they didn’t have the money.” Do you realize how much of our property a burglar would have to steal to support a \$200-per-day habit? Since a “fence” for the property will only give someone about ten percent of its value, those burglars have to steal about \$2,000-*per-day* just to support their habits!

Of course, we will not spend the \$2,000-\$3,000-*per-year* for outpatient drug treatment that might help them (and significantly reduce crime along the way), but we will spend the \$25,000-\$30,000-*per-year* to put them in jail or prison without hesitation. As a result of this shortsighted approach, the United States leads the world in the incarceration of its people—both in sheer numbers and per capita. We have less than five percent of the world’s population, but we have almost a *quarter* of its prisoners.²³ As of the year 2007, the United States had 2.3 million people behind bars. China, *which has four times our population*, is in a distant second place with 1.6 million prisoners—although this does not include hundreds of thousands of “political activists” who are in “detention.”²⁴

That means that we have 751 people behind bars for every 100,000 population (if you count only adults, 1,000 for every 100,000 population). Russia, with 627 for every 100,000 population, is the only major industrialized nation that comes anywhere close to us. England’s rate is 151; Germany’s is 88; Japan’s is only 63. These statistics have led James Q. Whitman, who is a specialist in comparative law at Yale, to write, “Far from serving as a model for the world, contemporary America is viewed with horror.”²⁵

²² See GRAY, *supra* note 20, app. B, at 251–66 (summarizing the findings of every neutral study in the United States, Great Britain, and Canada in the last 100 years).

²³ Adam Liptak, *U.S. Inmate Count Far Exceeds Those Of Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

²⁴ *Id.*

²⁵ *Id.*

In almost every way this situation and these numbers are the result of drug money harm, not drug harm. Because illicit drugs are so expensive, many drug users and particularly addicts are forced to commit crimes in order to get money to purchase the drugs. This results in many house and vehicle burglaries, check offenses, robberies at automatic teller machines, and, certainly, prostitution. It also directly results in the violence by illicit drug dealers to “protect their fiefdoms” from other dealers, or to “convince” their drug-using customers to get the money to pay past debts for their expensive purchases.

To address this reality in economic terms, criminalizing a product necessarily reduces the supply, which then substantially increases the price. That, in turn, makes it more lucrative for people to risk even large criminal justice sanctions to sell the prohibited product. This directly results in increased crime both because the users must obtain the increased amount of money to purchase the product, and because the illegal dealers must use violence and threats of violence to protect their market from other dealers. So all of this harmful activity is pre-ordained, and all of our efforts to repeal the Law of Supply and Demand are destined to be unsuccessful. Yet we still express surprise at the results!

Actually, none of these drugs are expensive to grow, manufacture, package, or distribute. Marijuana is not called a “weed” for nothing—it will grow anywhere. And, contrary to the attempts of the DEA to persuade us to the contrary, the opium poppy used to make heroin does not need a “mountainous” climate to grow and flourish. For years this beautiful flower was grown by the National Park Service in Thomas Jefferson’s home in Monticello, until the DEA ordered its removal.²⁶ If the poppies will grow in Virginia, they would grow virtually anywhere.

The rise in our prison population is also the natural result of the growth of bureaucracies. Once a bureaucracy is in place, its natural inclination is to grow and to justify its own existence. Among other things, that takes the form of increasing arrests of non-violent marijuana users. For example, an annual FBI report that was released at the end of 2007 showed that marijuana arrests have climbed in each of the last four years.²⁷ In the year 2006, there actually were 829,627 state and local arrests for marijuana, and a full eighty-nine percent of those were only for

²⁶ JIM HOGSHIRE, OPIUM FOR THE MASSES: HARVESTING NATURE’S BEST PAIN MEDICATION 49 (2009).

²⁷ MARIJUANA POLICY PROJECT, 2007 ANNUAL REPORT 2 (2008), http://www.mpp.org/assets/pdfs/general/AnnualReport_07.pdf.

possession, not the sale or manufacture.²⁸ That means that there was *one marijuana arrest in our country every thirty-eight seconds!*²⁹

So the question must be asked, just because some people make a stupid mistake and use, or even get themselves addicted to, one of these drugs, why should I suffer? Why must I put bars on my windows and see my insurance rates go up simply because drug users are trying to get the unnecessarily high amount of money to buy their drugs? Why must families of non-violent drug users be split apart and in many cases put on welfare because their breadwinner is imprisoned for the non-violent possession or usage of illicit drugs? And why must my taxes go up appreciably to support this entire failed enterprise? There must be a better way, and there is.

An honest discussion of this issue is not at all complete without addressing and acknowledging the drug money harm our country has directly inflicted upon the people of the developing world because of *our own appetite* for illicit drugs. The ultimate irony is that we could “bulldoze” the entire country of Colombia—and even take Peru and Ecuador with it—and those acts would not make the slightest difference in our nation’s drug problems. That is because if the demand is here, the demand will be met.

If the demand is not met by Colombia, Peru, and Ecuador, it will be met by Nigeria, Thailand, and Afghanistan. Or even by California, where marijuana is the state’s largest cash crop!³⁰ And as for concerns about violence and other serious harms resulting from our drug policy, in many nations like Colombia and Mexico the drug dealers often outspend and even outgun the police. This directly results in some honest police officers being assassinated, and others giving in to economic coercion and joining forces with the drug dealers. In addition to bloody battles and even running firefights between the police and the drug gangs, right-wing paramilitary fighters have been organized in an effort to fight against left-wing organizations that are supporting themselves with drug monies. So, now there are almost full-scale wars between those groups, accompanied by extortion, mass killings, and even suicide bombings. Then the

²⁸ *Id.*

²⁹ *Id.*

³⁰ Alison Stateman, *Can Marijuana Help Rescue California's Economy?*, TIME.COM, Mar. 13, 2009, available at <http://www.time.com/time/nation/article/0,8599,1884956,00.html>.

ultimate irony comes when the winners of these wars almost always take over the lucrative drug trade for themselves.³¹

There are even many truly harmful consequences of our drug policy that we never could have anticipated. For example, some fathers who raise opium poppies in Afghanistan lose their crops as a result of our country's eradication efforts, and most of them have already borrowed money from the drug dealers in reliance upon their eventual sale. So they are increasingly being forced to sell their young daughters to the drug dealers to pay their debts. Afghans disparagingly call these young girls "loan brides," because the fathers give them to the drug dealers as the only way they have to pay their debts.³²

Of course, we have also had our fair share of drug money harm. I even have a personal story about this. When I was first appointed as a judge, I took the seat of a fairly young man who, for reasons still unknown to me, decided that he no longer wanted to be a judge and resigned. Eight years later, former Judge Alan A. Plaia was convicted in federal court in Hawaii for conspiracy to distribute 220 pounds of cocaine.³³

I have no reason to believe former Judge Plaia was a bad man; I believe he was simply overcome by the allure of the big and easy money to be made by the sale of illicit drugs, and he is not at all alone. Many people from all walks of life in our country have been convicted of drug money offenses, including twenty-six members of the Los Angeles Sheriff's Office who were convicted for skimming drug money they had seized. That not only included the officers out in the field, but also the desk sergeant back at headquarters.³⁴ And without much difficulty we all can find stories in our newspapers virtually every day about similar convictions of people like police commissioners and chiefs of police, judges, mayors, former Justice Department lawyers, FBI agents, border guards, military personnel, airline employees,

³¹ See Ken Ellingwood, *Mexico vs. Drug Gangs: A Deadly Clash for Control*, L.A. TIMES, June 3, 2008, at A1; Ken Ellingwood, *Seven Mexico Agents Shot to Death*, L.A. TIMES, May 28, 2008, at A3; Associated Press, *Key Juarez Law Officer Shot Down*, L.A. TIMES, May 11, 2008, at A4; World in Brief, *Police Officer Arrested in Assassination*, L.A. TIMES, May 13, 2008, at A11; Chris Kraul, *New Colombia Drug Gangs Wreak Havoc*, L.A. TIMES, May 4, 2008, at A8; Marla Dickerson & Richard Marosi, *13 Die as Gun Battles Jolt Tijuana*, L.A. TIMES, Apr. 27, 2008, at A1; Hector Tobar, *Officials Silent in Tijuana*, L.A. TIMES, Apr. 28, 2008, at A1; M. Karim Faiez & Laura King, *Strike on Afghan Anti-drug Force Kills 19*, L.A. TIMES, Apr. 30, 2008, at A3.

³² Sami Yousafzai & Ron Moreau, *The Opium Brides of Afghanistan*, NEWSWEEK, Apr. 7, 2008, at 38.

³³ Susan Seager, *Ex-Judge Admits Drug Conspiracy*, L.A. DAILY J., Dec. 23, 1991, Part 1:2.

³⁴ See GRAY, *supra* note 20, at 74.

immigration inspectors, criminal prosecutors, and even a Roman Catholic priest.³⁵

A related problem is the material increase in the criminal acts of juvenile gangs throughout our country, which are exacerbated by the fact that the sales of illicit drugs provide the funding for most of the gangs. Not only that, but many of the more sophisticated gangs have begun to extort their drug customers in management positions in government offices, car dealerships, mortgage companies, and others, to provide them with access to credit and other personal information of their customers to use for identity theft offenses. As a result of all of this, many young people join the gangs expressly so that they can “be a part of the action.” So, once again our drug policy is affirmatively fueling anti-social and criminal conduct. None of these problems are caused by the drugs themselves, they are all caused by the drug money!

Another serious problem was often presented to me while I was on the Abused and Neglected Children’s Calendar in Juvenile Court. There would be, for example, a single mother of two children who made a big mistake—she hooked up with the wrong boyfriend. This man would be selling drugs, and the mother would know it, but that is the way the table was set. Then one day, the drug dealer would tell the mother that if she would take a package across town and give it to “Charlie,” he would pay her \$500. She would basically know that the package contained narcotics, but it would pay half her month’s rent and she needed the money. So she would do it, and then get arrested, convicted, and sentenced to about five years in prison. And to be honest, a sentence of five years for transporting four or five ounces of cocaine in today’s system is not an unreasonable sentence.

But when the mother is sent to prison, what happens to her children? Well, when the mother is confined she has legally abandoned her children. As a result, that case would come to me on the Abused and Neglected Children’s calendar. So now I would have in my courtroom the young mother in a jail jumpsuit and handcuffs. And I would tell her the truth, which is that she would not be a functional part of her children’s lives for the next five years—and she would start to get tears in her eyes at the realization. Then I would tell her the blunt reality that unless she either had a close personal friend or family member who was both willing and able to take custody of her children, her children

³⁵ *Id.* at 76.

would probably be adopted by somebody else by the time she was released from prison.

And then the mother would break down completely—wouldn't you? Unfortunately, if that is not enough to get an emotional response from you, I can break you down as a taxpayer. In this example, taxpayers will be spending upwards of \$5,000 per month to keep each of these children in a group home until they can be adopted, plus about \$25,000 for a year to keep their mother in prison. That means that for the first year, we as taxpayers will be spending about \$60,000 per child, times two children, plus the mother's incarceration, for a total cost of about \$145,000 to separate a mother from her children! And guess who gets to enforce that program? I do. But I do not have to do so quietly—that is one reason I am writing this article.

So far, we have not even discussed other serious and additional unintended consequences that we have suffered as a direct result of our nation's failed policy of Drug Prohibition. For example, we have lost more of our civil liberties as a result of this policy than anything in our history. In a book I wrote on the failures of Drug Prohibition, I arbitrarily selected 1971, which was the year I graduated from USC Law School, as a cut-off date. Then, by citing only drug cases decided by the United States Supreme Court, I demonstrated how we have lost many of our Fourth Amendment rights, as well as many of our rights under the First, Fifth, and Sixth Amendments solely because of Drug Prohibition.³⁶ In a similar fashion we have lost our civil and procedural rights to the government because of asset forfeiture laws in drug cases. And why is no one spreading the alarm? When we lose our precious liberties to the government, we almost never get them back. And all of this has happened because of drug money.

Another consequence of the failure of our national drug policy is seen when people who are suffering from serious pain are unable to obtain sufficient pain relief medication from their doctors. Today there are literally thousands of people in our country who are unnecessarily in great, yet treatable pain. This is because the DEA is looking over the shoulders of medical doctors with the express intent of prosecuting any of them who "over-prescribe" addicting pain medication. This rightfully has doctors so paranoid that many of them are actually under-prescribing painkillers to people who need them.

³⁶ See GRAY, *supra* note 20, at 95–123.

I refer to this as the “Rush Limbaugh problem.” To be honest, I would figuratively love to put this bombastic fellow in jail for lots of reasons, but this is not one of them. If Mr. Limbaugh actually has severe back pain, why should he have to allegedly acquire pain medication illegally in order for him to alleviate it?³⁷ All because of our nation’s drug policy. You may not be personally aware of this problem yet, but you or least your parents probably will be in the future. Similarly, due to Drug Prohibition, our country’s medical community was virtually forced to stop all research into the physiological reasons for drug addiction and its treatment. As a result, we are only now beginning to discover some promising pharmaceutical treatments for chemical addiction.

But the most far-reaching and ironical unintended consequence is the drug money damage that our current drug policy is doing to our children. When it comes down to it, most people are at least somewhat aware of some of the problems discussed above and realize that what we are doing is not working. But they are willing to continue with the same failed policy, “for all of its defects,” in order to keep these dangerous drugs away from our children. However, this policy directly puts our children in harm’s way for each of two important reasons.

First, it is actually easier for our young people to obtain marijuana or any other illicit drug, *if they want to*, than it is for them to get a six-pack of beer. That is what high school and college-age students under the age of twenty-one tell me, and they will tell you the same thing if you ask them. You might say that no one would want to get your thirteen-year-old daughter hooked on cocaine, but you would be wrong. They do want to get her hooked, so that they can make money from her.

Today, no one provides a free sample of Budweiser beer on a high school campus, because they will face real trouble if they were to do such a thing. But free samples of marijuana, ecstasy and other illicit drugs are made available to our children all the time, even on their school campuses. This brings me to one of the big secrets that our society must learn before we will begin to make progress in this entire area: Prohibition Never Works as Well as Regulation and Control. The reality is that when we prohibit a substance, we give up all of our ability to control it. And when this is done, we concede the entire market to the

³⁷ Sam Howe Verhovek, *Limbaugh Deal Avoids Drug Prosecution, Defense Says*, L.A. TIMES, Apr. 29, 2006, at A8; Jeff Leeds, *In Legal Deal, Limbaugh Surrenders in Drug Case*, N.Y. TIMES, at A12.

control of illicit drug dealers—and they do not ask children for identification.

Second, an adult drug seller can convince a fourteen- or fifteen-year-old boy, or girl, to take a substantial amount of risk almost anywhere for \$50 in cash. As a result, drug dealers routinely have as large a supply of these children as they want to act as look-outs, “go-fers,” couriers, or anything else. Then, as soon as the child’s reliability is established, the drug dealer trusts him or her to sell small amounts of drugs so that the drug dealer makes more money, and the child makes more money. Naturally the child sells the drugs to his or her twelve-, thirteen-, and fourteen-year-old peers, thus recruiting more children to a lifestyle of drug usage and drug selling. I saw this frequently in Juvenile Court, and this is all directly caused by drug money.

At the end of the day we simply must question ourselves about what our nation’s drug policy is doing. Has incarcerating all of these people really made any difference in the availability of the drugs to adults or even to children? Will the potential ruining of the lives of about ninety-five young people who were arrested in April of 2008 at San Diego State University for selling drugs on campus make any positive difference in the availability or use of any of these drugs on that campus,³⁸ or anywhere else? Are we in better shape today because we have lost many of our constitutional rights because of our War on Drugs? Are narcotics less available to illicit users because medical doctors under-treat the severe pain of thousands of chronic sufferers? Do we really want to increase the power of organized groups of juvenile and adult criminals here and all around the country? Are there better ways of addressing these critically important issues? And will these other policies better protect our children from the perils and dangers of these mind-altering and sometimes-addicting drugs? I think that if you see what is really happening in the world your answers will be the same as mine.

C. The Differences Among Drug Use, Misuse, Abuse, and Addiction

When it comes down to it, different situations with different people should give rise to different societal responses. Our present policy basically preaches that all illicit drugs are equally dangerous, all use is “bad,” and all such drug use should be prohibited. The same approach is taken for adults in the

³⁸ James Reno & Dirk Johnson, *These Guys Had To Be Taken Down*, NEWSWEEK, May 19, 2008, at 40.

workplace regarding drug testing. In supporting that approach, the Commission on Organized Crime's report in 1986 stated that "a person can no more tolerate a little recreational drug use than he or she can tolerate a little recreational smallpox."³⁹ This is a naïve and even silly thing to say.

When I talk about these issues publicly, I often acknowledge that most days after work I go home and take a mind-altering and sometimes-addicting substance—I have a glass of wine with dinner. Sometimes I have two. That is to say that I *use* this mind-altering and sometimes-addicting substance. I also confess that on a few occasions when I was younger I *misused* alcohol to the extent that I got sick to my stomach and the next day had a hangover. But, I am really careful not to drive after drinking alcohol, and I have never assaulted anyone while under the influence (or at any other time).

If my "drug of choice" were different, and I were brought into the criminal justice system, I would clearly be labeled as a drug addict that needs treatment because I use this substance almost every day. Many people do the same thing. I believe I am not a problem user and do not need any alcohol treatment whatsoever, but if that were my only hope of escaping a criminal conviction for my drug usage, I would be first in line to sign up. This, of course, would be a waste of public resources.

Otherwise, if people were to go home after work and drink ten martinis and then go to sleep, that certainly would not be a healthy thing to do. In fact, that would be an *abuse* of the drug of alcohol. And if those people continued that alcohol abuse, even in the face of serious negative consequences in their lives, those people would be considered to be *addicted* to alcohol. But none of those situations would or should expose them to criminal prosecution unless their actions exposed *other* people to harm. Then they would be problem users who should be prosecuted. Society can try to help the non-problem substance abusers to be healthier by trying to educate them about the danger of this conduct, and also by making drug treatment available upon demand. But otherwise we will be forced to leave them to their own poor decisions.

The same thing is true concerning other mind-altering and sometimes-dangerous drugs. Different conditions for different people require different responses. The secret is that the drugs do not have to be illegal to hold people accountable for their actions and to coerce the problem users into treatment.

³⁹ Greg Beato, *The Golden Age*, REASON, Mar., 2008, at 14.

D. Holding People Accountable for their Actions Instead of
What They Put Into Their Bodies

In 1913, Congress looked at the reality of drug use and abuse in our country, and saw that about 1.3 percent of our population was *addicted* to narcotic drugs. So, “in its wisdom,” it passed the Harrison Narcotic Act, which began taking us down the road to Drug Prohibition. Then in the early 1970s during the Nixon Administration, Congress again observed that about 1.3 percent of our population was drug addicted, so it tightened up our laws and began to pursue Drug Prohibition in earnest. Now, after spending more than a trillion dollars on this program, we still notice that about 1.3 percent of our population is drug addicted.⁴⁰

This information will, or at least should, tell us that no matter how tough we are on this issue, until medical science can develop a better way to deal with the problem, about 1.3 percent of our population will always be *addicted* to these sometimes-dangerous drugs. We can prosecute heavily and send thousands of drug-addicted people to jail or we can ease back on our prosecutions, and we will still have about a flat-line 1.3 percent of our population addicted to these drugs.

Thus, we should hold people accountable for their actions, and not for what they put into their bodies. Not only is that consistent with my Libertarian philosophy, it actually works. In our society, if one person harms another person, the criminal justice system is well equipped to respond. The victim will call the offense to the attention of the authorities, and will cooperate in the crime’s investigation and prosecution. But if a willing drug dealer sells an illicit drug to a willing buyer, no one will come forward or even cooperate in the investigation or prosecution of the offense. This forces the criminal justice system to take extraordinary measures to detect, prosecute, and convict any of these people. These measures include surreptitious activities like undercover “sting” operations, wire taps, often unsavory arrangements with paid informants, and encouraging defendants who have already been charged with offenses to “snitch” on other people. Not only are these prosecutions more difficult, they are also much more labor intensive, expensive, unreliable, and physically dangerous for everyone involved.

To put this issue in a different perspective, it makes as much sense to me to put that gifted actor Robert Downey, Jr. in jail for

⁴⁰ DVD: L.E.A.P. Promotional Video (Common Sense for Drug Policy), available at <http://www.leap.cc/cms/index.php?name=Content&pid=28>.

his heroin addiction (and he certainly seems to have one),⁴¹ as it would have to put Betty Ford in jail for her alcohol addiction. Nevertheless, if Robert Downey Jr., Betty Ford, or anyone were to drive a motor vehicle impaired by any of these drugs, or do anything else to put *other* people's safety into jeopardy, bring them to court. If they are problem users we can then coerce them into drug treatment. Otherwise, what they have is a medical problem. It makes much more sense to me to have medical problems addressed by medical professionals rather than by police officers.

The Supreme Court has actually acknowledged this distinction in 1962 in *Robinson v. California*. In that case, Mr. Robinson had been convicted of a California statute that made it a criminal offense to be addicted to the use of narcotics. But Justice Potter Stewart, in writing for the majority, said that making the status of narcotic addiction a criminal offense for which an offender could be prosecuted before he reformed, and, upon conviction required that he be imprisoned for at least ninety days, inflicted a "cruel and unusual punishment" upon him.⁴²

Unfortunately, over four dissenting opinions, *Robinson* was ignored in *Powell v. Texas*, which affirmed a conviction for public drunkenness to alcohol.⁴³ Justice Abe Fortas in dissent cited the holding of *Robinson* and said that "even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."⁴⁴ And Justice Fortas was right; *Robinson's* precedent has been basically forgotten ever since.

Fortunately, under *Sundance v. Municipal Court*, people in California still cannot be prosecuted for being addicted to alcohol.⁴⁵ The California Supreme Court supported the trial court findings of Judge Harry Hupp that if people are unable to stop drinking despite the negative effects it has upon their health and general well being, then "the penal system "has no positive effect" in deterring or treating them.⁴⁶ Therefore, they could not be arrested unless they would be screened and evaluated by a

⁴¹ See Doug Bandow, *The Robert Downey Jr. Problem*, CATO INSTITUTE, Dec. 11, 2000, <http://www.cato.org/dailys/12-11-00.html> (analyzing the ineffectiveness of the current model of punishing drug offenses through the example of Robert Downey, Jr.'s drug abuse issues).

⁴² *Robinson v. California*, 370 U.S. 660, 667 (1962).

⁴³ *Powell v. Texas*, 392 U.S. 514, 530, 536 (1968).

⁴⁴ *Id.* at 566-67 (Fortas, J., dissenting).

⁴⁵ *Sundance v. Mun. Court*, 729 P.2d 80, 110-11 (Cal. 1986).

⁴⁶ *Id.* at 88 (quoting the trial court's finding).

person who was trained to recognize their medical problems, and their condition monitored at least every hour.⁴⁷

As a trial judge overseeing the prosecution of people addicted to a number of mind-altering and sometimes-addicting drugs other than alcohol, I wonder why the court system, at least in California under the *Sundance* precedent, has not reached similar findings regarding those other drug-addicted people as well.

E. Being Managers of Problems Instead of Moralists

Within the last few decades, most of the countries in Western Europe have taken a different approach to the nagging and difficult problems resulting from the presence of mind-altering and sometimes-addicting drugs in their communities. The people in these countries almost universally do not condone drug misuse or abuse any more than we do, but they have adopted the more sophisticated understanding that these drugs, dangerous as they can be, are here to stay. So they have decided to be managers of the problems, instead of simply moralizing about them as a matter of “chemical chastity,” or hoping to incarcerate their way out of them.

Those countries are doing far better with their efforts than we are. In my view, we can learn from their experiences and more sophisticated approach, and we should change our policies accordingly. The next section will set forth several of their approaches.

II. OPTIONS TO OUR PRESENT POLICY OF DRUG PROHIBITION

A. More and More of What Has Been Proven Not to Work

The option we have selected for ourselves for the years since the Nixon Administration severely increased our punitive approach to drug use and abuse⁴⁸ has been to utilize more and more of what has been proven not to work. The core of this approach has been to respond to the ineffectiveness of increasing penalties for drug offenses by simply increasing them further.

This approach has not only been employed with jail and prison sentences, but we have also taken away the driver’s licenses of juveniles convicted of drug offenses, even though no

⁴⁷ *Id.* at 87–88 (citing the trial court’s opinion).

⁴⁸ David T. Courtwright, *The Controlled Substances Act: How a “Big Tent” Reform Became A Punitive Drug Law*, 76 *DRUG & ALCOHOL DEPENDENCE* 9 (2004).

driving was alleged to have been involved in the offense.⁴⁹ In addition, educational funding benefits have been stripped from students who have been convicted of drug offenses.⁵⁰ We also force unknowing parents and grandparents out of government-subsidized housing if their residing children or grandchildren are convicted of selling or even using illicit drugs.⁵¹ Interestingly, when the daughters of Governor Jeb Bush of Florida were believed to have had problems with addicting drugs, he publicly requested privacy and drug treatment to deal with this family emergency.⁵² I certainly sympathize with his situation and agree with his request. But if the same laws had been equally enforced, he should have been excluded from *his* government housing. But this is yet another example of the “if *we* have problems with drugs, *we* need treatment; but if it is *them*, *they* need jail” way of thinking. Many people around our country see the entire War on Drugs as being racist both in design and in application. I do not agree with these views, but, unfortunately, this situation gives them ample evidence to support their theories.

The circumstances have deteriorated this far primarily because we have developed a “prison-industrial complex” that centers its existence around the perpetuation of the so-called War on Drugs. Drug Prohibition is a multi-billion dollar-a-year business, and many people both in government and in the private sector have an enormous vested interest in its perpetuation. In effect, they have become addicted to the drug war funding. That is not to say that this is true of everyone in these areas, but it is certainly something to keep in mind when listening to their rhetoric.

B. Needle-Exchange Programs

Needle-Exchange Programs are quite straightforward. An adult exchanges a dirty hypodermic needle and syringe for a clean one. No money changes hands and no questions are asked. That is it. All of the neutral studies show that these programs do

⁴⁹ Aaron J. Marcus, *Are the Roads a Safer Place Because Drug Offenders Aren't on Them?: An Analysis of Punishing Drug Offenders with License Suspensions*, 13 KAN. J. L. & PUB POL'Y 557, 557–59 (2004).

⁵⁰ Kelly R. Brandstetter, *Repealing the Drug-Free Student Loan Provision: Would Putting Dope Back Into the College Classroom Help Keep Dope Off the Street and Out of the Prison System?*, 77 U. CIN. L. REV. 1127, 1134–40 (2009).

⁵¹ See generally Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161 (1991).

⁵² Maureen Norton-Hawk, *Social Class, Drugs, Gender and the Limitations of the Law: Contrasting the Elite Prostitute with the Street Prostitute*, in 29 STUDIES IN LAW, POLITICS & SOCIETY 123, 124 (Austin Sarat & Patricia Ewick eds., 2003).

not increase drug use or abuse, and they do not decrease it either—they are neutral in that regard. But they do decrease the incidence of AIDS, hepatitis, and other blood-borne diseases by about fifty percent.⁵³ AIDS is the largest cause of death for twenty-five to forty-four year-olds in our country, and the biggest group within those that die are drug users who use needles, as well as their sexual partners and their newborn babies who derive it from the users.⁵⁴

Nevertheless, even though the Centers for Disease Control, Institute of Medicine of the National Academy of Sciences, National Commission on AIDS, the General Accounting Office, and the American Medical Association have all agreed that governments should support needle-exchange programs,⁵⁵ the federal government continues to decline to fund them.⁵⁶ In fact, under section 11364 of the Health and Safety Code, it is still illegal in California to possess a hypodermic needle and syringe without it being obtained from an “authorized source,” which generally means from a medical doctor’s prescription.⁵⁷ And nowhere in the law are doctors authorized to prescribe needles for illicit drug addicts. This means that it is often much easier for drug-addicted people to find their drugs than it is a clean needle. So, not only does our policy of Drug Prohibition exacerbate the health problems in this area, it actually attacks programs that can reduce them.

Holland has used these programs to reduce the percentage of illegal drug-injecting people who have the AIDS virus down to about four percent with their needle-exchange and similar “harm reduction” programs. In fact, in order to reach the largest number of people, they have made their programs “user friendly” by placing needle-exchange machines in many local police stations.⁵⁸ This makes a great deal of sense since these locations

⁵³ Peter Lurie, *When Science and Politics Collide: The Federal Response to Needle-Exchange Programs*, 72 BULL. N.Y. ACAD. MED. 380, 385 (1995); Paul Recer, *Study Finds Needle Exchanges Don't Promote Illegal Drugs*, ORANGE COUNTY REG., Sept. 20, 1995, at News 12; Sheryl Stolberg, *Needle Exchange Cuts Risks*, *Study Finds*, L.A. TIMES, Jan. 12, 1994, at A3.

⁵⁴ Lurie, *supra* note 53, at 380.

⁵⁵ Joanne Jacobs, *Drug War Sticks a Needle in the AIDS Battle*, ORANGE COUNTY REG., Mar. 5, 1997, at Metro 9.

⁵⁶ At the time of this article, the House of Representatives had introduced a bill that would lift the ban on federal funding for syringe exchange programs. Community AIDS and Hepatitis Prevention Act, H.R. 179, 111th Cong. (2009) (as referred to the H.R. Comm. on Energy & Commerce, Jan. 6, 2009).

⁵⁷ CAL. HEALTH & SAFETY CODE § 11364 (West 2001).

⁵⁸ Ethan Nadelmann, *Europe's Drug Prescription*, ROLLING STONE, Jan. 26, 1995, at 38–39.

are safe, well lit, clean, and open twenty-four hours per day.⁵⁹ On the contrary, the percentage of drug-injecting people that have the AIDS virus in our country is about *thirty-five percent!*⁶⁰ This is a crime by our government against its own people, and we must take it upon ourselves to see that it is not perpetuated!

C. Drug Treatment

In June of 1994, the RAND Corporation released a study that found that taxpayers get a full *seven times* more value for their tax money with drug treatment than they do for incarceration, even for heavy-using drug-addicted people.⁶¹ Where are the headlines? Are we not interested in getting more “bang for our taxpayer buck?” If so, we should demand that we take non-violent drug-addicted people out of jail and place them into drug treatment programs!

To some degree, California’s Proposition 36 (Prop. 36) has done this by diverting non-violent drug users out of the criminal justice system and into treatment, which is a positive result.⁶² But there is a trap in this program. As stated above, the people who use these drugs without causing harm to anyone but themselves should not be in the criminal justice system to begin with. And, although they must go through a mild treatment program to take advantage of the provisions of Prop. 36, for the most part these people are able to get out of the system without a criminal conviction. But, unfortunately, if people are drug-addicted, Prop. 36 will usually not work. The reason for this is that the treatment programs under Prop. 36 are not intensive enough to meet these people’s needs. As a result, they will be brought back into court when they fail, and eventually they will be sentenced to longer amounts of incarceration than they would have, had they simply been sentenced right away for their original offense.

In contrast, rigorous drug treatment programs *do* work. For example, Donovan State Prison in San Diego County has a great but small treatment program for its drug-addicted inmates. This program emphasizes basic life skills such as anger management, job skills, parenting, overall health considerations, individual

⁵⁹ James P. Gray, *Policy Options for the Future*, in DRUG COURTS A NEW APPROACH TO TREATMENT AND REHABILITATION 414, 420 (James E. Lessenger & Glade F. Roeper eds., 2007).

⁶⁰ Stolberg, *supra* note 53.

⁶¹ Carolyn Skorneck, *Treatment Is Cheapest Way to Cut Cocaine Use in Nation*, *Report Says*, ORANGE COUNTY REG., June 14, 1994, at A5.

⁶² Drug Policy Alliance, California Proposition 36: The Substance Abuse and Crime Prevention Act of 2000, <http://www.prop36.org/about.html> (last visited April 12, 2010).

accountability for one's actions, and an honest assessment of the risks and benefits of using drugs. Importantly, the program also furnishes access to a support group once the graduates have been released from prison on parole.

The results of this program are strongly encouraging. Only sixteen percent of the drug-addicted inmates who successfully completed the program were arrested within a year of their release, as opposed to sixty-five percent of similar inmates who had not taken the program.⁶³

Drug Court programs also work. In fact, Drug Courts are a positive revolution in our nation's court system. The reason is that these programs force judges, prosecutors, and police officers to treat drug-addicted people as people. Once the court officials and police officers begin to work with drug-addicted defendants, they are no longer thought of as "hypes," "junkies," "dirt bags," or even simply as statistics. Instead, the defendants are seen as real people who have the same desires, needs, and failings as all of the rest of us. Of course, the drug-addicted defendants must be and are held accountable for their actions, but their failures cause noticeable disappointment to the Drug Court staff. This disappointment then often turns into encouragement for the future, and when combined with continued individual accountability, drug testing, anger management classes, and similar programs, they actually help the defendants eventually to succeed.⁶⁴

Unfortunately, Drug Courts are quite labor intensive for the judges, staffs, probation officers, attorneys, and everyone else. That is certainly not a reason for them not to continue, but in my view we should use them exclusively for the problem drug users that are causing so much harm and grief to society, instead of using those scarce resources for drug users who are not inflicting harm upon other people.

D. Drug Legalization

Many people use the term "drug legalization" without understanding what the term actually means. When you think of drug legalization, think of aspirin. This drug can be purchased either in brand names or generically in whatever quantity one wishes. The prices are set by the free market, the product can be advertised freely, and there are no age restrictions for the

⁶³ Editorial, *Attacking the Drug/Crime Link*, L.A. TIMES, Jan. 7, 1999, at B8.

⁶⁴ See generally DRUG COURTS—A NEW APPROACH TO TREATMENT AND REHABILITATION, (James E. Lessenger & Glade F. Roper eds., Springer, 2007).

purchasers. As such, no one I know wants presently illicit drugs to be “legalized” like aspirin. And that certainly includes me.

Nevertheless, in my view, which has been derived from my involvement with the criminal justice system for more than three decades, even this approach would be far superior to what we are doing now. To further emphasize this point, I once heard of a survey that asked one hundred people that if cocaine were to be legalized, would they themselves try it. Only about eight of the people responded that they might do so. The survey then asked them how many other people they thought would use cocaine if it were to be legalized, and they said about eighty. It was almost as if all of those people were standing in a circle and pointing to the person on their right.

The fact is that some people who are now deterred from using these drugs because they are illegal might indeed experiment with some of them if the policy were to be changed. But when it comes down to it, we could bless these presently illicit drugs by every religious leader in sight and give them away for free on every street corner, and I would still not jam cocaine up my nose—and neither would most other people. And most of the people who would try them are probably using them already. So, under no circumstances, regardless of what policy we adopt, will we ever become a “nation of zombies,” as the drug prohibitionists continue to claim. In fact, that argument is downright silly and even insulting.

E. Drug Criminalization

In 1976, after recognizing that a ban upon any illicit drugs was futile, Holland adopted a program of the non-enforcement of their drug laws for small-scale transactions.⁶⁵ But they combined this policy with programs to bring drug users who were harming themselves closer to the social workers and medical professionals that could help them.⁶⁶ In taking these steps, the government of Holland recognized that harm would necessarily come due to the presence of these sometimes dangerous drugs in their communities. So they took steps to reduce that harm, and eventually called their approach programs of “harm reduction.”⁶⁷ Of course, they continued to prosecute anyone whose actions caused harm to others.⁶⁸

⁶⁵ Nadelmann, *supra* note 58, at 38.

⁶⁶ Georgie Anne Geyer, *The Dutch Can Teach Us About Drug Programs*, ORANGE COUNTY REG., July 11, 1994, at Metro 7.

⁶⁷ *Id.*

⁶⁸ *Id.*

Among other things, this approach resulted in coffee shops being established in communities, controlled only by zoning laws, in which people of sixteen years of age or older could buy coffee, tea, and sandwiches, but also marijuana and hashish.⁶⁹ The police were completely aware of what was happening, but as long as everyone stayed within the widely known age and quantity restrictions, the police were instructed *in writing* to leave them alone.⁷⁰ If anyone provided hard drugs to the patrons, with great fanfare, the police would close them down.⁷¹ As a result, after a few years the Dutch had only about *half* of the marijuana usage in their country per capita than we did here in our country, *both for adults and for teenagers!* In a press conference, Eddy Engelsman, the former Dutch Drug Czar, explained the reason for this success by saying that they “succeeded in making pot boring.”⁷² Of course, by making marijuana illegal in our country, we do the exact opposite by glamorizing its usage, and by establishing an appreciable profit motive for sellers to entice people to try it.

Holland has similar policies for the harder drugs as well—and they are working. For example, between 1979 and 1994, the percentage of people in Holland between twelve and twenty-two years of age who were using harder drugs went down from 15 percent to 2.5 percent.⁷³ In a similar fashion, the percentage of adults in Amsterdam who had used cocaine within the last year in 1987 was only 1.7 percent, whereas 6 percent of the adults in New York City in that year acknowledged they had used cocaine *within the last six months*.⁷⁴

Holland does have one problem that deeply concerns the government, which is that Holland is a small country, and many of the people who use and abuse drugs in Holland are foreigners who come over there “to have a good time.”⁷⁵ I agree that this is a problem, and have no suggested answer. But if we were to adopt Holland’s policies, we would not have that problem, since our country is so much larger.

Even more noteworthy is the fact that in 2001, Portugal decriminalized all drugs by officially abolishing all criminal

⁶⁹ Larry Collins, *Holland’s Half-Baked Drug Experiment*, FOREIGN AFF., May–June 1999, at 82, 83.

⁷⁰ David Duncan & Thomas Nicholson, *Dutch Drug Policy: A Model for America*, 8 J. HEALTH & SOC. POL’Y 1, 5 (1997).

⁷¹ Nadelmann, *supra* note 58, at 38.

⁷² *Id.*

⁷³ Geyer, *supra* note 66.

⁷⁴ GRAY, *supra* note 20, at 220.

⁷⁵ Geyer, *supra* note 66.

penalties for their possession and use. It did so because during the 1990s Portugal had seen an alarming increase of drug use and even addiction, as well as the pathologies that can accompany them. So a national commission of apolitical experts was convened to answer the question of how best to limit drug usage and drug addiction, and the eventual recommendation was to encourage drug treatment administratively instead of punish it through the criminal justice system.⁷⁶

According to the commission, the reason for this recommendation was basically twofold. First, criminalization had created a barrier between the government and its people, such that many people learned to fear the government, and therefore took their drug involvement “underground.” This, of course, also kept them from seeking drug treatment from the medical professionals who were able to help them. Second, once drug possession and usage were no longer crimes, large amounts of government monies that were previously used for investigations, prosecutions, and jails were freed up to be used for meaningful drug treatment.⁷⁷

The CATO Institute published a paper that studied Portugal’s experience for the first seven years under this new approach. After two years of research, it reported that “illegal drug use among teens in Portugal declined and rates of new HIV infections caused by the sharing of dirty needles dropped, while the number of people seeking treatment for drug addiction more than doubled.”⁷⁸

According to Glenn Greenwald, who conducted the research for the study, this policy change “enabled the Portuguese government to manage and control the drug problem far better than virtually every other Western country does.”⁷⁹ For example, Portugal now has the lowest rate of lifetime marijuana use in the European Union for people over fifteen years of age, which is ten percent.⁸⁰ In the meantime, the number of people over twelve in the United States who have used marijuana in their lifetime is 39.8 percent.⁸¹ Furthermore, more people today in the United

⁷⁶ Nick Gillespie, *Drug Decriminalization in Portugal*, REASON, July 2009, at 13. See generally GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (Cato Institute 2009); Maria Szalavitz, *Drugs in Portugal: Did Decriminalization Work*, TIME.COM, Apr. 26, 2009, <http://www.time.com/time/health/article/0,8599,1893946,00.html>.

⁷⁷ Gillespie, *supra* note 76. See also GREENWALD, *supra* note 76; Szalavitz, *supra* note 76.

⁷⁸ Szalavitz, *supra* note 76. See also GREENWALD, *supra* note 76.

⁷⁹ Szalavitz, *supra* note 76. See also GREENWALD, *supra* note 76.

⁸⁰ GREENWALD, *supra* note 76, at 21; Szalavitz, *supra* note 76.

⁸¹ Szalavitz, *supra* note 76.

States per capita have used cocaine than people in Portugal have used marijuana.⁸² In addition, significantly more than twice as many people in Portugal were on methadone and similar treatment programs at the time of the study than before the policy change began, and the number of illegal drug-related deaths was also reduced by more than half.⁸³

This change of policy by Portugal shows that the speculation by some people that changing away from a punitive approach would “open the floodgates” to greater drug usage, death, and crime has no basis in fact. Not only did the explosion of drug usage not materialize, the facts actually show that the opposite was seen to occur.

F. Medicalization

Switzerland has a problem that few countries in the world unfortunately share: since they are economically quite well off, their cities do not have the “down and out” areas that other countries have. But they do have heroin addicts, and their affluence makes their addicts a lot harder to hide. So, in the middle 1990s, Switzerland adopted a three-year pilot program that put a staff consisting of a medical doctor, a registered nurse, and a social worker in clinics in eight of their cities.⁸⁴ Then, these professionals were instructed to seek out the heroin-addicted people, and take them to the clinics.

What did they do next? The same thing that you or I would do, they tried to interest them in drug treatment. But it is a fact of life that most addicts either do not want to get off their drugs, or do not feel that they can. In those situations, the addicts were told that if they qualified in three areas, they could be placed on a program that would make their lives far less dangerous. The areas were: 1) they were at least twenty-two years old and had failed traditional treatment at least twice; 2) they actually were addicted to heroin; and 3) they were and would remain crime free.⁸⁵ If they qualified, they would be given a prescription for heroin that could be filled at pharmaceutical prices.

Now, as we discussed before, none of these drugs are expensive. The only reason they cost so much today is that they

⁸² GREENWALD, *supra* note 76, at 24. See also Szalavitz, *supra* note 76.

⁸³ Szalavitz, *supra* note 76. See also GREENWALD, *supra* note 76.

⁸⁴ GRAY, *supra* note 20, at 198–206. See also Martin Buechi & Ueli Minder, *Swiss Drug Policy: Harm Reduction and Heroin-Supported Therapy*, SENSIBLE SOLUTIONS TO THE URBAN DRUG PROBLEM 1 (Fraser Institute 2001); Ambros Uchtenhagen et al., *Programme for a Medical Prescription of Narcotics*, 4 EUR. ADDICTION RES. 160 (1997).

⁸⁵ GRAY, *supra* note 20, at 198–206. See also Buechi, *supra* note 84; Uchtenhagen, *supra* note 84.

are illegal. As a result, even the heaviest-using addicts can purchase their supply for no more than the equivalent of ten dollars per day at a pharmacy. If they cannot afford even that amount, the supply is subsidized, but that seldom is the situation.⁸⁶ Then, the addicts can use the heroin and a clean needle under medical supervision.

The Minister of Health for the country held a press conference less than a year after the program began and said that they were not going to wait the full three years to institute some changes.⁸⁷ Instead they were going to expand the program to all twenty cities in the country right away.⁸⁸ What caused that change were the tremendously positive results they were seeing.

The first thing they found was that crime in the neighborhoods surrounding the clinics had dropped substantially.⁸⁹ This is because drug-addicted people turn to burglaries, purse-snatchings, check offenses, and similar street crimes in order to support their habit. But these people knew they would be off the program if they were even arrested for an offense, which would put them back into the "hustle" to find the money to support their habits and force them to once again deal with their suppliers. Thus, as a result of program, they chose to stay away from crime. In fact, the merchants in the neighborhoods experienced a seven-fold decrease in shoplifting, which certainly pleased the merchants.⁹⁰

The second thing they found was that there was appreciably less drug-usage in the neighborhoods surrounding the clinics as well.⁹¹ In fairness, the drug-addicted people on the program were probably using more drugs now than they had before, due to the lower cost and steady supply. So how did this program actually reduce drug use? Upon analysis, in addition to burglaries, etc., drug-addicted people also invariably gather larger amounts of their drugs and sell them to others in order to support their habit. But since they know that if they are even arrested they

⁸⁶ GRAY, *supra* note 20, at 198–206. *See also* Buechi, *supra* note 84; Uchtenhagen, *supra* note 84.

⁸⁷ GRAY, *supra* note 20, at 198–206. *See also* Buechi, *supra* note 84; Uchtenhagen, *supra* note 84.

⁸⁸ Buechi, *supra* note 84, at 11.

⁸⁹ Uchtenhagen, *supra* note 84, at 162. *See also* Buechi, *supra* note 84; GRAY, *supra* note 20, at 198–206.

⁹⁰ GRAY, *supra* note 20, at 198–206. *See also* Buechi, *supra* note 84; Uchtenhagen, *supra* note 84.

⁹¹ Uchtenhagen, *supra* note 84, at 162. *See also* Buechi, *supra* note 84; GRAY, *supra* note 20, at 198–206.

will be off the program,⁹² fewer of them are selling the drugs, which directly results in fewer people using the drugs in the communities.

Now, regardless of what a person might think of a program of this kind, certainly everyone would agree that reducing crime and drug usage in the communities would be positive things. And this program did not at all result in an “orgy” of heroin usage by the participants. The reason was that in every case the medical doctors would screen the addicted people to see what their standard usage amount was.⁹³ Then the amount of heroin they received was calculated such that it would not be enough to give them that temporary “kick” or euphoria, but it was enough to keep them from going into heroin withdrawal.⁹⁴ In effect, the dosages would *maintain* them at their current level, which led to the programs being called Heroin Maintenance Programs.⁹⁵

The third thing they found was a fifty percent increase in employment for the participants.⁹⁶ Soon, many of the participants were able to support themselves and their families, get off welfare, pay their taxes, and stop being a drain on society.⁹⁷ The fourth thing was that the health of the participants began noticeably to improve due to their working relationship with the medical staff.⁹⁸ Not only were they injecting the drugs less dangerously and not being harmed by unknown strengths and purity of their drugs, but their other medical problems were also being addressed. This also resulted in most of the participants being more functional, and also less of a drain on government resources. The final thing they noticed was that the participants were coming to the medical staff in much higher numbers and requesting to take the next step and get into a program of drug treatment.⁹⁹

⁹² GRAY, *supra* note 20, at 198–206. *See also* Buechi, *supra* note 84; Uchtenhagen, *supra* note 84.

⁹³ GRAY, *supra* note 20, at 198–206. *See also* Buechi, *supra* note 84; Uchtenhagen, *supra* note 84.

⁹⁴ GRAY, *supra* note 20, at 198–206. *See also* Buechi, *supra* note 84; Uchtenhagen, *supra* note 84.

⁹⁵ GRAY, *supra* note 20, at 198–206. *See also* Buechi, *supra* note 84; Uchtenhagen, *supra* note 84.

⁹⁶ Uchtenhagen, *supra* note 84, at 162. *See also* Buechi, *supra* note 84; GRAY, *supra* note 20, at 198–206.

⁹⁷ Uchtenhagen, *supra* note 84, at 162. *See also* Buechi, *supra* note 84; GRAY, *supra* note 20, at 198–206.

⁹⁸ Uchtenhagen, *supra* note 84, at 162. *See also* Buechi, *supra* note 84; GRAY, *supra* note 20, at 198–206.

⁹⁹ Uchtenhagen, *supra* note 84, at 162. *See also* Buechi, *supra* note 84; GRAY, *supra* note 20, at 198–206.

With those results, the Swiss government has made the programs permanent until the year 2014 in all twenty cities in the country.¹⁰⁰ Nevertheless, some “moralizers” in Switzerland sponsored a national plebiscite in 1992 called Youth Without Drugs, which resolved to terminate these programs. They complained that the government had become the “pusher” of illicit drugs,¹⁰¹ but the Swiss cabinet and most of the Parliament opposed this measure, and it actually failed by more than seventy percent of the votes.¹⁰² This happened not because the Swiss are tolerant of the usage of heroin or because they do not love their children. Instead, the Swiss voted this way because they chose to manage the problems instead of moralize about them, and they saw that this was a program that was working.

There is no legitimate reason why we should not have similar programs in every town and city in our country.

G. Strictly Regulated and Controlled Distribution

The best way to reduce the drug money harm outlined above is to deprive the illegal growers, manufacturers, and sellers of their market by utilizing a program of strictly regulated and controlled distribution of drugs for adults. We could begin with allowing adults to purchase marijuana, heroin, and cocaine, or maybe just marijuana, at government package stores. Then, we could assess the results and determine if that approach should later be expanded to other drugs, or not.

The drugs could easily be grown and packaged on low-bid government contracts by pharmaceutical or tobacco companies, or any other reputable company. The package stores could be staffed on similar low-bid contracts as well. All the drugs would have to be of good quality, but otherwise they would be sold in plain brown packaging with a warning label and information about where to go for drug treatment. No brand names and no advertising of any kind would be allowed. Since the government would own the product, there would not be any First Amendment problems in eliminating the advertising. If anyone bought, possessed, or used drugs from any source other than the package stores they would still be prosecuted, as would anyone who furnished these drugs in any fashion to children.

¹⁰⁰ World Report, *Swiss Vote Overwhelmingly to Keep Drug for Addicts*, ORANGE COUNTY REG., Sept. 29, 1997, at News 3.

¹⁰¹ JEAN-PIERRE GERVAISONI ET AL., INSTITUT UNIVERSITAIRE DE MEDECINE SOCIALE ET PREVENTIVE, EVALUATION OF THE FEDERAL MEASURES TO REDUCE THE PROBLEM RELATED TO DRUG USE 14 (1996).

¹⁰² GRAY, *supra* note 20, at 206.

The prices of the drugs would be set just slightly below where an illegal dealer could stay in the market. Since the illegal growers, manufacturers, and sellers would not be able to compete with the government's price, the market would drive them out of business. And, of course, if they tried they would still be prosecuted. Furthermore, the problems with users harming themselves by taking drugs with unknown purity and strengths would virtually be eliminated, which would save many lives, and much suffering and expense.

Realistically, under a program of this kind, drug usage by adults would certainly increase—for at least six months, and maybe even a year or longer. But, eventually, it would probably begin to decrease, or at least change. Under today's system, many people—whose drug of choice really is marijuana now—are actually coerced into taking harder drugs because it is so much easier to detect and test for marijuana usage than for the harder drugs. So those users would probably revert back to marijuana. In addition, since much of the purchase price of the drugs would be in the form of a tax that would be used for honest education and drug treatment, more people would be guided and helped away from harmful drug usage, just like in Portugal. And, since the private profit motive and the glamour of taking illegal drugs would be reduced, fewer users would be enticed into the market in the first place, just like in Holland.

No one can design a perfect system, but this one would go a long way in reducing the overall harms to society. One of the benefits would be that it would bring drug abusers closer to the health professionals who could help them. Another benefit would be that the criminal justice system could re-focus its resources on other offenses such as burglaries, homicides, identity theft, criminal fraud, and otherwise holding people accountable for their actions, whether the offenders were under the influence of mind-altering and sometimes-addicting drugs or not. Furthermore, this approach would take away the billions of dollars from the illicit market that are now fueling violence, graft, and corruption, and destabilizing the safety, freedom, and ways of life of good and law-abiding people all around the world.

H. Federalism

Surprisingly, the best option for our country to utilize is almost never discussed. Our great country was founded upon the concept of federalism. That means that each state should be at liberty to take the approach it believes would best serve its own people. That is actually what we did when we finally came to our senses and repealed Alcohol Prohibition. At that time we did not

say that the individual states had to make alcohol available to their people. Instead, the power of the federal government was simply restricted to assisting each state in enforcing its chosen laws.

If we were to re-adopt this policy, we would in effect have fifty “crucibles of democracy.” If a program seemed to be working well in one state, that program might be fine-tuned a little bit, but otherwise it would probably be left alone. If another state tried a program that did not work well, its government would probably look around and learn from the experience of other states and try something else that appeared to be more promising. To most of us it is starkly obvious that the federal government does not have all of the answers. So I strongly suggest that we revert back to one of the strong legacies we received from our Founding Fathers, and re-employ the concept of federalism.

III. IN CONCLUSION: WINNERS, LOSERS, AND RECOMMENDATIONS

In any policy there are always some winners and some losers. That is true for our policies in education and health care, and it certainly is true in the field of drug policy as well. So ask yourself: Who is winning today with our policy of Drug Prohibition? I have six groups of winners.

The first group that is winning is obviously the big-time drug dealers here and all around the world. They are literally making hundreds of millions of dollars each year (tax free), and they are laughing at us as they pocket this money.

The second group is juvenile youth gangs and other hoodlums whose antisocial and criminal acts are primarily funded by the sale of illicit drugs.

The third group that is winning is the people in government that are being paid large tax dollars to fight against the first two groups. Their bureaucracy, funding, and power continue to increase. In fact, what we have is an amazing partnership of the “good guys” and the “bad guys” because they both have a vested interest in the perpetuation of the status quo. But, may I say strongly here that I do not at all blame law enforcement for the problems we are facing in these areas. They have a dangerous job, and they are doing it far better than we have a right to expect. The failure of Drug Prohibition is no more the fault of today’s law enforcement than was the failure of Alcohol Prohibition the fault of people like Elliott Ness. The problem is that our drug *policy* has failed, not law enforcement.

The fourth group is the politicians who get elected and re-elected by “talking tough” on drugs. Not smart, just tough. But this really is our doing, because if the votes were seen to be in favor of being managers of the problems instead of moralists, politicians would get in front and lead the charge for change. Politicians will always follow where the votes are.

The fifth group is comprised of people in the private sector that make money because of increased crime. That includes people who build prisons and those who staff them. As you probably know, the prison guard’s union is the strongest lobbying group in California and most other states today,¹⁰³ and these people are certainly winning. Other people in this group are those who sell such things as burglar alarm equipment and security services.

The sixth group that is winning is the terrorists. There will always be radical and extremist people in the world who want to do harm to others who are good and law-abiding. But they will be far less dangerous if their funding is taken away. And make no mistake, Drug Prohibition is the primary source of funding for all of the terrorists of the world.¹⁰⁴ In fact, our policy of Drug Prohibition is the “Golden Goose” of terrorism.

Who is losing under this policy? Virtually everyone else—particularly our children, as we have shown, as well as the taxpayers. So now that we have discussed this critical issue in some detail, I will end this discussion by giving you four suggestions regarding what we as concerned citizens should do right now.

First, we should institute programs of Needle-Exchange wherever injecting drug-addicted people are found.

Second, we should institute drug maintenance programs in every town and city in which there is a need, under the guidance of medical professionals instead of police officers. Furthermore, we should not hide these programs from our children; we should actually take them there. The drug-addicted people will tell our children the truth, which is that they would give anything not to have started down this path. That will be honest education that our children will understand and from which they will learn.

Third, we should institute programs of honest education. Our children easily recognize deception and hypocrisy.

¹⁰³ *Fading are the peacemakers*, *ECONOMIST*, Feb. 27, 2010, at 38.

¹⁰⁴ See, e.g., Muhammad Tahir, *Fueling the Taliban: Poppies Guns and Insurgents*, 6 *TERRORISM MONITOR* 4, 5 (2008), available at [http://www.jamestown.org/programs/gta/single/?tx_ttnews\[tt_news\]=5043&tx_ttnews\[backPid\]=167&no_cache=1](http://www.jamestown.org/programs/gta/single/?tx_ttnews[tt_news]=5043&tx_ttnews[backPid]=167&no_cache=1).

Obviously, there are some benefits in taking these presently illicit drugs, because if there were not, no one would take them. Of course, there are definite and important risks as well, and our children will make much better decisions if they are exposed to an honest appraisal of both the benefits as well as the risks.

Fourth, we should treat marijuana like alcohol. There would be six primary results of this change. The first five are demonstratively positive, and then we can discuss the sixth. First, taxpayers in California, for example, would save hundreds of millions of dollars that are now being spent in a futile attempt to eradicate marijuana and prosecute and incarcerate non-violent marijuana users. And, as discussed earlier, marijuana is now the largest cash crop in California, so clearly we are not very effective at eradicating the stuff. Second, we could tax it, and generate at least \$1.3 billion per year in California alone.¹⁰⁵

But the third benefit would trump the first two because, as we discussed earlier, this change would result in marijuana actually being *less* available for our children than it is today. Fourth, we would eliminate the emotional and sometimes tragic problems with the entire medical marijuana issue. And fifth, we could restore the traditionally useful and lucrative hemp industry.

With regard to the sixth result, in order to run more strongly the illicit dealers out of business, the cost of the drug would have to be reduced—in fact, it would probably be required to be cut in half, with taxes included. Therefore, it is fundamental economics that if the demand increases or even remains the same, and the price is lowered, usage would be increased. However, we would soon probably experience the same phenomenon as Holland, and, by “making pot boring,” the usage of marijuana would, within a few years, go back to where it is today, or maybe even less.

Throughout my entire involvement in recommending that we change away from our present so-called War on Drugs, there has been no question in my mind that some day we will change our policy. I do not know when, and I do not know to what, but the change certainly will occur. And, after these changes do occur, I guarantee that *all* of us will stand up as one and look at each other in amazement that we could have allowed such a failed and hopeless policy to have been enforced for such a long period of time. So, the sooner you help us to make these changes, the better the entire world will be.

¹⁰⁵ Jesse McKinley, *Legal-Marijuana Advocates Focus on New Kind of Green*, N.Y. TIMES, Mar. 26, 2010, at A1.