

Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace

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The explosion in our prison population began in 1973, the same year President Nixon declared war on drugs. During the preceding forty years, the prison population was stable at around 200,000.¹ Since 1970, however, the number of people in U.S. prisons and jails has increased 800 percent² and our rate of imprisonment, the percentage of the population in prison or jail, is up more than 500 percent.³ The United States not only has the largest number of people in prison,⁴ nearly one fourth of the world's total prison population,⁵ it has the highest rate of imprisonment in the world.⁶ There is much speculation about the causes of this mass imprisonment mania,⁷ but the mechanisms by which mass imprisonment was accomplished are clear. We have continued to arrest people at about the same rate since 1973,⁸ but since then we have sentenced those we convict to prison, for much longer terms, with fewer opportunities for parole or

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¹ See CRAIG HANEY, REFORMING PUNISHMENT 63 fig 3.2 (2006).

² JAMES AUSTIN, ET AL., JFA INSTITUTE, UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 1 (2007), available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica/pdf>.

³ The U.S. imprisonment rate per 100,000 of population in 1970 was 95.1. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1974, at 164 tbl.281 (1974), available at <http://www2.census.gov/prod2/statcomp/documents/1974-03.pdf>. The rate in 2006 was 501. Sourcebook of Crim. Just. Stat. Online, tbl.6.29.2006 (2006), available at <http://www.albany.edu/sourcebook/pdf/t6292006.pdf> (last visited Nov. 15, 2009).

⁴ AUSTIN, *supra* note 2, at 3.

⁵ Glenn Loury, *A Nation of Jailers*, CATO UNBOUND, March 11, 2009, available at <http://www.cato-unbound.org/2009/03/11/glenn-loury/a-nation-of-jailers/>. The U.S. has about 5 % of the world's population. *Id.*

⁶ AUSTIN, *supra* note 2, at 3.

⁷ See John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY L. REV. 547 (2008); Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47 (2008); Yair Listokin, *Does More Crime Mean More Prisoners? An Instrumental Variables Approach*, 46 J.L. & ECON. 181 (2003).

⁸ U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S., at 152 tbl.254 (1974), available at <http://www2.census.gov/prod2/statcomp/documents/1974-03.pdf>; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. 2006, LAW ENFORCEMENT, COURTS, AND PRISONS 204 tbl.313 (2006), available at http://www.census.gov/compendia/statab/2006/law_enforcement_courts_prisons/law.pdf.

early release than in previous years.⁹ When we do release someone on parole, we revoke parole and return the parolee to prison more often than we formerly did.¹⁰ That explains how we increased our prison population eightfold; why we did it is less obvious.

Television coverage of violent crimes has greatly increased and has been accompanied by a false perception in the public that crime rates are relentlessly ascending.¹¹ Responding to that phenomenon and the ubiquity of television, politicians have discovered that their rants about rising crime and their passage of new anti-crime legislation, however redundant that legislation may be, translates into popularity among the polity.¹²

Sparked by the media-generated fear of crime, Americans have undergone a paradigm shift in humane values. From the inception of the penitentiary in the 19th century through the 1960s, imprisonment was justified by its promise of reforming prisoners so that they could return to society as productive, law-abiding citizens.¹³ Criminal behavior was commonly thought to be causally related to biographical, environmental factors rather than to inherent wickedness. It was also widely believed and more widely hoped that the prison environment could override or reduce the prisoner's criminal proclivities. Theories of human nature changed during this period, along with theories about how deviant propensities could be modified, but the idea of imprisonment as an instrument of rehabilitation persisted.¹⁴

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals declared that prisons, reformatories and jails had

⁹ AUSTIN, *supra* note 2, at 3-4. Between 1980 and 1990, incarceration rates for federal offenders increased *tenfold*. Peter Reuter, *Hawks Ascendant: The Punitive Trend of American Drug Policy*, 121 DAEDALUS 15, 25 (1992). Between 1990 and 1997, prison admissions increased by only 17 % while the prison population increased by 60 %. PAULA M. DITTON & DORIS J. WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, TRUTH IN SENTENCING IN STATE PRISONS 4 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf>.

¹⁰ About two-thirds of prison admissions today are the result of revocation of probation or parole. AUSTIN, *supra* note 2, at 1. In 1971, only about 15 percent of the admissions were revocations. U.S. DEP'T OF COMMERCE, *supra* note 3, at 164 tbl.282, available at <http://www2.census.gov/prod2/statcomp/documents/1974-03.pdf>. In 1977, only 788 inmates who had been released on parole were returned to prison in California. In 1999, that number had grown to 90,000. Fox Butterfield, *Often, Parole Is One Stop On the Way Back to Prison*, N.Y. TIMES, Nov. 29, 2000, at A1.

¹¹ AUSTIN, *supra* note 2, at 6.

¹² See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 397-398 (2006).

¹³ See James Reed, *Prisons: History*, in 3 ENCY. CRIME & JUST. 1197, 1201 (Sanford H. Kadish ed., 1983).

¹⁴ See generally HANEY, *supra* note 1, at 27-49.

produced a “shocking record of failure.”¹⁵ The Commission opined that these institutions may have created more crime than they prevented. But rather than producing alternatives to incarceration, such questioning of the correctional capabilities of the modern prison was soon followed by a “profound counterrevolution” in which “the intellectual cornerstone of corrections policy for nearly a century—rehabilitation—was publicly and politically discredited.”¹⁶ Driven “by political steam and fueled by media-induced fears of crime,”¹⁷ imprisonment “soon came to be thought of as its own reward, serving only the goal of inflicting pain.”¹⁸

The rehabilitative ideal has been overwhelmed by the notion that criminals are fundamentally evil and irredeemable. James Q. Wilson reflected the public mood when he undertook to remind liberals that “wicked people exist. Nothing avails except to set them apart from innocent people.”¹⁹ The prevalent contemporary perspective is that only the criminal is responsible for his behavior and “deserves” whatever punishment society chooses to inflict. It is that perspective that accounts for our pinnacle position in the world of imprisonment. It also explains why our “correctional institutions” are actually administered as “toxic waste management facilities.”²⁰

America could not have achieved the distinction of being the world’s foremost jailer without a steady stream of new subjects. For if those we have locked up have no more than an average propensity within their demographic groups to commit crimes, imprisoning more than two million Americans should have sharply reduced crime rates and the numbers of new prisoners. It has not. Overall crime rates are about the same as they were in 1973.²¹

¹⁵ NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON CORR. 597 (1973).

¹⁶ HANEY, *supra*, note 1, at 59.

¹⁷ Craig Haney and Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty Five Years After the Stanford Prison Experiment*, 7 AM. PSYCHOLOGIST 709, 712 (1998).

¹⁸ HANEY, *supra* note 1, at 59. See also LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 305-308 (1993).

¹⁹ JAMES Q. WILSON, THINKING ABOUT CRIME 209 (1975).

²⁰ JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 142-143 (2007).

²¹ There is a sense in which “crime rates” have inevitably increased since the propensity of legislatures to criminalize behavior, some of it trivial, has continued uninterrupted these past several decades. See William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505-569 (2001); Steven Duke, *Clinton and Crime*, 10 YALE J. REG. 575, 576-577 (1993); Alex Kozinski and Misha Tseytlin, *You’re (Probably) A Federal Criminal*, in IN THE NAME OF JUSTICE 43, 43 (Timothy Lynch ed.) (2009). When I and most others refer to crime rates, however, we are usually referring to predatory crime, i.e., serious violent and property crimes that have identifiable victims. It is these crimes that are collected and tabulated by the FBI’s Uniform Crime Reports and the National

Moreover, apart from the fact that 1 percent of our adult population, and a much larger percentage of our most demographically crime-prone men,²² are incarcerated, a myriad of other forces, circumstances and technological developments over the past thirty-five years should have sharply reduced our crime rates.

Among the changes that should have greatly reduced crime is the aging of the population. Crime rates peak in the late teen years.²³ Between 1980 and 2007, however, the proportion of the population between the ages of 15 and 19 decreased almost 24 percent.²⁴ After the teenage peak, the older we get, the less crime we commit. The median age in 1970 was 28.1 years.²⁵ It was 32.8 in 1990²⁶ and 36.2 in 2005.²⁷ Thus, the median age during the relevant period increased about 30 percent.

We have also invested far more of our resources in police. From 1972 to 2009, the U. S. population increased by about 45 percent.²⁸ Yet we

Crime Victimization Survey. See generally SHANNAN M. CATALANO, *THE MEASUREMENT OF CRIME: VICTIM REPORTING AND POLICE RECORDING* 2 (2006). Because the results of the Uniform Crime Reports (based upon data collected by local police) and the Victimization Survey (surveys of victims, whether or not they have reported crimes to the police) vary considerably, there is some disagreement about crime trends, especially in the early 1990s. See *id.* at 2. The FBI Crime Reports show violent crime peaking in 1991 and now down about 39 percent from that peak; property crime peaking in 1989 and now down about 36 percent from there. FED. BUREAU OF INVESTIGATION, 2008 CRIME IN THE UNITED STATES tbl.1, available at http://www.fbi.gov/ucr/cius2008/data/table_01.html. The Victimization Survey shows a moderate increase in the early 1990s and a sharp decrease in violent crimes from there. Both surveys show slightly lower crime rates at present than in 1973. See AUSTIN, *supra* note 2, at 5 fig. 2.

²² The percentage of the prison population that is female has doubled from 4 percent in 1973 to almost 8 percent in 2008. For 1973 data, see U.S. DEP'T OF COMMERCE, *supra* note 3, at 166 no.285; for June 30, 2008 data, see U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/prisons.htm#findings> (last visited Nov. 16, 2009). This increase in the imprisonment of women is "largely due to their low-level involvement in drug-related activity and the deeply punitive sentencing policies aimed at drugs." Austin, *supra* note 2, at 1.

²³ See David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189, 189 (1986); Travis Hirschi and Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 555 (1989).

²⁴ U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P25-1095, at tbl.7, available at <http://www.census.gov/compendia/statab/tables/09s0007.xls>.

²⁵ U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1974, at xiii, available at <http://www2.census.gov/prod2/statcomp/documents/1974-01.pdf>.

²⁶ U.S. CENSUS BUREAU, POPULATION ESTIMATES PROGRAM, MEDIAN AGE OF THE POPULATION FOR THE U.S., available at <http://www.census.gov/popest/archives/1990s/ST-99-21.txt>.

²⁷ U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX 2000 TO 2005, at tbl.1, available at <http://www.census.gov/popest/national/asrh/NC-EST2005/NC-EST2005-01.xls>.

²⁸ U.S. CENSUS BUREAU, POPULATION ESTIMATES PROGRAM, HISTORICAL POPULATION ESTIMATES, available at <http://www.census.gov/popest/archives/1990s/popclockest.txt>. The population was about 212,000,000 in 1973; it is about 307.9 million today. See U.S. CENSUS BUREAU, U.S. POPCLOCK PROJECTION <http://www.census.gov/population/www/popclockus.html> (last visited Nov. 15, 2009).

employ almost two and a half times as many police as we did in 1972.²⁹ We also spend about \$100 billion annually on police functions³⁰ compared to less than \$7 billion in 1972.³¹

Technological and training advances greatly facilitate both prevention and detection of crime. Police have learned better how to prevent crime by community policing and community educational programs.³² The government and other organizations underwrite studies to determine where pockets of crime exist and who is likely to perpetrate particular types of crime.³³ Their findings are available to the police in their computers.³⁴ Sex offenders, probationers, parolees and defendants released on bail are under supervision and can be subjected to electronic monitoring. Police cruisers are equipped with computers that can run a license number or seek other information about a suspect or a crime scene almost instantaneously.³⁵ Police cars also contain video cameras that can record much crime as it is being perpetrated.³⁶ Also ubiquitous are surveillance cameras installed in shopping centers, stores, schools, residences and,

²⁹ We employed about 486,162 police in 1972. U.S. DEP'T OF COMMERCE, *supra* note 3, at 157 tbl.264. We employed about 1,154,193 in 2006. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FILE NCJ -224394, tbl.2, *available at* <http://www.ojp.gov/bjs/eande.htm#selected..>

³⁰ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: DIRECT EXPENDITURES BY CRIMINAL FUNCTION, 1982-2006, *available at* <http://www.ojp.gov/bjs/glance/tables/exptyptab.htm> (last visited Nov. 15, 2009).

³¹ U.S. DEP'T OF COMMERCE, *supra* note 3, at 156 no.262 (adjusted for inflation, the increase in police expenditures is still more than 300 percent), *available at* <http://www2.census.gov/prod2/statcomp/documents/1974-01.pdf>.

³² The efficacy of "community policing" is debated, however. See Gloria Laycock and Ronald Clarke, *Crime Prevention Policy and Government Research: A Comparison of the United States and the United Kingdom*, 2001 INT. J. COMP. SOC. 235, 243 (2001). See generally, Amie Schuck, *American Crime Prevention: Trends and New Frontiers*, 2005 CAN. J. CRIM. & CRIM. JUSTICE 447 (April, 2005).

³³ See Nat'l Inst. of Justice, *Funding*, <http://www.ojp.usdoj.gov/nij>; Laycock & Clarke, *supra* note 32, at 243.

³⁴ See Barry Wise, *Catching Crooks with Computers*, AM. CITY & COUNTY, May 1, 1995, at 54, *available at* http://americancityandcounty.com/mag/government_catching_crooks_computers/; Samuel Nunn, *Police Information Technology: Assessing the effects of Computerization on Urban Police Functions*, 61 PUB. INF. REV. 221 (2001); Mac Margolis, *Mapping Crime: Police Around the World Are Using Technology to Anticipate Where the Bad Guys Will Strike Next*, NEWSWEEK, Apr. 24, 2006, *available at* <http://www.newsweek.com/id/47131>.

³⁵ Kathy McCabe, *Cutting Edge: Latest Technology Helps Police Operate Smaller in Lean Times*, BOSTON GLOBE, Jan. 15, 2006, at 1; Matt Zapotosky, *Cruiser-Top Cameras Make Police Work a Snap: Quick Checks for Violators Improve Officers' Efficiency But Worry the ACLU*, WASH. POST, Aug. 2, 2008, at A01.

³⁶ Joni Eddy & Joe Martin, *Applying Digital In-Car Video Systems to Manage Evidence and Obtain Prosecutions*, POLICE CHIEF, Dec. 2009, at 26.; Zapotosky, *supra* note 35.

increasingly, in public places.³⁷ Millions of cell phones allow crime witnesses to call the police immediately and even to photograph crimes as they are being perpetrated or as the criminals seek to escape.³⁸ Private parties and businesses have also spent enormous sums on alarm and other security systems and private police.³⁹ The ability of a criminal to successfully commit thefts, robberies, burglaries or other predatory crimes is substantially diminished by numerous technological advances and vast private investment in self-protection measures.

Despite these powerful developments, however, crime rates, although fluctuating, have remained relatively stable over the thirty-five year period of the prison boom.⁴⁰ The most likely explanation, ironically, is the “War on Drugs.”

I. THE SEEDS OF DRUG PROHIBITION WERE PLANTED IN 1914, BUT WAR WAS NOT DECLARED UNTIL 1973

Recreational use of some drugs has been illegal in the United States since 1914, when the Harrison Act proscribed some nonmedical uses of cocaine and heroin. Rather than being a prohibition of the use or distribution of these drugs, the Act was “merely a law for the orderly marketing of opium, morphine, heroin, and other drugs.”⁴¹ Alcohol was considered a far greater problem, but as momentum built for prohibiting alcohol, the animosity spilled over to other drugs. The Supreme Court virtually created cocaine and heroin prohibition in a 1919 decision⁴² shortly before the Volstead Act, instituting alcohol prohibition, was enacted in 1920. During the 13 years of Prohibition, crime and corruption increased enormously. According to James Ostrowski, “The murder rate

³⁷ Fran Spielman, *Surveillance Cams Help Fight Crime, City Says*, CHI. SUN-TIMES, Feb. 19 2009, at 22; Jeremy Brown, *Pan, Tilt, Zoom: Regulating the Use of Video Surveillance of Public Places*, 23 BERKELEY TECH. L. J. 755 (2008).

³⁸ Mark Niese, *Camera Phones Helping to Fight Crime*, ASSOC. PRESS ONLINE, March 19, 2004; Lisa Fleisher, *Caught on Camera*, N.Y. DAILY NEWS, May 5, 2005, at 3.

³⁹ See FREEDONIA GROUP, FREEDONIA FOCUS ON ELECTRONIC SECURITY SYSTEMS (2008); Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH. L. REV. 573, 575 (reporting that more money is spent on private police than on public police agencies).

⁴⁰ See TODD R. CLEAR, *IMPRISONING COMMUNITIES* 17 fig.2.1 (2007); Austin, *supra* note 2, at 5. From 1982 to 2001, the number of inmates in U. S. prisons grew by 228% while arrest rates during the same period grew only 13%. HANEY, *supra* note 1, at 67 fig.3.3. For a lucid analysis of various theories of crime causation and the difficulties of proving any of them, see FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* (2007).

⁴¹ EDWARD BRECHER ET AL., *LICIT AND ILLICIT DRUGS* 49 (1972).

⁴² *Webb v. United States*, 249 U.S. 96, 99-100 (1919) (holding that the Harrison Act was violated by a doctor who prescribed morphine for a patient despite a provision in the Act exempting physicians, dentists and veterinarians who dispensed or prescribed the drugs “in the course of his professional practice”).

rose with the start of Prohibition, remained high during Prohibition, then declined for eleven consecutive years when Prohibition ended. The rate of assaults with a firearm rose with Prohibition and declined for ten consecutive years after Prohibition.⁴³ As Prohibition wore on, prison terms increased in length and penalties increased. Law enforcement budgets more than doubled.⁴⁴ When Prohibition ended, the black marketers that had formed to distribute alcohol transferred their talents to other vices, such as gambling, prostitution and illegal drugs.⁴⁵ This transformation was facilitated in 1937 when marijuana was added to the prohibited list as a result of a fraudulent campaign highlighted by the movie, "Reefer Madness."⁴⁶ Enforcement of drug prohibition, however, was sporadic and relatively benign prior to 1973, when President Richard Nixon declared an "all-out global war on the drug menace."⁴⁷ Since then, the federal drug enforcement budget has grown by about 3300 per cent.⁴⁸ Federal, state and local governments spend around \$40 billion per year to enforce drug prohibition.⁴⁹ Drug arrests have increased 380 percent since 1973.⁵⁰

II. THE DRUG WAR'S DIRECT CONTRIBUTIONS TO MASS IMPRISONMENT

The three types of crime that account for most prison admissions are

⁴³ James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 641 (1990).

⁴⁴ STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 87 (1993).

⁴⁵ Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 621 (1994); DUKE & GROSS, *supra* note 36, at 93-94.

⁴⁶ See DUKE & GROSS, *supra* note 36, at 45; LARRY SLOMAN, REEFER MADNESS: MARIJUANA IN AMERICA (1983).

⁴⁷ RICHARD NIXON, PRESIDENT OF THE UNITED STATES, REORGANIZATION PLAN NO. 2 OF 1973, ESTABLISHING A DRUG ENFORCEMENT ADMINISTRATION, H. R. Doc. No. 98-69 (1973). In the same year, New York Governor Nelson Rockefeller persuaded the legislature to enact the Nation's fiercest sentencing provisions for drug offenses. See Jeremy W. Peters, *Albany Reaches Deal to Repeal 70's Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1.

⁴⁸ In 1969, the federal budget for drug treatment, education, research and law enforcement was \$81.4 million. Peter Goldberg, *The Federal Government's Response to Illicit Drugs, 1969-1978*, in THE DRUG ABUSE COUNCIL, THE FACTS ABOUT DRUG ABUSE at *5 (1980), available at <http://www.druglibrary.org/schaffer/library/studies/fada/fada1.htm>. In 1970, it was \$101.9 million. *Id.* at *8. In 1972, it was \$418 million. *Id.* at *13. Recently, it was \$14.1 billion. OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY, FY 2009 BUDGET SUMMARY 1 (2008), available at <http://www.whitehousedrugpolicy.gov/publications/policy/09budget/index.html>.

⁴⁹ See JEFFREY A. MIRON, DRUG WAR CRIMES: THE CONSEQUENCES OF PROHIBITION 1 (2004) (estimating cost in 2003 of \$33 billion).

⁵⁰ There were 448,000 drug arrests in 1973. U.S. DEP'T OF COMMERCE, *supra* note 3, at 158 no.266. There were 1,841,182 drug arrests in 2007. Sourcebook of Criminal Justice Statistics Online, at tbl.4.1.2007, <http://www.albany.edu/sourcebook/pdf/t412007.pdf> (last visited Nov. 15, 2009).

violent crime, property crime and drug crime. Of the three, drug crimes account for the most admissions.⁵¹ Although the number of users of illicit drugs has been on the decline for about three decades,⁵² arrests for drug offenses have never been higher.⁵³ Drug offenders in prisons and jails have increased 1100 percent since 1980.⁵⁴ Nearly half a million persons are in jail or prison for drug offenses, compared to 41,000 in 1980.⁵⁵ The percentage of State prisoners doing time for drug offenses has gone up from 6 percent in 1980 to 20 percent in 2003.⁵⁶ The percentage of federal prisoners who are incarcerated for drug offenses has increased during the same period from 25 percent to 55 percent.⁵⁷

III. THE CRIMINOGENICS OF DRUG PROHIBITION: INDIRECT EFFECTS ON MASS IMPRISONMENT

The fact that drug crimes account for one-third of our prison population is only part of the story, for, like alcohol prohibition, drug prohibition is criminogenic in myriad ways. Here are four.

A. *Motivations to Steal and Rob*

A premise behind the drug war is that if we ratchet up the cost of using illicit drugs, we will reduce demand for the drugs. The more distributors that we send to jail or prison, and the longer we keep them there, the greater the cost of the drugs. As a result, there will be fewer consumers of the drugs and those who do use the drugs will use less of them.⁵⁸ There is a germ of truth in that premise since the demand for even the most popular addictive drugs is not wholly inelastic. The demand for tobacco is curbed somewhat by high prices.⁵⁹ The demand for alcohol during Prohibition

⁵¹ The rates are: violent crime, 27 percent, property crime, 30 percent, and drug crime, 31 percent. See Austin, *supra* note 2, at 25.

⁵² Ellis Close, *The Casualties of War*, NEWSWEEK, Sept. 6, 1999, at 29 (citing that overall, drug use is down from 1979; cocaine use peaked in 1985). Monthly drug users in 1979 were 14.1%, 6.6% in 1991 and 8.1% in 2005. MARK MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 4 (2007), available at http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

⁵³ See *supra* note 42 and accompanying text; MAUER & KING, *supra* note 44, at 4 fig.1.

⁵⁴ MAUER & KING, *supra* note 44, at 10.

⁵⁵ *Id.*

⁵⁶ *Id.* at 9.

⁵⁷ *Id.*

⁵⁸ See MARK A. R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 105 (1992).

⁵⁹ U.S. DEP'T OF HEALTH & HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 536-39 (1989), available at http://profiles.nlm.nih.gov/NN/B/B/X/S/_/nnbbxs.pdf; Kenneth E. Warner, *Smoking and Health Implications of a Change in the Federal Cigarette Excise Tax*, 255 JAMA 1028, 1028-32 (1986).

was apparently reduced by about 30 percent.⁶⁰ But users who are addicted to a particular drug, such as heroin, do not easily give up the habit or transfer it to other, cheaper drugs. Instead, as the costs of heroin usage increase, many users augment their incomes to make the drug more affordable. The more drugs cost, the more predatory crime is committed by users to cover those costs.⁶¹ In a survey of persons in prison for robbery or burglary, one out of three said they committed their crimes in order to buy drugs.⁶² The amount of property crimes generated by drug addictions is staggering. A study of 573 heroin users in Miami found that they admitted to committing nearly 215,000 offenses during the previous year. Included were 25,000 shopliftings, 45,000 thefts and frauds, 600 robberies and assaults, and 6,700 burglaries.⁶³ Another group of 356 heroin users admitted committing nearly 120,000 crimes (an average of 332 per person) during a single year.⁶⁴ Cocaine addictions are even more expensive than heroin, since some cocaine users spend thousands per week on the drug. In a survey of 500 callers to a cocaine hotline, the average caller reported spending \$637 per week on the drug and 45 percent reported that they had stolen to buy cocaine.⁶⁵ In a nationwide sample of 1,725 adolescents, less than 2 percent of the sample admitted using cocaine or heroin but also admitted to 40-60 percent of the serious crimes committed by the entire sample.⁶⁶ Drug prohibitionists often attribute such crimes to "drug use,"⁶⁷ but drug use alone, without prohibition, produces very little crime apart from the drug use itself. Although few, if any, drugs are as addictive as

⁶⁰ Jeffrey A. Miron & Jeffrey Zweibel, *Alcohol Consumption During Prohibition*, 81 AM. ECON. REV. 242, 242 (1991).

⁶¹ The more intense the law enforcement efforts against predatory property crimes like thefts, burglaries and robberies, the less attractive those crimes become to potential criminals. The risks of punishment increase, but enforcement efforts do not increase the value of the stolen property. If anything, they depress the market in stolen goods. With drugs, however, the more intense the enforcement efforts, the greater, usually, is the price of the product. This will attract more risk-prone, sophisticated, or more violent distributors, but it will not necessarily reduce their profits. More intensive law enforcement could even conceivably increase the profits of the distributors by driving out their more timid or less wily competitors. The deterrent effects of law enforcement against drug distribution may therefore be less potent than such effects against predatory crimes.

⁶² U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FACT SHEET: DRUG-RELATED CRIME 3 tbl.3 (1994), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dtrc.pdf>.

⁶³ JAMES A. INCIARDI, THE WAR ON DRUGS: HEROIN, COCAINE, AND PUBLIC POLICY 126-27 (1986).

⁶⁴ James A. Inciardi, *Heroin Use and Street Crime*, 25 CRIME AND DELINQ. 335, 342-43 (1979).

⁶⁵ COCAINE: A CLINICIAN'S HANDBOOK 13-14 (Arnold M. Washton & Mark S. Gold eds., 1987).

⁶⁶ Bruce D. Johnson et al., *Concentration of Delinquent Offending; Serious Drug Involvement and High Delinquency Rates*, 21 J. DRUG ISSUES 205 (1991).

⁶⁷ See Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 596 (1995).

tobacco, crimes are seldom committed to buy cigarettes. When cigarettes are in short supply, however, addicts will rob and steal for a smoke.⁶⁸

B. Systemic Violence

The distribution and consumption of illegal, contraband drugs is a black market activity, wholly illegal.⁶⁹ The legal system cannot be relied upon to enforce agreements, to determine the validity of claims, to allocate territories, to protect trade names or even to protect property. The system is maintained and disputes are settled by force or threat of force. The result is the commission of many murders. In some cities, the majority of murders are attributed to hostilities between drug dealers.⁷⁰ During the height of the crack epidemic, between 5,000 and 10,000 murders per year were attributed to the illegal drug business.⁷¹ Far more people are killed by the prohibition of drugs than by the drugs themselves.⁷²

The contribution of drug prohibition to violence is dramatically demonstrated by the ongoing wars between Mexican drug cartels and between the cartels and the Mexican Government. Authorities estimate that these turf wars have resulted in 10,000 murders in the past two years.⁷³ There is even a concern about the possible “collapse” of the Mexican government which has deployed 40,000 soldiers and federal police in an unsuccessful effort to quell the violence.⁷⁴ The violence has spread across the border into Texas, Arizona, Alabama and even to Canada.⁷⁵ Murders and kidnapping occur there as well, since many associates of the drug

⁶⁸ Alan Cowell, *A Tobacco Strike is Driving Italians to Desperate Ends*, N.Y. TIMES, Nov. 26, 1992, at A1; DUKE & GROSS, *supra* note 36, at 27-29.

⁶⁹ The unlawful dispensing and consuming of prescription drugs is a serious problem but the legality of the distribution and consumption process is in a gray area where law can still have some sway.

⁷⁰ See DUKE & GROSS, *supra* note 36, at 110.

⁷¹ One study found that 53 percent of homicides were drug-related. Hardly any were related pharmacologically. Paul G. Goldstein et al., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 651, 662 (1989).

⁷² James Ostrowski estimated that about 600 deaths are caused annually by ingesting cocaine and heroin. See James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 654 (1990). According to the National Institute on Drug Abuse, in 1990, American medical examiners reported 5,830 deaths in which there was at least some indication of drug use by the deceased. There was no finding about how many of the deaths were caused by ingesting the drugs. U.S. DEP'T OF HEALTH & HUMAN SERVS., No. 10-B 1990, ANNUAL MED. EXAM'R DATA (1991).

⁷³ Howard LaFranchi, *Obama's Overtures Seek to Help a Spiraling Mexico*, CHRISTIAN SCIENCE MONITOR, Mar. 5, 2009, at 2.

⁷⁴ *Mexican Drug Cartels Threaten U.S. National Security*, AUSTL. BROADCASTING CO., Feb. 26, 2009, <http://www.abc.net.au/news/stories/2009/02/26/2502517.htm>; Editorial, *Mexico's War Hits Home*, CHI. TRIB., Mar. 13, 2009, at 32.

⁷⁵ Randal C. Archibold, *Drug Cartel Violence Spills Over From Mexico, Alarming U.S.*, N.Y. TIMES, Mar. 23, 2009, at A1.

cartels live in the U.S. and Canada. The Mexican drug business and its tentacles has made Phoenix the kidnapping capital of the United States.⁷⁶ The drug cartels, it is reported, make up to \$25 billion a year, most of it from selling drugs to U. S. consumers.⁷⁷ As long as that market exists, so will the violence.⁷⁸

C. Corruption of the Criminal Justice System

During Prohibition, many, perhaps even most, law enforcement officers were bribed to allow the production, distribution and sale of alcohol.⁷⁹ There is no reason to suspect that the level of police corruption today remotely resembles that which existed during Prohibition. Still, the corruption associated with drug prohibition is seriously criminogenic. Some police in virtually every major city are on the payrolls of drug merchants, tipping off drug dealers about raids or searches and about “snitches.” Some police even engage in drug dealing themselves, stealing drugs from drug dealers and redistributing them. In the late 1980s, dozens of police officers in Miami were charged with crimes ranging from murder to robbery and extortion in connection with drug investigations.⁸⁰ In 1989, eighteen Los Angeles County deputy sheriffs were found guilty of systematically stealing cash seized in drug raids.⁸¹ Nearly half of the federal narcotics agents in New York City in the 1970s were convicted or discharged for corruption and the Knapp Commission found that corruption was even worse in the New York City Police Department.⁸² Two decades later, the City’s Mollen Commission made similar findings.⁸³

It goes on and on. A federal investigation of New York City police in 2004 bagged a dozen police who were stealing drugs and money from drug

⁷⁶ Eve Conant & Arian Campo-Flores, *The Enemy Within: Cartel Related Violence has Moved Well Beyond American Border Towns*, NEWSWEEK, Mar. 23, 2009, at 37.

⁷⁷ LaFranchi, *supra* note 65, at 2.

⁷⁸ See Ted Galen Carpenter, *Troubled Neighbor: Mexico’s Drug Violence Poses a Threat to the United States*, CATO INST., Feb. 2, 2009, at 1, http://www.cato.org/pub_display.php?pub_id=9932 (persuasively arguing that stopping the flow of guns into Mexico from the U.S., sealing the border, and winning the war on drugs are all “bogus solutions”); See also, Steven B. Duke, *Drugs: To Legalize or Not*, WALL ST. J., Apr. 25, 2009, at W1.

⁷⁹ SEAN DENNIS CASHMAN, PROHIBITION 44 (1981).

⁸⁰ See George Volsky, *7 Former Officers on Trial in Miami*, N.Y. TIMES, Oct. 12, 1986, at A35; Jon Nordheimer, *Police Corruption Plaguing Florida*, N.Y. TIMES, Aug. 3, 1986, at 19.

⁸¹ Paul Lieberman, *Raid Rules Being Tightened: Rising Tide of Drug Cash Testing Honesty of Police*, L.A. TIMES, Sept. 11, 1989, at 1.

⁸² See generally KNAPP COMM’N REPORT ON POLICE CORRUPTION (1973).

⁸³ See generally MILTON MOLLEN ET AL., CITY OF N.Y., COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T (1994).

dealers.⁸⁴ New Haven police were recently convicted of a series of crimes, including stealing money and drugs, bribery and planting fake evidence in drug cases.⁸⁵ Three Boston police were recently convicted of major drug offenses. One of them extorted money on behalf of Columbian drug dealers while in uniform.⁸⁶ Others agreed to protect shipments of cocaine coming into the city.⁸⁷

Even lawyers and judges are not immune to the lure of drug cash. An Assistant United States Attorney in the Southern District of New York was convicted of stealing drugs and money from government supplies.⁸⁸ Federal Judge Robert F. Collins was convicted of bribery in a drug case and Judge Walter Nixon was convicted of perjury in an investigation of a drug case.⁸⁹ Corruption demoralizes all police and spreads like cancer into all phases of law enforcement.

D. Diversion of Law Enforcement Efforts

Despite massive increases in police resources, personnel and law enforcement intelligence and technology, the effectiveness of the police in solving predatory crimes and arresting their perpetrators is at or near an all-time low. The reason is drug prohibition.

In many cities, half or more of the arrests are for drug offenses or drug-related crimes.⁹⁰ Nationwide, there are more arrests for drug crimes than for any other offense category.⁹¹ Police are encouraged to focus their law enforcement efforts on drugs because they can obtain forfeitures of drug

⁸⁴ John Marzulli, *Ex-Narc to Admit Ripoffs*, NEW YORK DAILY NEWS, Apr. 13, 2004, at 18; John Marzulli, *4th Ex-Narc Pleads Guilty*, NEW YORK DAILY NEWS, May 5, 2005, at 16; William Rashbaum, *Guilty Plea by a Detective Who Stole and Sold Drugs*, N.Y. TIMES, Apr. 15, 2004, at B3.

⁸⁵ William Kaempffer, *Ex-detective Admits Guilt to Bribery, Theft Counts: Once An Honored Cop, White Now Faces Prison*, NEW HAVEN REG., Oct. 27, 2007, at A1; Lea Yu, *Two NHPD Cops Enter Guilty Pleas*, YALE DAILY NEWS, Oct. 8, 2007, <http://www.yaledailynews.com/news/city-news/2007/10/08/two-nhpd-cops-enter-guilty-pleas/> (last visited Nov. 16, 2009).

⁸⁶ Jonathan Saltzman, *Former Boston Police Officer Sentenced to 11 Years*, BOSTON GLOBE, July 30, 2008, at B2.

⁸⁷ Biran Ballou & Jonathan Saltzman, *Police Chief Pledges Probe*, BOSTON GLOBE, Nov. 9, 2007, at A1.

⁸⁸ Arnold Lubasch, *Ex-Prosecutor Gets 3 years in Drug Thefts*, N.Y. TIMES, Jan. 11, 1986, at 25; Sandra Torry, *Lawyers on Drugs Create Problem Fraught With Legal, Moral Questions*, WASH. POST, Oct. 5, 1988, at D1.

⁸⁹ Frances Frank Marcus, *U.S. Judge is Convicted in New Orleans Bribe Case*, N.Y. TIMES, June 30, 1991, at A13; Marianne Lavelle & Fred Strasser, *Judge Nixon Says He "Had Nothing to Hide,"* NAT'L L.J., Oct. 2, 1989, at 5.

⁹⁰ OFFICE OF CRIMINAL JUSTICE PLANS AND ANALYSIS, CRIME AND JUSTICE REPORT FOR THE DISTRICT OF COLUMBIA 16 (1990).

⁹¹ FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2007, ESTIMATED NUMBER OF ARRESTS, tbl.29, available at http://www.fbi.gov/ucr/cius2007/data/table_29.html.

money, cars, boats, houses and other property used by the drug dealers. If they don't steal this property, as corrupt police do, honest police will at least indirectly benefit from the forfeitures, since some of the forfeited property, if not all of it, can remain with the department.⁹² Thus, for both corrupt and honest police, there is a built-in bias in favor of investigating and prosecuting drug crime versus predatory crime. Moreover, given the diminution of the Fourth Amendment as interpreted by the courts since the declaration of the drug war,⁹³ it is much easier to make a drug arrest than one for theft, burglary or other crimes that require a modicum of investigative effort. The police can simply drive into an open air drug market, stop whoever is there and search them, a technique that commonly produces a drug arrest. Also, when police arrest people for a motor vehicle infraction, they can often search their persons or their cars and find drugs, converting a motor vehicle stop into a drug arrest.⁹⁴ In part because of the enforcement lure and ease of drug arrests, in 2007 only 44.5 percent of violent crimes reported to the police and only 18.6 percent of thefts and 12.4 percent of burglaries were cleared.⁹⁵ These clearance rates are far lower than they were before the drug war was declared. In 1958, 93.5 percent of homicides were cleared.⁹⁶ In 1961, the figure was 93.1 percent.⁹⁷ By 1974, the homicide clearance rate was down to 80 percent.⁹⁸ By 2007, the homicide clearance rate had dropped to 61.2 percent.⁹⁹ The

⁹² Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40-41 (1998); See also, Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 287 (2000) (finding that legislation permitting police to keep seized assets in drug cases increases drug arrest rates by about 18 percent).

⁹³ DUKE AND GROSS, *supra* note 36, at 123-28; See generally David A. Harris, *Frisking Every Suspect*, 28 U.C. DAVIS L. REV. 1 (1994).

⁹⁴ This practice may be in some legal jeopardy after the Supreme Court's recent decision in *Arizona v. Gant*, No. 07-542, (S. Ct. Apr. 21, 2009), holding that once the driver of a car was arrested, handcuffed and placed in the patrol car, the police could not search his car unless they had reason to believe that it contained evidence supporting the offense for which the driver was arrested. This invalidated a common practice, covering decades, of searching the interior of the car whenever the occupant was arrested.

⁹⁵ FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2007, PERCENT OF OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS, tbl.25, available at http://www.fbi.gov/ucr/cius2007/data/table_25.html.

⁹⁶ FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 77 tbl.13 (1958).

⁹⁷ FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 83 tbl.8 (1961).

⁹⁸ FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 42 (1974).

⁹⁹ FED. BUREAU OF INVESTIGATION, *supra* note 87, at tbl.25. Over time, moreover, the definition of "clearance" has been broadened. In the 1960s and 1970s, crimes were reported as "cleared by arrest."

overall clearance rate for all violent offenses was 79 percent in 1958,¹⁰⁰ compared to 44.5 percent in 2007.¹⁰¹ The clearance rate for property crimes was 24 percent in 1958¹⁰² compared to 16.5 percent in 2007.¹⁰³ A thief, robber, rapist or murderer who avoids the drug business stands a much better chance of avoiding detection and conviction than he would were the police not so distracted by drug crime.¹⁰⁴

If a person arrested for a drug crime also happens to be a violent drug dealer or a drug user who steals and robs to support his addiction, a drug arrest that ends in a conviction and sentence could have a preventive impact on predatory crime as well as drug crime. There is, however, no reason to believe that this is a common collateral benefit of a drug arrest. Nearly half of all drug arrests are for marijuana offenses.¹⁰⁵ There is little evidence that marijuana users or even most marijuana distributors (as opposed to large scale growers or smugglers) are violent or thieves. Marijuana is less often involved in addiction than cocaine, heroin or methamphetamine and it is much less costly than the other drugs. Few consumers need to rob or steal in order to afford marijuana. Moreover, only about 6 percent of marijuana arrests result in a felony conviction.¹⁰⁶ As noted, some cocaine and heroin addicts steal to afford their addictions. However, arrests for cocaine and heroin comprise less than 30 percent of drug arrests¹⁰⁷ and less than 4 percent of all arrests.¹⁰⁸ And while many predatory criminals use drugs, there is no evidence that the typical user of hard drugs also commits predatory crimes. Contrary to common

Now they are "cleared by arrest or exceptional means." Thus, some crimes are "cleared" even though no arrest is made.

¹⁰⁰ FED. BUREAU OF INVESTIGATION, *supra* note 88, at 77 tbl.13.

¹⁰¹ FED. BUREAU OF INVESTIGATION, *supra* note 87, at tbl.25.

¹⁰² FED. BUREAU OF INVESTIGATION, *supra* note 88, at 77 tbl.13.

¹⁰³ FED. BUREAU OF INVESTIGATION, *supra* note 87, at tbl.25. It should be noted that reporting practices have changed over time as have the propensities of victims to report crimes to the police. These comparisons, therefore, must be regarded as merely suggestive of temporal differences in police effectiveness in solving crimes.

¹⁰⁴ See generally MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 151-153 (1992); See also Bruce L. Benson, David W. Rasmussen & Iljoong Kim, *Deterrence and Public Policy: Trade-Offs in the Allocation of Police Resources*, 18 INT'L REV. L. & ECON. 77 (1998).

¹⁰⁵ FED. BUREAU OF INVESTIGATION, *supra* note 87, at "Arrest Table."

¹⁰⁶ RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990s, at 1 (2005), available at http://www.sentencingproject.org/doc/publications/dp_waronmarijuana.pdf.

¹⁰⁷ FBI, *supra* note 87 at Arrest Table.

¹⁰⁸ *Id.* Of more than 14 million arrests, 1.8 million, or 13 percent of all arrests were for drug offenses. Cocaine and heroin arrests comprise less than 30 percent of all drug arrests.

assumptions, the typical user of cocaine or heroin is not an addict¹⁰⁹ and is apparently employed in a legitimate occupation.¹¹⁰ It is also doubtful that most persons arrested for heroin or cocaine offenses are actually convicted and sentenced as felons.¹¹¹ Thus, while drug arrests can prevent some predatory crime, the collateral benefit is much attenuated. The typical drug arrest has virtually no preventive impact on predatory crime. Were it not for drug arrests, much of the time and effort spent investigating, arresting, processing and prosecuting drug arrestees would be spent productively on predatory crime.

Repeal of drug prohibition, or even repealing the prohibition of marijuana, might be the law enforcement equivalent of adding a few hundred thousand police to the rolls—at no cost.

IV. WHAT CAN BE DONE?

The case for replacing drug prohibition with regulation is strong.¹¹² The U.S. would have difficulty extricating itself from the world-wide mess it has created with drug prohibition, since it has persistently and powerfully insisted that the rest of the world support its prohibitionist policies. For this reason, as well as the fact that drugs are a convenient lightning rod for a variety of societal fears, frustrations and prejudices,¹¹³ hardly anyone regards the substitution of a regulatory regime as likely. Still, one should not bet too heavily against fundamental change in this arena. Throughout the 1920s, Billy Sunday preached that repealing Prohibition was no more likely than “repealing the Thirteenth Amendment and restoring slavery.”¹¹⁴ Three years before Prohibition was ended by Constitutional amendment,

¹⁰⁹ BRUCE L. BENSON & DAVID RASMUSSEN, INDEPENDENT INSTITUTE, *ILLCIT DRUGS AND CRIME* 10 (1996).

¹¹⁰ *Id.* at 12.

¹¹¹ Only a fraction of people arrested for felonies in large cities are ever convicted of those felonies. See HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* 21 (1982); VERA INST. OF JUSTICE, *FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS* 6 (1977).

¹¹² See generally Duke, *supra* note 59; JEFFERSON M. FISH, *HOW TO LEGALIZE DRUGS* (1998); JEFFREY A. MIRON, *DRUG WAR CRIMES: THE CONSEQUENCES OF PROHIBITION* (2004).

¹¹³ Racism has been closely linked to drug prohibition throughout its history in the U. S. See DUKE & GROSS, *supra* note 36, at 160-171; See generally, CLARENCE LUSANE, *PIPE DREAM BLUES: RACISM AND THE WAR ON DRUGS* (1991). There is a vast literature debating whether contemporary drug prohibition is racist. See generally, Heather MacDonald, *High Incarceration Rate of Blacks is Function of Crime, not Racism*, INVESTOR'S BUS. DAILY, Apr. 28, 2008; Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL. F. 25 (1994); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991). It is outside the scope of this essay to join that debate. However, the fact that so many Americans believe that the drug war is (still) racist is a major cost of the war in terms of racial healing.

¹¹⁴ CASHMAN, *supra* note 71, at 161.

Senator Morris Sheppard of Texas asserted that “[t]here is as much chance of repealing the Eighteenth Amendment as there is for a hummingbird to fly to the planet Mars with the Washington Monument tied to its tail.”¹¹⁵ Prohibition was repealed for the same reasons drug prohibition has failed, including but not limited to crime, corruption, disrespect for law, death and disease from defective or poisoned products, and waste of taxpayer money.¹¹⁶

Even though repeal of drug prohibition is unlikely in the near term, the prospect of de-escalating the drug war is far from hopeless. Glimmers of rationality occasionally appear. Australia, Spain, Italy, Luxembourg, and Belgium have decriminalized marijuana use in the past decade, joining the Netherlands that did so in the 1970s.¹¹⁷ Portugal decriminalized all drugs in 2001 and drug use has not increased there since then. A recent study asserts that Portugal’s decriminalization has been “a resounding success.”¹¹⁸ Massachusetts recently joined Alaska and Maine in decriminalizing possession of small quantities of marijuana and other states are considering doing so.¹¹⁹ Fourteen states have legalized (as far as State laws can do so)¹²⁰ medical marijuana and the Obama administration has announced that it will not bring federal prosecutions against distributors of marijuana for medical purposes.¹²¹ This policy should also result in a more tolerant law enforcement attitude toward recreational use of marijuana, since the distinction between medical use and recreational use will be often be unclear and, in any event, the medical use of marijuana will demonstrably undermine false assumptions about the deleterious

¹¹⁵ CHARLES MERZ, *THE DRY DECADE 297* (Americana Library ed.1969) (1930).

¹¹⁶ See Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons From Alcohol Policy for Drug Policy*, in CONFRONTING DRUG POLICY: ILLICIT DRUGS IN A FREE SOCIETY 161 (Ronald Bayer & Gerald M. Oppenheimer eds., 1993); DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 25-35 (1979). There is also a libertarian position on the matter, i.e., that it is the individual’s right to decide what to put in his body, not the government’s. This position makes no distinction between alcohol and heroin. See JOHN STUART MILL, ON LIBERTY 22 (1859); See generally THOMAS SZASZ, OUR RIGHT TO DRUGS, THE CASE FOR A FREE MARKET (1992).

¹¹⁷ Eric Schlosser, *The World: Up in Smoke; The U.S. Bucks a Trend on Marijuana Laws*, N.Y. TIMES, June 1, 2003, at 45.

¹¹⁸ GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 1 (2009), available at http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf. Following Portugal’s lead, Mexico also recently decriminalized possession of small amounts of all drugs. Associated Press, *Mexico Legalizes Drug Possession*, N. Y. TIMES, Aug. 21, 2009, at A12.

¹¹⁹ David Abel, *Voters Approve Marijuana Law Change*, BOSTON GLOBE, Nov. 5, 2008, at B6.

¹²⁰ *Gonzales v. Raich*, 545 U.S. 1, 2 (2005), upheld federal prohibition of marijuana despite California’s efforts to legalize medical marijuana. Federal law remains supreme.

¹²¹ David Johnston and Neil A. Lewis, *Ending Raids of Dispensers of Marijuana For Patients*, N.Y. TIMES, Mar. 19, 2009, at A20; Solomon Moore, *Dispensers of Marijuana Find Relief in Policy Shift*, N.Y. TIMES, Mar. 20, 2009, at A15.

psychological and physiological effects of the drug. While not entirely harmless, marijuana is easily the least dangerous recreational drug in common use.¹²² It has never produced a documented case of marijuana rage or “reefer madness.” Nor has anyone ever died from a marijuana overdose.

The case for legalizing or at least tolerating recreational use of marijuana by adults is overwhelming, and, for the first time in decades, prominent politicians are willing to encourage debate on the subject.¹²³ Governor Arnold Schwarzenegger recently urged a study of the matter, saying “[I]t’s time for a debate.”¹²⁴ Representative Barney Frank wants to legalize marijuana to “make room” in prison for some “in the financial world” by “getting the people who smoke marijuana out.”¹²⁵ Among other benefits of decriminalizing marijuana would be the strengthening of official admonitions against and prohibitions of the recreational use of more harmful drugs such as heroin, cocaine and methamphetamine. Official lumping of marijuana with these drugs in messages to potential users and in criminal penalties discredits the prohibitionist enterprise. It is analogous to a “war” against “incest and public nudity.” Although related in a very broad sense to sex, those two offenses are simply incomparable. Marijuana, like heroin, cocaine and methamphetamine, is a psychotropic drug, but its dangers and effects are strikingly different from those other drugs, as are the dangers and effects of other drugs like caffeine, alcohol, and tobacco. Legalizing marijuana would also remove a substantial drain on law enforcement resources, greatly improving effectiveness in policing and preventing predatory crimes. We would be a much safer nation were we to pursue this course.

Apart from scaling back the intensity of the war against marijuana,

¹²² DUKE & GROSS, *supra* note 36, at 43-52, 74-77; see generally LESTER GRINSPOON & JAMES B. BAKALAR, *MARIJUANA: THE FORBIDDEN MEDICINE* (1993).

¹²³ When he ran for President in 1976, Jimmy Carter supported the decriminalization of marijuana and, after he was elected, supported federal legislation that would have decriminalized small amounts of marijuana. Jean Seligmann and Lucy Howard, *Easing the Pot Laws*, *NEWSWEEK*, Mar. 28, 1977, at 76. Such legislation was introduced by Senators Jacob Javits (R-NY) and Alan Cranston (D-Calif), among others, Edward Walsh, *Carter Endorses Decriminalization of Marijuana*, *WASH. POST*, Aug. 3, 1977, at A1. A decade later, however, Harvard Professor Douglas Ginsburg’s nomination to the United States Supreme Court had to be withdrawn because he had smoked marijuana eight years before. Janet Cawley & Joseph R. Tybor, *Ginsburg Admits Pot Use in 60s, 70s*, *CHI. TRIB.*, Nov. 6, 1987, at 5C. In 1994, when U.S. Surgeon General Joycelyn Elders suggested that drug legalization deserved to be “studied,” she was asked by President Clinton to resign. Pryor Jordan, *Elders Stresses Health Over Mere Longevity*, *ARKANSAS DEMOCRAT-GAZETTE*, Apr. 23, 2008, at 10; Amy Zarlenga, *Elders Feisty, With No Regrets*, *CAPITAL TIMES* (Madison, WI), Sept. 24, 1997, at 2A.

¹²⁴ Rebecca Cathcart, *Schwarzenegger Urges a Study on Legalizing Marijuana Use*, *N.Y. TIMES*, May 7, 2009, at A21.

¹²⁵ Transcript of Show at 14, *Lou Dobbs Tonight* (CNN television broadcast May 6, 2009).

there is evidence that some politicians are beginning to consider reducing sentence severity and mandatory minima, especially in drug cases.¹²⁶

What a rational approach to crime reduction or a rediscovery of humane values toward prisoners could not accomplish, a shortage of money might. Several states the budgets of which are undergoing drastic reductions are deciding that they cannot afford to continue the imprisonment mania and are releasing inmates early, adopting more sentencing alternatives to incarceration and generally reversing the trend that has been in place since 1973.¹²⁷

Since we now have a President who has admitted having used illegal drugs,¹²⁸ and who doubtless has observed drug use by others, we may hope to receive some leadership from him in reducing the baseless fears associated with drug use and the tendency of politicians and others to demonize users as well as distributors. When and if that happens, we can hope to reconsider a range of sentences and attitudes toward sentencing that are not animated merely by a desire to reduce the monetary costs of incarceration.

One of the most bizarre and inexcusable results of the militaristic approach to drug problems is imprisoning drug users while denying them treatment for drug dependency, meaningful work and educational opportunities. Study after study has shown that drug treatment works and that it is far more cost-effective in reducing drug consumption than law enforcement.¹²⁹ Studies have also shown that more than half of persons admitted to State prisons have used psychotropic drugs (in addition to alcohol and tobacco) during the 30 days prior to their incarceration.¹³⁰ Many of them are addicted to drugs and resourcefully continue to use drugs in prison.¹³¹ Yet only 14 percent of those who were drug-dependent

¹²⁶ See, e.g., Jim Dwyer, *Letting Judges Have a Say in Sentencing*, N.Y. TIMES, Mar. 25, 2009, at A23; Jeremy Peters, *Albany Reaches Deal to Repeal 70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1.

¹²⁷ Jennifer Steinhauer, *To Trim Costs, States Relax Hard Line on Prisons*, N.Y. TIMES, Mar. 25, 2009, at A1.

¹²⁸ BARACK OBAMA, *DREAMS FROM MY FATHER* 93 (Crown Publishers 2004) (1995).

¹²⁹ See, e.g., C. PETER RYDELL & SUSAN S. EVERINGHAM, *CONTROLLING COCAINE: SUPPLY VERSUS DEMAND PROGRAMS*, at xvi (1994); MATHEA FALCO, *THE MAKING OF A DRUG-FREE AMERICA: PROGRAMS THAT WORK* 108-30 (1992); see generally VICTOR TABBUSH, *ECON. ANALYSIS CORP., THE EFFECTIVENESS AND EFFICIENCY OF PUBLICLY FUNDED DRUG ABUSE TREATMENT AND PREVENTION PROGRAMS IN CALIFORNIA: A BENEFIT COST ANALYSIS* (1986); MAUER & KING, *supra* note 44, at 17-18. Some studies question the effectiveness of prison treatment programs in reducing recidivism. AUSTIN, *supra* note 2, at 15-17.

¹³⁰ CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. OF DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, *DRUG USE AND DEPENDENCE, STATE AND FED. PRISONERS 1* (2006), available at <http://www.ojp.gov/bjs/pub/pdf/dudsfp04.pdf>.

¹³¹ ALAN ELSNER, *GATES OF INJUSTICE: THE CRISIS IN AMERICA'S PRISONS* 46-47 (2004); U.S. DEP'T OF JUSTICE, REPORT NO. I-2003-002, *FED. BUREAU OF PRISONS' DRUG INTERDICTION*

or drug abusers prior to entering prison ever received any drug treatment in prison.¹³² This was down from 36.5 percent in 1991.¹³³ Even more appalling, two-thirds of prisoners are functionally illiterate¹³⁴ yet only about 10 percent of prisoners are enrolled in full-time training or education programs.¹³⁵ More than 700,000 of these prisoners, many after ten or twenty years locked away from society, will be released this year.¹³⁶ Discharging inmates in such huge numbers who are wholly unprepared for lawful participation in society is a cruel injustice to those inmates and, for all of us, a construct for calamity¹³⁷

ACTIVITIES (2003). The fact that prison administrators cannot keep drugs from entering our prisons should shed light on the likelihood that we can keep drugs from entering the country.

¹³² MUMOLA, *supra* note 116, at 9.

¹³³ MAUER & KING, *supra* note 44, at 2, 18.

¹³⁴ U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY 17 (1994), available at <http://nces.ed.gov/pubs94/94102.pdf>.

¹³⁵ Fox Butterfield, *Often, Parole Is One Stop On The Way Back To Prison: A Special Report*, N.Y. TIMES, Nov. 29, 2000, at A1. This is much lower than in the early 1990s. In 1991, 31 percent of prisoners released that year had participated in vocational training and 43 percent had participated in educational programs. James Lynch & William Sabol, *Prisoner Reentry in Perspective*, 3 URBAN INST. CRIME POL'Y REP. 1, 11 (2001), available at http://www.urban.org/UploadedPDF/410213_reentry.pdf.

¹³⁶ Sourcebook of Criminal Justice Statistics Online, tbl6.0009.2006, <http://www.albany.edu/sourcebook/pdf/t600092006.pdf> (last visited Nov. 16, 2009) (showing that 713,473 state and federal prisoners were released in 2006).

¹³⁷ Substantial efforts are currently being made to assist released prisoners in re-entry, but those programs are too little and too late. See Editorial, *Shrinking the Prison Population*, N.Y. TIMES, May 11, 2009, at A 22.

