Nova Law Review

Volume 11, *Issue* 3 1987 *Article* 1

Nova Law Review Full Issue

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NOVA LAW REVIEW

THE WAR ON DRUGS: IN SEARCH OF A BREAKTHROUGH
A SYMPOSIUM

Introduction: In Search of a Breakthrough in the War on Drugs ..... *Steven Wisotsky*
Breaking the Impasse in the War on Drugs: A Search for New Directions ..... *Norman E. Zinberg, M.D.*
Towards New Perspectives on Drug Control: A Negotiated Settlement to the War on Drugs ..... *David A.J. Richards*
Why the Drug War is Unstoppable ..... *Thomas Szasz, M.D.*
Vice Policy in a Liberal Society: An Analysis of the Impasse in the War on Drugs ..... *Mark A.R. Kleiman*
A Proposal for Regulation and Taxation of Drugs ..... *Lester Grinspoon, M.D.*
The War on Drugs: Predicting the Status Quo ..... *John Kaplan*
The National Strategy—An Overview ..... *Leon Kellner*
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Coda: What Impasse? A Skeptical View ..... *Peter Reuter*

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The Law School and the Profession: A Need for Bridges ..... *Judge Frank M. Coffin*
The Five Year Residence Requirement for Naturalization: Its Operation and Employment-Related Exceptions and Ameliorations ..... *Judge Juan M. Bracete*
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An Argument Against Judicial Immunity for Employment Decisions

Volume 11 Spring 1987 Number 3

Published by NSUWorks, 1987

Testing for Drug Use in the American Workplace

Drug-use testing is one of the most controversial topics of our time. Many questions about drug testing have yet to be answered. Now, for the first time, there is one place to look for information and opinions about the legal, scientific, and political aspects of drug testing. The Nova Law Review has just published a 500-page symposium on drug testing. The issue contains a variety of viewpoints.

Thirty authors contributed to the symposium:

Roger I. Abrams
Dean, Nova Law Center

George Anastaplo
Prof. of Law, Loyola Univ. of Chicago

Phyllis T. Bookspan
Prof. of Law, Delaware Law School

Tia Schneider Denenberg and
Richard V. Denenberg
Co-authors of Alcohol and Drugs: Issues in the Workplace

Prof. Kurt M. Dubowski
Professor of Medicine, Univ. of Oklahoma

Karen Hudner
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Prof. of Law, Univ. of Cal., Davis

Paul R Joseph
Prof. of Law, Nova Law Center

Dr. Arthur J. McBay
Prof., Univ. of N. Carolina School of Medicine

Dennis J. Morikawa,
Peter J. Hurtgen,
Terence G. Connor, and
Joseph J. Costello
Morgan, Lewis & Bockius

Cliff Palefsky
McGuinn, Hillsman and Palefsky

Rep. Patricia Schroeder and
Andrea L. Nelson
U.S. Congresswoman, Colorado

Rep. E. Clay Shaw and
Roger T. Fleming
U.S. Congressman, Florida

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Copies of the issue are $15.00.

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THE *Nova Law Review* is published three times a year. Listed in the *Index to Legal Periodicals* and the *Current Law Index*, the *Nova Law Review* is a reliable reference source for practitioners and judges, as well as a widely read forum for the airing of fresh ideas by legal scholars.

The Board of Editors welcomes the submission of manuscripts by members of the legal community. However, all manuscripts, both text and footnotes, must be typed and double or triple spaced. The Nova Law Review will contact all contributors within two weeks of receipt of the manuscript, but does not assume responsibility for the return of any material.

Subscriptions are available at $20.00 for one year. Individual issues may be purchased for $10.00. Special issues, such as volume 11:2, *Testing for Drug Use in the American Workplace*, are $15.00. If a subscription is to be discontinued, or address changed, notice to that effect should be sent one month in advance; otherwise, the *Review* will be mailed as usual. Foreign mailings are an additional $6.00 per issue.

To cancel, notice must be received by the Review prior to publication of the first issue of the volume.

Address all correspondence to:

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3100 S.W. Ninth Avenue
Fort Lauderdale, Florida 33315

Past editions of the Nova Law Review are now available through William S. Hein & Company, Inc.

1285 Main Street, Buffalo, New York 14209

Issues contained in the current volume may be obtained through the Review.

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IN OUR NEXT ISSUE . . . .

The *Nova Law Review* will publish the 1986 Survey of Florida Law. The issue will include the following articles:

Contracts	*Keara M. O'Dempsey*
Florida Blue Sky Laws	*Marilyn B. Cane*
Criminal Law	*Mark R. Brown*
Criminal Procedure	*Gerald T. Bennett*
Evidence	*Mark M. Dobson*
Limited Partnership Act	*Richard R. Thames*
Professional Responsibility	*Howard R. Messing*
Property	*Joseph M. Grohman*
Tax	*I. Richard Gershon*
Torts	*Michael L. Richmond*

The issue will also contain an article by Sandy Karlan on Gender Bias in the Florida Courts, and two student notes: strict liability for alcohol manufacturers and the influence of videotaped trials on the standards of appellate review.

The issue may be ordered for $10.00.

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EDITOR'S NOTE

The War on Drugs is one of the most publicized social policies of the 1980's, at times dominating the mass media and preoccupying government at all levels. As law students we take special note of its impact on civil liberties[1] and the criminal justice system.[2] Yet, there is little reflection on whether the War on Drugs is being fought well, or even if it makes sense to wage a war on drugs.

On April 18, 1986, an outstanding group of scholars assembled in Fort Lauderdale, Florida, to analyze the War on Drugs. Experts from the fields of law, psychiatry, and criminal justice presented papers and discussed "The War on Drugs: In Search of a Breakthrough." The participants—Steven Wisotsky, Norman E. Zinberg, M.D., David A.J. Richards, Thomas Szasz, M.D., Mark A.R. Kleiman, Lester Grinspoon, M.D., John Kaplan, and U.S. Attorney Leon Kellner—disagreed on many issues. With one notable exception, though, they shared the view that the War on Drugs in its present form is significantly defective. Some went further, and stated that the very *idea* of a war on drugs is a mistake.

In order to further the discussion of the wisdom of the War on Drugs, the *Nova Law Review* decided to publish the articles which each participant wrote for the symposium in April, 1986.[3] In addition, this issue of the *Law Review* contains an edited transcript of the symposium proceedings, including a round-table discussion and questions from the audience. Peter Reuter, who did not participate in the symposium, has contributed a concluding piece in which he offers his reflections on the symposium and on the War on Drugs. Also included are a chronology of the War on Drugs, a selective list of writings by participants, and other suggested writings on drug law and policy.

The Editors of the Law Review are grateful to Professor Steven Wisotsky of Nova for allowing the Review to publish this symposium. Prof. Wisotsky organized the symposium and attracted the superb group of scholars. Prof. Wisotsky's own critique of the War on Drugs is expressed in his recent book, *Breaking the Impasse in the War on Drugs*.

The *Nova Law Review* Board of Editors also offers special thanks to Maria Del Carmen Dantes for her assistance with Judge Juan Bracete's article.

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1. One of the most controversial aspects of the War on Drugs is the increased use of drug testing in the workplace. The Winter 1987 issue of the *Nova Law Review* (v.11, n.2) was devoted to this subject.

2. Wisotsky, Crackdown: The Emerging "Drug Exception" to the Bill of Rights, 38 HASTING L.J. (1987) (in press).

3. The symposium papers were originally edited by Prof. Steven Wisotsky and Robert C. Levine, Editor-in-Chief of volume ten of this law review.

Introduction: In Search of a Breakthrough in the War on Drugs

Steven Wisotsky*

I have convened this symposium because my research has brought me to the firm conclusion that the War on Drugs is a serious mistake, inflicting on society the worst of both worlds: a rapidly rising tide of drug abuse exacerbated by the pernicious effects of a drug trafficking parasite of international dimensions. Cocaine cowboy killings, corrupt public officials, subversive "narcoterrorist" alliances between guerrillas and drug traffickers and many other black market pathologies flourish in the drug underworld. Indeed, the more enforcement we have, the worse things seem to get. It is only rational to ask whether the "cure" may not be worse than the "disease." Yet there is no real public debate on that question, only an occasional parody of discussion in which crude demands to intensify or militarize the war are opposed by simplistic rejoinders for "decriminalization." This impoverished dialog gets us nowhere.[1] Society is stuck on the drug issue, and there seems to be no way out of the morass. How did we arrive at such an impasse?

Not many years ago, the President of the United States, in response to public fears about spreading drug use, declared war on drugs. He denounced drug abuse as "public enemy number one," declared it to be a "national emergency" and called for a "total offensive" against drugs. A like-minded Congress, which only a year earlier had comprehensively revised the federal drug laws, cooperated by expanding the drug abuse budget ten times over. Seizing the momentum, the President re-organized the drug enforcement agencies and hired hundreds more drug agents to staff DEA. The war was on. The year was 1971. The President was Richard Nixon.

Although the war on drugs soon generated record levels of drug arrests and drug seizures, it was no match for the social forces at work. Marijuana, a symbol of youthful protest among hippies and yippies in

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1. *The Wall Street Journal* ran a front page story on Nov. 29, 1984, with these headlines and subheadings: *The Drug Trade: Experts in the Field of Narcotics Debate Ways to Curb Drub Abuse: One Side Touts Legalization, Other Wants Crackdown, Probably Neither is Right.*

the late 1960's, moved into the mainstream of American life during the 1970's and gained what now looks like a permanent foothold. Twenty-three to twenty-four million Americans report smoking marijuana, a remarkable figure that is just under one-half the number of those who smoke cigarettes.

Cocaine followed a similar social path, moving in less than a decade from underground or avant-garde status to the cover of *Time Magazine*: White powder in a martini glass, topped by an olive, captured the essence of the cover story "Middle Class High". By the time the Reagan Administration declared its war on drugs in 1982, pledging to "cripple the power of the Mob in America" and to "do what is necessary to end the drug menace," experimentation with or occasional use of illicit drugs had ceased to be an aberration and came close to being the statistical norm. According to the National Institute of Drug Abuse, about one-half of all persons under age 50 have some illegal drug experience. Two-thirds of all high school students have used illicit drugs.

Given that social context, the current war on drugs had to fail even more badly than the first. It has been an intense effort nonetheless, reflecting the Reagan Administration's negative attitudes about drugs: "The mood towards drugs is changing in this country and the momentum is with us. We're making no excuses for drugs, hard, soft or otherwise. Drugs are bad and we're going after them." And the Administration did just that.

President Reagan's speech of October 14, 1982, called for (and got) more of everything: (1) more personnel — 1,020 law enforcement agents for DEA, FBI and other agencies, 200 Assistant United States Attorneys, and 340 clerical staff; (2) more aggresive law enforcement — creating twelve (later thirteen) regional Organized Crime Drug Enforcement Task Forces (OCDETFs) in "core cities" across the the nation "to identify, investigate, and prosecute members of high-level drug trafficking enterprises, and to destroy the operations of those organizations"; (3) more money — $127.5 million in *additional* funding, and a substantial re-allocation of the existing $702.8 million budget away from prevention, treatment and research programs to law enforcement programs; (4) more prison bed space — addition of 1260 beds at 11 federal prisons to accomodate the increase in drug offenders to be incarcerated; (5) more stringent laws - a "legislative offensive designed to win approval of reforms" with respect to bail, sentencing, criminal forfeiture and the exclusionary rule; (6) more (better) inter-agency coordination, bringing together all federal law enforcement agencies in "a

comprehensive attack on drug trafficking and organized crime" under a Cabinet level committee chaired by the Attorney General"; and (7) improved federal-state coordination, including federal training of State agents.

The President's perception about the mood of the country seemed accurate. His antidrug initiative was not imposed from above upon an indifferent public but drew energy from a broad base of political support. Before his October 14, 1982, speech, for example, the Attorney General's Task Force on Violent Crime had recommended "an unequivocal commitment to combatting international and domestic drug traffic." In the Senate, twenty-eight Senators had banded together in the Drug Enforcement Caucus in order to "establish drug enforcement as a Senate priority." And the House Select Committee on Narcotics Abuse and Control had urged the President to "declare war on drugs."

Energized by this hardening attitude against illegal drugs, the Administration acted aggressively, mobilizing an impressive array of federal bureaucracies and resources in a coordinated attack on the drug supply. This Administration cut through bureaucratic rivalries like no Administration before it to streamline operations and force cooperation between DEA, Customs, and other agencies. The FBI was placed in charge of DEA and given major drug enforcement responsibility for the first time in history.

The Administration attempted to erect a modern anti-drug version of the Maginot Line with National Narcotics Border Interdiction System (NNBIS), a national network designed to coordinate surveillance and interdiction efforts around the entire coastline of the United States. As part of that initiative, NNBIS floated radar balloons in the skies of Miami, the Keys, and even the Bahamas to protect the nation's perimeter against drug incursions.

The CIA joined the war effort by supplying intelligence about foreign drug sources, and NASA assisted with satellite-based information about coca and marijuana crops under cultivation. Financial investigations, aided by computerized data banks and staffed by Treasury agents specially trained to trace money laundering operations, were emphasized. The State Department pressured foreign governments to eradicate illegal coca and marijuana plants and financed pilot programs to provide peasant farmers with alternative cash crops. Mutual assistance treaties to expose "dirty" money secreted in tax haven nations and to extradite defendants accused of drug conspiracies against the laws of the United States were also concluded.

President Reagan also succeeded in literally militarizing what had

previously been a rhetorical war by deploying the military forces of the United States in drug enforcement operations. The Department of Defense provided pursuit planes, helicopters and other equipment to civilian enforcement agencies, while Navy "hawkeye" radar planes patrolled the coastal skies in search of smuggling aircraft and ships. The Coast Guard, receiving new cutters and more personnel, intensified its customary task of interdicting drug-carrying vessels at sea. Finally, for the first time in American history, Naval ships, including a nuclear-powered anti-aircraft carrier, interdicted — and in one case fired upon — drug smuggling ships in international waters. On a purely technical level, the Administration could rightly claim success in focusing the resources of the federal government in an historically single-minded attack on the drug supply.

Congress reinforced the executive branch by passing its "legislative offensive" toughening the laws on bail, sentencing, and criminal forfeiture. The Supreme Court responded too by narrowing the scope of protections against unlawful search and seizure afforded citizens by the fourth amendment. In almost every case the Court ruled for the Government, upholding warrantless searches of open fields and automobiles, and dispensing with the requirement of probable cause to stop, detain and question travelers, to use a detector dog to sniff luggage, to board and search vessels on the high seas or inland water ways, and so on.

The states and localities joined the war with highway roadblocks, drug detector dogs in the schools, urinalysis proposals, TIPS (Turn in a Pusher) bounty programs, and mandatory prison terms of up to 35 years for convicted drug traffickers.

And what were the results of this extraordinary enforcement effort? It racked up new records in every category of measurement. A September 27, 1984, White House press release, "Summary of Accomplishments [of] the National Campaign Against Drug Abuse," listed these results:

* Arrests of the top-level organizers and financiers of the drug traffic have increased 18 percent, from 195 per month in 1981 to about 231 per month in 1984. Total arrests averaged about 1,000 per month.

* Convictions for all drug law violations have increased 90 percent, from 485 per month in 1981 to about 921 per month in 1984.

* Convictions for top echelon organizers and financiers have increased 186 percent, from 88 per month in 1981 to about 252 per month in 1984.

* U.S. seizures of cocaine during the first seven months of 1984

are 216 percent greater than cocaine seizures during all of 1981. Heroin seizures are 67 percent greater for the first seven months of 1984 than in all of 1981.

* In the first half of 1984, over 25 metric tons of cocaine were seized in the United States and Latin America, compared to approximately 3.7 metric tons in 1981.

But the bottom line of the War on Drugs showed new highs in the volume of cocaine imported to the United States, about 100 metric tons (a trebling in six years); new highs in the number of persons who had tried cocaine or become addicted to it; new highs in the purity of cocaine available on the street; and a lower price for cocaine than when the war started.

With marijuana, imports dropped, but domestic production rose to fill the market demand. A large-scale American marijuana industry has emerged to fill the gap in foreign supply caused by intensive interdiction of marijuana freighters in Caribbean and Atlantic waters. As a result of this "successful" interdiction of marijuana from abroad, we now have extensive, and still burgeoning, cultivation of high potency marijuana in the United States. In one three-day "sweep" during 1985, DEA agents sighted 3,010 illegal plots of marijuana. The National Organization for the Reform of Marijuana Laws estimates that marijuana is now America's third largest cash crop, worth nearly $14 billion per year. Notably, prices of commercial grade marijuana at $40-$60 ounce are less, after correcting for inflation, than they were fifteen to twenty years ago.[2]

Theoretically, a highly committed program of interdiction, with a level of border security characteristic of closed societies, might become more successful. But such a program would also be very costly, as shown by a General Accounting Office study of interdiction:

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2. Heroin, which used to carry the stigma of a ghetto drug, has now penetrated the lifestyles of the rich and famous. John Belushi's death was one notorious case. A Kennedy son was another. A *Rolling Stone* magazine story suggested that heroin has become the plaything of the progeny of the rich and occupies the same chic social status that cocaine held fifteen years ago. The story gets worse. "China White" and other heroin analogs have entered the lexicon as "designer drugs." These laboratory creations are said to be far more potent and more toxic than the "real" thing. The ingenuity of the creators of these drugs shows the potential for an infinite supply of new domestic drug products. Further, because they require no smuggling to get to market, they lie even further beyond the reach of law enforcement officials.

> [T]he Coast Guard has estimated that it would have to seize 75 percent of the marijuana entering the United States before drug traffickers would be driven out of business . . .[at a cost of] $2.3 billion in additional operating funds. . . . Estimates to seize 75 percent of the cocaine, heroin, and dangerous drugs entering this country are not available, but it would also take billions of dollars.

It would also disrupt the flow of commerce and damage normal business operations. Most of all, it would have no impact on domestically produced drugs. The Department of Justice concedes these limitations of drug interdiction. "[Y]ears of experience have shown that this band-aid approach to controlling illegal drugs — stopping them midway along the delivery chain — is nothing more than a maintenance effort which, standing alone, will never have any permanent effect on drug traffic."

Thus, despite the Administration's bigger-than-ever statistics in every category — seizures, forfeitures, investigations, indictments, arrests and convictions — the fact remains that the black market in drugs, especially cocaine, has grown to record size. In fact, by 1980, Americans had consumed twice as much cocaine per capita as they did in the basically free market that prevailed in the years before enactment of the Harrison Narcotics Act of 1914. Moreover, this rapid market growth occurred in the face of President Reagan's doubling of the federal drug enforcement budget from $645 million in fiscal year 1981 to over $1.2 billion in fiscal year 1985. This budgetary expansion seems all the more remarkable when compared to the equivalent budget for FY 1969 of $34.2 million. The social "return" on the extra billions spent during that decade and a half is a drug abuse problem of historic magnitude, accompanied by freewheeling drug trafficking that corrodes our political institutions and destabilizes the governments of our allies in this Hemisphere.

Might things be even worse but for the War on Drugs? I doubt it. In the United States in the 1960's and 1970's, smoking marijuana was an idea whose time had come. No marshalling of the forces of law in a free society could then (or now) begin to control the private behavior of twenty-four million Americans.[3] Social behavior proceeds independently of legal regulation. Thus, the few states that decriminalized ma-

3. Not even a police state can do it — the Soviet Union, for example, now confronts a growing supply of heroin and opium (smuggled in from Afghanistan) to add to its [illegible] problem of alcoholism.

rijuana in the 1970's encountered no perceptible increase in the level of smoking. Similarly, if marijuana smoking is now on the decline among high school youth, as some surveys suggest, it is not because of law enforcement (and certainly not because of any shortage of supply) but because, as with cigarette smoking, the health movement and other social developments now work to undermine it. The same thing will eventually happen with cocaine as its reputation worsens.

The law has very little role to play in these trends. Worse, it does not even have any realistic goals. In their wildest fantasies, do law enforcement officials dream of cutting the black market in cocaine by, say, one-half? While that would be a heroic achievement, given the limited powers of law enforcement, its impact on public health would be minimal. It would, after all, only roll back the black market in cocaine to the level of the early 1980's, the very level which triggered the War on Drugs hysteria in the first place. Moreover, the social benefit would be quite modest. Cutting the black market in cocaine back to forty or fifty tons would save perhaps a hundred lives and a few thousand emergency room visits each year, far less than would be accomplished by comparable expenditures on, say, highway safety. For example, the Department of Transportation estimates that mandatory seat belt use by front seat passengers would save 10,000 lives each year. Zero cocaine and heroin use would save perhaps 2,000 lives. Zero cigarette consumption would save 360,000 lives! The rhetoric of death and destruction about illicit drugs so obscures the true state of affairs that the War on Drugs lacks all sense of proportion.

The ultimate question is whether the War on Drugs makes a net contribution to the quality of life in the United States. Does it promote or harm the safety and well being of the nation? To answer that question intelligently, we must ask about the price we pay for it. What does it cost society to maintain the War on Drugs?

The direct budgetary cost of the War on Drugs — $1.5 billion — is the least of it, not even a drop in the bucket of a trillion dollar federal budget.[4] The true cost of the War on Drugs comes from its creation and perpetuation of a massive black market. Responding to the laws of supply and demand, the alchemy of prohibition transforms a $60.00 ounce of pharmaceutical cocaine into $2000 or $3000 worth of black market cocaine. Economists call this a crime tariff, a "tax" for

4. On the state level, however, the criminal justice systems suffer a massive diversion of resources resulting from the processing of 750,000 drug arrests each year, most of them for simple possession or minor sales.

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the benefit of criminals willing to break the law. The paramilitary pounding away at the production and distribution of cocaine props up its exorbitant price, thereby creating a vast underground economy estimated by the Government at $80-100 billion in yearly revenues, $30 billion of it from cocaine alone.

These black market billions feed the growth of powerful crime syndicates willing to commit murder and to corrupt public officials in order to protect their operations. One quarter of all the homicides in Miami, Los Angeles and New York are "drug-related," *i.e.*, drug hits or drug rip-offs. Bribery of public officials is so pervasive and the amounts of money so great that according to former Attorney General William French Smith, corruption "threatens the very foundations of law enforcement." Indeed, whole nations — Bolivia and the Bahamas stand out — have been captured by drug syndicates. The black market also supports international terrorism and subversion by funding unholy alliances between drug traffickers and guerrillas who protect drug operations in return for arms. "Narcoterrorism" thus threatens the stability of friendly governments in Colombia, Peru, and elsewhere.

Within the United States, frustrated reaction to the growth of the black market leads to increasing demands for enlarged police powers,[5] destroying the civil rights of both criminal defendants and ordinary citizens. The pressure debases the rule of law through a gradual but obvious result-oriented squeezing of the Constitution.[6] If preventive detention is "necessary" to "get" drug traffickers, then let's pass a law and the Eighth Amendment be damned. As the Supreme Court itself has recognized, "[T]he history of the narcotics legislation in this country 'reveals the determination of Congress to turn the screw of the criminal machinery — detection, prosecution and punishment — tighter and tigher.'" Pretrial detention, longer (or mandatory) prison sentences, enhanced fines and property forfeitures, good faith exception to the exclusionary rule, roadblocks, drug detector dogs, compulsory urine samples, wiretaps, informants, undercover agents, extradition treaties, tax investigations, computers, currency controls — the list grows and

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5. The crackdown contributes nothing at all to public safety but paradoxically makes it worse. The pressure of drug prices "compels" many addicts to commit street crimes in order to pay for their habits.

6. Justice Hugo Black warned that "grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden short cuts . . . ." Turner v. United States, 396 U.S. 398, 427 (1970). "Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind . . . ." *Id.* at 426.

Published by NSUWorks, 1987

grows. And still it is not enough. Always the Government needs more.

That, ultimately, is the truly insidious quality of the War on Drugs: The drug enforcement system can never have enough power, never enough resources, to win the war. Legislative reforms, doubling of "troops," administrative directives, task forces, executive coordination — all of these have proven ineffective in controlling the drug supply and, short of a police state, always will. Yet the reflexive response of the system is always to do more, always to expand. "In one sense," said former Attorney General William French Smith, "to deal with this problem, we have to blanket the world."

Blanketing the world, of course, begins at home. When one initiative and then the next fails to produce any discernible or lasting impact on the black market in drugs, the frustrated impetus for control carries the system to its next "logical" extension. And the internal logic of the War on Drugs, coupled with its insatiable appetite for resources and power in its futile pursuit, leads inevitably to repressive measures. The demand for capital punishment for drug dealers is one current manifestation of this attitude. But the trump card of the black market in cocaine is that it can never be deterred. Rather, it thrives on enforcement, depends on it for its profitability. There is thus no escape from the drug supply, or from the destructive effects of drug enforcement.

The blind refusal of federal policy-makers to acknowledge this truth and to confront it in some realistic and constructive way presents an easy target for critics of the status quo. Yet, the criticisms are not only fair, but imperative. The federal drug enforcement system is out of control, unaccountable and irresponsible. It mindlessly claims "success," for example, when enforcement pressure in the Caribbean diverts smugglers to alternative routes or, worse, from bulky marijuana shipments to more easily concealable cargoes of cocaine. These consequences may be unintended but they are surely predictable.

The War on Drugs has made things worse and will do so in the future. Yet we remain stuck on this course of action. Isn't there a better way? The need is to precipitate a breakthrough, a turning point, a transformation of social context so that the destructive machinery of the War on Drugs ceases to be the only conceivable response to the problems created by illegal drug use.

Many people agree with this analysis but are stymied by the lack of a reasonable alternative. "Professor, what's the answer; what should replace the war on drugs," they ask. They shouldn't ask. First, it has taken the Government seventy years and billions of dollars to produce the present messy state of affairs. No individual should be expected to

produce a quick fix. Second, the truth isn't really "tellable." It's something people have to discover for themselves. They can be guided toward it, however. Thus, if the Government were really interested in meliorating "the drug problem" rather than waging a holy war on inanimate objects, it could begin a serious study of alternatives. It would not take the ridiculous position that drug abuse and drug supplies are worse than ever but that we can't even *consider* doing anything other than continuing on a failed course of action.

I refuse to believe that the human mind that created our political system of representative democracy, the most dynamic free enterprise system in the world, the computer revolution, and a culture whose popular entertainments captivate the imagination of the world, is not up to the task of devising a principled and effective response to the drug problem. I would start by first recognizing that the War on Drugs is unwinnable, a policy disaster that inevitably produces destructive consequences worse than the disease it is intended to "cure." I would then convene a panel of experts, brilliant scholars and experienced professionals such as the ones you have before you, to begin a search for new directions.

Breaking the Impasse in the War on Drugs: A Search for New Directions

Norman E. Zinberg, M.D.*

Although virtually all illicit drugs in use today have been available for many decades—Havelock Ellis experimented with and then recounted his use of psychedelics in *Godey's Ladies' Book* in 1898—most people date the Drug Revolution from 1962. Timothy Leary's cry of "Tune In, Turn On, and Drop Out" heralded the sixties and the use of acid. LSD (lysergic acid diethylamide) was used in the first wave of a vast social experiment with psychoactive drugs. By 1965, polls showed that illicit drug use was the greatest single concern of Americans, ahead of nuclear war, the brain drain, and the teacher shortage, and during that year was accorded as many front-page stories in *The New York Times* as any other topic.

One of Richard Nixon's first acts in office was to create the Special Action Office for Drug Abuse Prevention, which proclaimed the definitive War on Drugs. There was to be, first, an all-out attack on supply, including political pressure on exporting countries, and second, a build-up of treatment facilities to take care of the unfortunates "hooked" on such substances. Almost 25 years have passed since illicit drug use became "popular" and users have gone from being the repentant deviants of the twenties and thirties to enemy deviants, to use Joseph Gusfield's felicitous phrase. Enough time has elapsed, as this discussion will describe, to assess trends in the use and treatment of those in trouble, and to reflect on how what has gone on over the past 25 years and what has been learned can be brought to bear on current social policy.

Essentially, the vast social experiment has consisted of four waves of expanded use of some psychoactive drug. First, beginning in 1962, were the psychedelics, chiefly LSD. By 1965, white America discovered marijuana. Heroin took over from 1968 to 1972, and to everyone's surprise, in the mid-seventies cocaine use began to grow exponentially. During these periods, other drugs also experienced expanded use. For example, the use of amphetamines, which had been a problem because

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they had been prescribed for dieting since the thirties, had a surge—as "speed"—in the late sixties; PCP—as "angel dust" or THC—reappeared briefly as a devil drug in the late seventies. Barbiturates, "ludes" (methaqualone), and later benzodiazepines, chiefly Valium—the "downers"—were always available. It should be remembered that those drugs other than the psychedelics, alcohol, marijuana, the opiates, and cocaine did not have a "good," *i.e.*, highly pleasurable, reputation among users. The downers were known as "wallbangers" because users, when intoxicated, lost so much control that they banged themselves against objects. PCP was cheap, could be eaten, sniffed, or smoked, and was usually used only when other drugs were not available. As early as 1969, *Avatar*, a Boston underground newspaper, carried on its entire front page the headline, "Speed Kills." Amphetamines are harsh and metabolically upsetting in heavy use.

These differentiations among drugs are far easier to recognize with the passage of time. When headlines screamed of the assaultive potential of PCP use, it was harder to think of such use as the passing fad that it was, not because of law enforcement prevention or treatment efforts, but because users didn't much like the drug. In the throes of the sixties when LSD was thought to offer the hope of spiritual oneness with the universe and mystic insight or fear of permanent madness and disintegration, who would have imagined the "Oh, so that's what is meant by a psychedelic color" response of a first-time user in 1973, after a decade of psychological preparation for the experience? There was virulence in the ideological struggle between the peaceniks, marijuana-using "heads," and the patriotic, alcohol-using "juicers" in the late sixties and early seventies. Soon the mixing of alcohol use with other drug use became standard for all persuasions and social classes. The divergence between alcohol users and marijuana users allowed the choice of drug for a short time to have a political significance that seems a parody in the upper middle-class, Republican cocaine use of the early eighties.

Some increases in the use of such drugs as methaqualone or Valium seemed to be iatrogenically initiated. Before the decline of use in the last few years, Valium was the most prescribed drug in the pharmacopaeia. And methaqualone, despite a growing reputation in Europe and England as "heroin for lovers," when introduced into the United States as a Schedule IV drug (little potential for abuse) led to an almost unprecedented onslaught of free samples to doctors. Then, once the dissemination of the drug took on other than medical uses, which could easily have been anticipated, its classification abruptly

shifted to Schedule I (no legitimate medical use), thus depriving the pharmacopaeia entirely of perhaps the safest, least hangover-producing, mild sedative.

One of the most remarkable aspects of this drug revolution was the speed with which it caught on with such huge numbers of people. It is hard to believe that by 1972 over 10 million people had tried a psychedelic drug, and over 50 million, marijuana. In the same year, the estimates of cocaine users were in the low thousands, too few to count. By now, however, more than 20 million Americans have tried cocaine. There have been major reductions in the use of some of these other substances along the way.

After 1973, psychedelic use dropped sharply until a recent minor upsurge in 1984 with the appearance of MDMA, "Ecstasy." But each wave of use of each drug has left a residue of more users than there were before. Following the heroin epidemic of 1968 to 1972 there was an enormous drop in use, but many estimates suggest—and this numbers game is a highly inaccurate one—that the addict population stabilized at about 500,000, perhaps double what it was before that surge of heroin use. Little is known about the influence of that surge of use on the existence of an unknown number (probably large) of occasional users, "chippers."

What has been learned about the effects of these drugs varies. Our knowledge of the physiological and pharmacological effects has increased phenomenally, but our increase in objective understanding of the psychological and emotional impact has been hampered by the climate of bias and prejudgment by both users and opponents of use. The understanding of how to treat people in trouble, particularly with heroin and cocaine, has also increased dramatically, but more for social and economic reasons than because of prejudice against drug users—only a few get the best possible treatment.

One great change in our understanding over these years, which eventually should be reflected in social policy, is that while intoxicants differ from each other in many ways, the basis for estimating their danger and their effect cannot be simply whether one is legal and another not. An increased concern about drunk driving or, more properly, driving while intoxicated, shows that this dangerous practice usually, but certainly not exclusively, takes place under the influence of a licit drug. Oddly, as the extreme destructiveness of heavy cocaine use becomes increasingly apparent, the tendency of such users to build their use into their everyday, automatized behavior patterns for a lift is more like the use of cigarettes, which practice is physiologically most dangerous,

than it is like heroin, marijuana, or alcohol use.

During these twenty-five years, there have been marked changes in public attitudes toward various drug usage. Much money has been expended not only on peer-reviewed, data-based research, but also on learned commissions in both the United States and Canada intended to inform the public and initiate public policy reforms. As marijuana use spread rapidly among the youth of the nation in the late sixties and early seventies, its use was virtually institutionalized. For many students of the issue, the fact of its illicitness, with its aura of law-breaking, fear of police, and indeed, in far too many cases, actual incarceration, seemed more socially disruptive than the drug itself.

In the light of such opinions, the reports of the Shafer Commission in this country and the LeDain Commission in Canada called for decriminalization of marijuana. Decriminalization, many felt, was legally ambiguous, but by removing criminal penalties for the possession of small amounts for personal use while still punishing dealers harshly, it at least prevented young people from facing jail for something that was not seen by them as a crime. It also bought time for society and for the research community to evaluate further the long-term social, psychological, and physiological effects of marijuana, without taking a definitive stand toward moving marijuana from the illicit to the licit category. Twelve states passed some version or other of a decriminalization statute at that time.

That time was, after all, just after the peace movement had forced the end of the Vietnam war, when affirmative action seemed morally unambiguous, and the arguments about social justice were more about when, how, and how much, than about whether. Several things happened which shifted the social climate.

There was a marked conservative political shift in this country; cocaine use began to erupt; and most frightening of all, the age of first use of both licit and illicit drugs was dropping each year. By 1977 and 1978, the extent of the use of marijuana, alcohol, and some other substances, and the possibility that beginning use would move from the high schools to the junior high schools, led to more screaming headlines, more scare reports about the dangers of marijuana, the formation of mothers' groups against marijuana, and demands for stepped-up law-enforcement efforts not only within this country but at its borders and in the supplier nations. The talk at that time was of "gateway" drugs. "Gateway" was a new version of the old stepping-stone theory that claimed that users would begin use with a relatively soft drug like marijuana and gradually find that drug too weak, and proceed step by

step to stronger drugs, ending up inevitably with heroin. The gateway concept, which often, due to the newer enlightenment about all intoxicants included cigarettes and alcohol, more sophisticatedly insisted that once the barrier to any drug use is broken, gates are open making the use of any intoxicant socially and psychologically possible and even attractive.

One of the most powerful thrusts of the Shafer and LeDain Commissions, and later the 1978 President's Commission on Mental Health, had been to separate use from misuse. The Shafer Commission developed a five-point scale ranging from experimenters, who may have only tried marijuana, to chronic users. These commissions felt it was essential to take into account the quantity and quality of use if one were to understand the physical and psychological effects of that use on the user. The new gateway theory attempted to obliterate such thinking by claiming that any use opened up the way to misuse—the dogma of the fifties—and that, in fact, efforts to separate use from misuse were permissive and amounted to condoning drug use.

Mrs. Reagan has been a powerful proponent of the gateway theory and an advocate of the "new" war on drugs. Thus, there has been a sense that this position is our current social policy. Nevertheless, other factors create a more complex picture. Of all the learned commissions studying marijuana, the Relman Commission, which reported in 1982, was perhaps the most learned and certainly the most objective. While by no means "white-washing" the health effects of marijuana use, this group found most of the claims of its deleterious effects on health not proven and called for more research. Since 1979, the age of first use of any intoxicant has been consistently rising, and the general extent of use among young people is down. In fact, with the possible exception of cocaine, the use of intoxicants has stabilized or declined with some evidence that many of those who do use are more moderate or controlled in their use. For example, for the first time in the history of the United States, more light wine and beer have been sold than hard liquor during each of the last three years, with the curves widening. Combining this with the drop of proof in hard liquor from an average of 86 proof in 1975 to 80 proof today, it seems that more people are drinking but are drinking less. The curve of marijuana use shows that the preponderance has moved from the teens and early twenties to the 25- to 35-year-old group. Heroin use has declined somewhat. Prescriptions for Valium are down more than one-third. And even with cocaine, while the number of users seems to continue to grow slightly, there appears to be a change in the social class of user. The upper middle class,

which fueled those years of enormous growth, has seen too many casualties and has grown cautious. Other social classes are, unfortunately, still in the time of discovery, but if the cycle is as familiar as it now seems, there should soon be an overall drop in use. Two influential books by John Kaplan and by Arnold Trebach have, in the eighties, demolished the stepping-stone or gateway theory, just as so many researchers did in the sixties and seventies.

The new war on drugs also follows its familiar cycle. Large expenditures of money, new efforts to consolidate the forces, and new additions to those forces—a recent attempt to involve the armed services of the United States—have led to initial pronouncements of larger drug busts and assurances of eventual victory to a growing realization of impasse: a sad and predictable repetition.

Marijuana's bulk makes it easier to interdict, so most of the growing has moved to within the United States borders to an extent that it was recently announced as the largest cash crop in this country. Coca growers have learned to get at least one extra harvest per growing season, which more than makes up for the busts. This is not to say that this struggle against drug trafficking does nothing. In the Kaplan book mentioned earlier, this eminent legal scholar goes over every possible alternative policy relating to heroin and finds them all equally unsatisfactory.

At this time in this particular emotional climate, few major changes seem possible, but some minor, reasonable changes may be possible that may shift the balance of the impasse. First, it is again time to reconsider the question of marijuana. In the states where it was decriminalized, use patterns are no different from those in other states, and in one, Oregon, there has been a greater reduction in use than in most others. Not only would federal decriminalization of marijuana save money in law enforcement and reduce the load in our courts, but it would also help with the forthcoming civil rights struggle over urine testing. It is important to remember that there is no test for marijuana intoxication. Urine testing, which is notoriously inaccurate, can detect metabolic remnants of the cannabis molecule and give a positive result as long as two weeks after use. As I pointed out earlier, decriminalization commits society to little. In some ways this reduction in criminalization may make it easier to enforce certain restrictions, for example, on age, while we watch the results of marijuana legalization in countries like the Netherlands. At the same time, the United States can continue to invest in our own long-term social, psychological, and physiological research, as recommended by the Relman Commission.

Second, it is time to make heroin available for the terminally ill patient. Research shows that most terminally ill patients—at least 80 percent—do well on morphine or other opiate derivatives for their chronic pain. But a sizable fraction do better on heroin, and as the National Committee on the Treatment of Intractable Pain tirelessly points out, that horribly ill group should not be penalized by our current social policy.

Third, medical education at both the undergraduate and continuing education levels must be taught so that these professionals can learn more about the drugs they prescribe and the ones that people take outside a medical regimen. Even with alcohol, physicians and other health professionals know far too little. Few incidents are repeated more often or are more disappointing than for the family of a denying alcoholic to persuade him/her to go to the doctor for a "checkup" and have the doctor miss the alcohol problem. If doctors were more aware and more sophisticated, they might be more active in decisions about drug scheduling which might change several of them.

None of these changes are enormous in themselves. Their import is to alter the climate of interest around these drugs from a war mentality to more rational considerations. If it can be shown that drugs are being thought about for their actual impact—and marijuana is different from cocaine and heroin—or their actual use—and giving heroin for terminal illness is different from giving it to junkies—then an informed medical professional and an informed public may look at this vast social experiment of the last twenty-five years and recognize what can or cannot actually be tolerated within our social fabric. Only when people can trust the information they receive will they themselves separate which intoxicants can be used and which cannot. It is that capacity that is necessary to break the impasse.

Towards New Perspectives on Drug Control: A Negotiated Settlement to the War on Drugs

David A.J. Richards*

The terms of American drug policy are conceived on the model of the current rhetoric of a war on drugs in which victory must be unconditional, namely, no drug use. I believe that the terms both of this policy and its supporting rhetoric are radically misconceived both on grounds of political morality and of effectiveness. If it would be desirable to reduce drug use in the United States (which I am prepared to concede), that end could be more sensibly achieved without inflicting on the body politic the costs in political immorality of current drug policy. In this brief expose, I summarize arguments which I have made elsewhere to the effect that our prohibitory drug policies are both morally wrong as well as remarkably ineffective,[1] and call for a negotiated settlement of the "war on drugs." This would allow sensible regulatory policies (akin to those familiar in the regulation of alcohol and tobacco sale and use) to shape drug use in ways less crassly violative of a decent respect for persons.

I. Against a Prohibitionist Drug Policy

My objection to our current prohibitionist drug policy is that its prohibitions either fail to rest on any coherently defensible theory of secular harms or worsen whatever harms are incident to drug use.

The first point is an issue of philosophical liberalism: In a community of persons committed to radically diverse moral and religious traditions, the just scope of criminal sanctions must be limited to the enforcement of those public standards of action and forebearance from action which secure respect for general goods which all can accept as the conditions that enable them to pursue their ends, whatever their ends may be. Put simply, criminal sanctions must be justifiable in

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1. *See* Richards, *Drug Use and the Rights of the Person: A Moral Argument for the Decriminalization of Certain Forms of Drug Use*, 33 RUTGERS L. REV. 607 (1981); D. RICHARDS, SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 157-212 (1982).

terms of protecting persons from harms, the deprivation of such general goods.[2] But, the prohibition of drug sale and use often cannot be defended on such grounds. Often, the distaste for forms of drug use reflects not neutral assessments of imminent risks to life or health, but ideological judgments about legitimate experience and even life style (the role of one drug as opposed to another drug or activity in different patterns of social life). The enforcement of such judgments through criminal prohibitions thus deprives people of the right to make reasonable judgments about the regulation of consciousness, mood, and experience (an aspect of the general good of control of one's mind) either where there is no risk to life or health, or where such risks might reasonably be taken in view of their role in the larger pattern of a well lived life. Not only do these prohibitions either fail to rest on any harm or on any harm sufficient to justify prohibition, but the harms they do combat are often incoherently pursued. What coherent theory of harms can explain the different ways our law treats alcohol and nicotine use in contrast to marijuana and cocaine use? A dominant cultural consensus of legitimate drug use (alcohol, nicotine) enjoys a kind of cultural hegemony at the expense of a genuine pluralism of alternative cultural patterns, ways of life, and spiritual perspectives. The true nature of the judgments underlying our prohibitory drug laws is reflected in both the substance and rhetoric of the "war on crime": The aim is not a reasonable concern with shifting patterns of drug use in ways that heighten the benefits and reduce the harms, but the ugly Manicheanism of the wars of religion.

The consequence of this uncompromising prohibitionist and extirpatory policy may have been, if anything, to tilt the balance of drug use in more harmful directions than otherwise. For example, because the Food and Drug Administration does not regulate the sale of heroin, the buyer is never sure of what she is getting and may accidentally take a fatal overdose. The lack of appropriate medical supervision over the sterilization of hypodermic needles used to inject heroin accounts for the diseases found at the site of injection. In addition, the illegality of drug use discourages the addict from seeing a physician. A physician, if consulted, might detect symptoms of illness that are masked by the addiction. Malnutrition, for example, is common among addicts and is

2. The *locus classicus* for this argument is John Stuart Mill's ON LIBERTY (Alburey Castell ed. 1947) (originally published 1859). An extremely important recent restatement of Mill's argument is Joel Feinberg's HARM TO OTHERS (1984). *Cf.* RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

caused both by lack of interest in food and by a lack of money due to the crime tariff (the excessive price of the drug attributable to the costs of illegality—avoiding police detection). In short, the evils of heroin use, often alleged as a ground for criminalization, may be fostered by prohibitory criminalization; many of these dangers could be appreciably reduced if heroin use were legal and regulated, as it is in Britain.[3]

II. Favoring a Regulatory Drug Policy

I believe that this kind of consequence of a prohibitory policy (namely, worsening, not mitigating harms) pervades any such policy which unjustly criminalizes conduct on sectarian or ideological grounds which fail to accord a fair respect for people's judgment about general good. Because reasonable people know that the prohibitory laws are unjust in principle, the legitimacy of such laws is undermined by both a sense of hypocrisy about the underlying judgment of harms and a sense of injustice about its contempt for personal judgment. Disobedience to such laws is therefore natural at least in a political and constitutional culture as rights-based as the United States. And because the policy of such laws is not regulatory but prohibitory, a public — not inclined to obey laws which create evil where none often naturally exists — is also deprived of any reasonable regulatory guidance about realistic risks of harms to which they would give weight if they had confidence that the assessments were realistic and were addressed to their sense of self-respect as persons responsible for making such assessments and decisions. In effect, the fictionalization of harms (used to justify prohibitionist extirpation) distorts appreciation of the realistic risks of harms from certain kinds and contexts of drug use.

In the nature of things, the proper policy—to achieve both these desiderata (realism and respect for persons)—is not our current prohibitory policy, but a regulatory policy. This should be keyed both to realistic assessments of levels of harm and circumstances of use in which people are reasonably apprised of such harms and positioned to reduce them appropriately (including, where appropriate, licensed sale and use[4]) in light of their judgment about proper trade-offs between these risks and other benefits. The current legal treatment of alcohol and nicotine sale and use is a useful analogy. Though both alcohol and nico-

3. For pertinent citations, *see* SEX, DRUGS, DEATH AND THE LAW, *supra* note 1, at 167-68 and accompanying notes.

4. *See id.* at 190-92.

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tine use often inflict a balance of harm over benefit, a regulatory policy has been found to be both more respectful of a just right of personal judgment in these matters and for that reason more likely to lead to patterns of use less harmful over all than a prohibitory policy. If Americans are, for example, now drinking less, that may be because people know that their responsible judgment at least in these matters is respected and because they exercise such responsible judgment with confidence that the cumulative medical evidence about its harms to health is realistic.

It is wholly consistent with this approach to drug policy that one believe that levels and kinds of drug use in the United States often do more harm than good, and that steps should reasonably be taken to shift this balance. My responsive point would be that a prohibitory policy (resting on both a normatively inappropriate and unrealistic end—total extirpation) is not a reasonable step in this direction and that a regulatory policy is.

If our prohibitory drug policy is as wrong-headed and as self-defeating as I believe it is, the answer is to discontinue forthwith the "War on Drugs." We need rather a kind of negotiated settlement in which the current level of illegal drug sales and use might be a kind of working *modus vivendi* if sellers and buyers agreed to observe appropriate regulations of sale and use keyed to realistic assessment of harms. Both society and the drug trade would gain from this negotiated settlement, and that would be the key to its political realism and stable workability. Society would secure a regulatory interest in shifting patterns of drug use towards a balance of benefit over harm; the drug trade would secure markets unhampered by the substantial costs of the concealment of illegality (the crime tariff). It would suffice for the realism and workability of such a negotiated settlement that there is some equilibrium point or range of equilibrium points in which society would gain more control over both levels and kinds of drug use (than it currently has) and the drug trade would retain sufficient profitability even with lower prices because the exorbitant costs of illegality would evaporate (maintaining private armies, smuggling, etc.). Indeed, legality itself might be a status reward independently valuable to relevant businesspeople; people in the drug trade would be no less (and no more) reputable than Seagram. The measure of success of this program would not be ending drug use but shifting current patterns of drug use into less destructive forms through engaging (not degrading) the responsible judgment of people.

This is, of course, a distinctly nonutopian solution to the drug

Why the Drug War is Unstoppable

Thomas Szasz, M.D.*

The purpose of this symposium is to search for a breakthrough in drug policy, or, to put it more simply, to stop the War on Drugs. Given the present imbalance of power between those who want to continue to wage this war and those who do not, it is, in my opinion, unstoppable in the foreseeable future.

Historians have always understood that certain social problems are, in a fundamental sense, created by the societies in which they arise and exist; that is to say, they are not discovered, but invented. Modern sociologists have re-articulated this insight, observing that the construction of such problems typically follows several stages: 1) emergence—through agitation by interest groups; 2) legitimation—through an agreed-upon explanation of the problem; 3) development of an official solution—through an ideologically sanctioned program, such as the War on Poverty or the War on Drugs; and 4) implementation of the solution—through legislation, government funding, and imposition of appropriate social controls. Clearly, this scheme applies to our so-called drug problem.

Supposedly, the great moral contest of our age is the struggle between open and closed societies, the market economy and socialism, capitalism and communism. Actually, that struggle conceals an even greater contest—a struggle waged by politicians and their intellectual lackeys, both East and West, against free will and personal responsibility. Whether couched in the imagery of historical or biological determinism, whether seen as Marxist or behavioral "science," the real message is the same: the individual is not responsible for his behavior; he is a victim who must be saved—from himself—by a protective, therapeutic state.

The simple fact is that so long as they remain in the laboratory or on the shelf—that is, anywhere outside the human body—drugs are merely inert substances. Heroin, cocaine, and marijuana pose no problems for those who do not take them, and unlike the currently fashionable psychiatric drugs, no one is forced to take them. Surely, the

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gun lobby's slogan "Guns don't kill, people kill," applies to psychoactive drugs as well. Since illicit drugs are not dangerous to those who do not deliberately choose to use them, it is a grave abuse of language to call them "dangerous drugs."

From the traditional point of view of the theory of public goods, drug controls constitute a veritable caricature of a legitimate State service—that is, of a service individuals cannot provide for themselves and hence need society, or the State, to provide for them. If a person does not want to smoke tobacco or marijuana, he does not have to; if a person does not want to inject himself with heroin, he can refrain from doing so. Surely, it is ridiculous to regard the State as providing us with a "service" when it defines the use of certain chemicals as both crimes and diseases, subject to penal sanctions and involuntary psychiatric "treatments." When the American capitalistic State deprives us of the choice among drugs, it acts exactly as the Soviet State acts when it deprives Russians from the choice among consumer goods, with this important difference: The Russians do not get punished or "treated" if they make their own bluejeans, rendered deliberately unavailable through State-approved channels.

Given all this, one might think that Conservatives—supposed defenders of the free market and the rule of law, not to mention common sense—would unite in declaring that drug-taking is a matter of self-discipline; in other words, that, in principle, using illicit drugs is no different from smoking, drinking, or overeating and is hence not a legitimate arena for government meddling. Has this happened? No. Conservative administrations, such as those of Nixon and Reagan, have waged the War on Drugs just as enthusiastically as have Liberal administrations, such as those of Johnson or Carter. I take it for granted that since the Liberal looks to the State to improve the human condition, he can always be counted on to wage wars with therapeutic objectives—be it on poverty, racism, drugs, or war itself. However, the Conservative should appreciate that, if individual freedom and responsibility are to be preserved, important areas of life must be out of the reach of the coercive apparatus of the State. Hence, if he too, joins the War on Drugs, who is left to oppose it? A handful of classical liberals and libertarians—not nearly enough to make a difference.

Illustrative of the Conservative capitulation to the ideology of anti-druggism is an otherwise superb essay by Joseph Sobran, a nationally syndicated Conservative columnist. Written for the Thirtieth Anniversary Issue of *National Review*, this essay—titled "Pensees: Notes for the Reactionary of Tommorrow"—offers an important example of the

selective conservatism of today's Conservative: Sobran systematically closes his eyes to the significance—both practical and symbolic—of the War on Drugs.

He begins by noting that "malcontents [his sobriquet for Liberal] always seem to want to 'eliminate' something—poverty, racism, war . . . ." Illegal drugs (as well as pornography and promiscuity) are conspicuous by their absence from this list and from the entire essay. Sobran cogently emphasizes that "A political and legal system has to be based on the moral habits of its citizens," and that "those laws are best that don't require a huge apparatus of surveillance and enforcement"—sentences that veritably cry out for a rejection of the War on Drugs. Instead, all we get is an irrelevant reference to Prohibition.

Apropos of abortion and religion, Sobran caustically comments on the Liberal's selective support of the right to choose, but seems oblivious of the Conservative's similar indulgence in this habit. "It is instructive to notice," he writes, "when the liberal resorts to the rhetoric of 'choice' and when he abruptly drops it." Poor people should have a choice about aborting their fetuses but not about where to send their children to school: Liberal hypocrisy, all right. But it is Conservative hypocrisy to wax indignant about modern socialism illustrating "Burke's dictum that 'criminal means, once tolerated, are soon preferred'," without mentioning the criminal means entailed in the apparatus of drug enforcement.

Next, Sobran ridicules an activist Supreme Court for "discovering," two hundred years after the Framers wrote it, that the Constitution of the United States contains a right to abortion, and yet remains silent on the even more obvious issues of drugs—namely, that there is nothing in the Constitution to legitimately empower the federal government to regulate what substances we may ingest, inhale, or inject into ourselves.

Enough said. Surely, I need not dwell here on the countless victims of the War on Drugs: the persecuted "drug addicts," "drug abusers," and "drug pushers;" the corrupted and killed drug enforcement agents; the ordinary men and women robbed and murdered by individuals whose incentive for a criminal career is directly attributable to the lack of a free market in drugs; the children seduced into a fascination with "drugs" by the glamor of the illicit and by the defiance of the law by the glamorous; the nation as a whole, undermined in its elementary duty to instill self-control in its citizens.

My argument is simple: the American War on Drugs is a war on scapegoats, similar to the War on Witches waged in the Late Middle

Ages, or the war on Jews waged in Europe only a few years ago. Although not everyone may wholeheartedly support the aims of such epic struggles, few people—especially in politics, law, science, or the academy—are willing to stand up and publicly denounce the values ostensibly legitimating the struggle, and fewer still are willing to risk refusing to participate in it. German intellectuals and scientists had cravenly capitulated to the anti-Semitic rhetoric and programs of the Nazis. And so have American intellectuals and scientists to the anti-drug rhetoric and programs of the warriors against chemical dependency. How many participants in this very conference have received government funds linked to this crusade? Who has had the courage of his convictions to refrain from feeding at the lavish trough that the drug warriors have laid before the medical and psychiatric establishment?

The Soviets, to quote Sobran once more, "try to impose their [economic and social] fantasies by force and terror, and their real achievement is to be found not in their population centers but at their borders, which are armed to kill anyone who tries to flee. Communism can claim the distinction of driving people by the millions to want to escape the homeland of all their ancestors." I agree. And I do not, for a minute, believe or contend that the U.S.S.R. and the U.S. are similar powers or represent symmetrical ideologies. But I would be less than appreciative or loving of my adopted homeland if I refrained from observing that Americans can now claim the distinction of spending billions of dollars on armed personnel of all kinds to ferret out, harass, imprison, and kill those engaged in providing drugs desired by the American consumer; and billions more on physicians and their paramedical stooges—armed with powers provided by the State and with drugs provided by pharmaceutical companies—to chemically control and subdue those who rebel against the prevailing chemical mores. Moreover, the doctors and the State do all this—*horrible dictu*—in the name of treatment, health, and a War on Drugs.

I do not see how anything short of a principled rejection, by the intellectual and moral leaders of this country, of the entire ideology and program legitimizing the War on Drugs could even begin to bring the drug warriors to the negotiating table.

Vice Policy in a Liberal Society: An Analysis of the Impasse in the War on Drugs*

Mark A. R. Kleiman**

I. Theoretical Foundations of the Current Muddle

The liberal order rests on the assumption that individuals making their own choices about their own well-being will make better choices for themselves than the state could choose for them. The liberal order of free markets and free individual choice of personal consumption cannot easily deal with the need, real or perceived, to control a range of market-mediated consumption activities believed to be morally degrading, socially dangerous, or otherwise noxious. Prostitution, pornography, gambling, and the use of intoxicating or habit-forming substances ("drugs") are all potential subjects of vice control.

Our current vice control policies — including our policies concerning the sale and consumption of intoxicants — are incoherent and frequently counterproductive. In part, this stems from conflicts between liberal values and institutions and strong illiberal currents of belief. The Moral Majority may have renamed itself Liberty Federation, but its leaders do not believe that individuals should be at liberty to choose to consume prostitutes' services, pornographic movies, casino gambling, or heroin. They believe that the decision to consume any of those commodities is necessarily wrong, due to the nature of the activities, the nature of human beings, and the structure of the revealed moral law. They further believe that limiting the scope of those wrong choices is a legitimate governmental function. When these "Biblical" beliefs are widely held in an institutionally liberal society, some incoherence of policy is a natural result.

But some of the incoherence and irrationality comes from a failure to think clearly about the *liberal* bases of vice control policy. As long as we insist on thinking of all vice control as representing the incursions of Babbitts and Mrs. Grundys into what ought to be unconstrained

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* This article is a revised version of an article appearing in 6 J. POLICY ANALYSIS 242 (1987).

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choices — as long as we reason as if there is no difference, in principle, between forbidding the sale of PCP to 14-year-olds and forbidding the sale of chocolate to overweight adults — we cannot begin to think seriously about what a liberal vice control policy should look like. It should not surprise us if the resulting policies are both illiberal and unsuccessful.

In what follows, I will argue that there is good theoretical basis for a liberal vice policy, at least if we take liberalism to be what John Stuart Mill taught rather than what Robert Nozick and the Cato Foundation think he should have taught. In addition, I will explain that basis and how it might be applied to the analysis of drug policy. I deliberately draw most of my examples from the licit intoxicant alcohol and licit addictive nicotine — this to demonstrate that the first step in rationalizing drug policy is to consider currently licit and currently illict drugs together rather than separately.

II. Reasons for Intervention

My analysis begins with the fundamental Millian assumption that it is the business of the state to allow individuals to advance their own welfare according to their own lights rather than to enforce on them some vision of the good life. Under what circumstances would that assumption still allow state intervention in private consumption activities and the production activities which serve them?

External Costs in Consumption. Clearly, where my consumption activities directly affect the welfare of others, an optimum will not be achieved unless those external effects are brought home to me. Smoking in a crowded elevator is one obvious example: the slogan "It's all right to smoke as long as you don't exhale" makes the point.

External Costs in Production. Your owning and using ivory billiard balls is your business; your buying them, by creating a market for smuggled ivory, interferes with my ability to see live elephants (or just to derive satisfaction from the knowledge that they exist). If the import and sale of ivory is easier to control than elephant poaching, a consumption restriction may well substitute for production controls. The same principles apply to "snuff" movies and photographs of children being used sexually.

Behavioral Consequences of Consumption. If the civil and criminal laws were perfectly and costlessly enforceable, then any tendency of some consumption behaviors to produce subsequent wrongful acts by the consumer could be adequately controlled by lawsuits and prosecu-

tions. In fact, however, our civil and criminal laws do a miserable job, and rely almost exclusively on self-control by citizens. Consumption activity that weakens self-control — alcohol consumption is the most obvious example — therefore both further strains the capacity of the system and leads to an increase in the number of wrongful acts committed.

As a Millian liberal, I should not care whether you get drunk; but I should care if you get drunk and beat your children, drive your car into mine, or maim someone in a barroom brawl. Again, liquor may be easier to control than inebriated behavior.

The practical importance of the external costs of alcohol consumption is not subject to much dispute: from one-third to one-half of the automobile accident toll (45,000 deaths, some multiple of that number of maiming injuries, billions of dollars in medical bills and material damage); some large fraction of the child and spouse abuse; some large fraction of the other violent crime (half of imprisoned felons report having been drinking when they committed their crimes; one-quarter reports having had more than 8 ounces of absolute alcohol — about 16 drinks — in the previous 24 hours). The extent to which alcohol controls would reduce these costs is far more speculative. Under current conditions, only PCP among the illicit drugs appears to be a frequent cause of violent behavior after consumption, as opposed to (sometimes violent) acquisitive crime to gain the wherewithal for purchase.

Pecuniary Externalities. We extract taxes from those who work both to support common needs and to assist the poor. We are not, therefore, perfectly indifferent to consumption activities that tend to depress earning power.

Citizenship and Personal Responsibility. As citizens, we have common responsibilities for political life. We also rely on our fellow-citizens to adequately discharge a wide range of private responsibilities — as parents most of all, but also as neighbors — which their default would throw on the state. If it is the case (I am ignorant of the evidence) that heavy alcohol users are less attentive citizens, less competent parents, less public-spirited neighbors than moderate users or abstainers, we have reason to think about restricting alcohol use even if we regard the private welfare of drinkers as being none of our concern.

Failures of Individual Self-Control.

A. *Children.* No one would allow a baby to drink lye in the name of non-interference with private consumption activities; the baby is not

capable of understanding the consequences of its actions. I would claim that a sixth-grader who has never awakened with smoker's hack is almost equally incapable of a rational choice about taking up tobacco. Clearly, the more profound and irreversible the effects of a given consumption activity (nicotine addiction is one example; schizophrenia from PCP use another) the more reason there is to limit a child's immediate freedom to choose in favor of keeping his options open for the future. Again, in a perfect world, the job of limiting the child's consumption could be left entirely to his parents; in the real world, parents as a class may need the help of the state, and the state may even insist on foreclosing certain options. (If a parent allowed a child to swallow lye, we would regard that parent as neglectful; is PCP fundamentally different?)

Vices that make it more difficult for children to learn in school are particularly matters for public concern.

As the examples of alcohol and tobacco have shown, products available to (and commercially promoted for) adults have a way of getting to children. (In addition, of course, the line between children and adults is not a bright one in principle, though it may be made so in law.)

B. *Adults*. Even adults sometimes make consumption decisions inconsistent with maximizing their own well-being as they evaluate it. This is particularly likely to be true where the pleasures are immediate and the pains deferred. T.C. Schelling cites a large variety of everyday occasions in which competent adults treat their own behavior as something requiring external control in their own interests; the assertion that everyone always chooses for his own good is either a tautology without practical significance or an empirical proposition easily refuted. If a majority of all tobacco smokers report that they regret having started to smoke and report having attempted to quit over the last year, and if a substantial minority goes to outside experts and pays them for help in quitting, it is more than mere Grundyism that regards smoking as a bad habit to be discouraged by public policy.

III. Making Vice Policy

Given these principles, where do we go from here?

The liberal critique of vice policy has two main thrusts, which may be summed up as "None of your business" and "You can't stop it anyway and you'll only make things worse by trying." The catalogue above lists some of the exceptions to "None of your business." By acknowl-

edging them (or at least some of them) we are put in a more secure position from which to reiterate the main principle that the state has no business stepping in to stop me from doing something I enjoy just because someone else dislikes it and thinks that I would be better off not doing it.

The more practical objection to most actual drug policies remains. They reduce drug consumption only with difficulty and cause horrible side-effects:

— They create black markets (with the violence that accompanies black markets) and enrich criminals.

— They corrupt law enforcement and weaken respect for the law by turning otherwise inoffensive citizens into lawbreakers.

— They force the remaining drug users to buy impure and adulterated drugs, and to pay black-market prices. This can leave them sicker, poorer, and more likely to commit non-drug crimes than they would have been were the drugs legal.

— They put extra burdens on the criminal justice system, making drug consumption a net user of public funds and capabilities rather than a net contributor through excise taxes.

Therefore, we want drug policies to concentrate on those drugs that cause identifiable harm and to take into account the costs as well as the benefits of prohibition. Even among prohibited drugs, we should concentrate enforcement resources where they do the most good and the least harm, not necessarily on the drugs which are currently on the cover of *Newsweek*.

IV. Three Concrete Suggestions

1. *Before we legalize anything else, get control of the two major legal recreational drugs, alcohol and nicotine.* The real-dollar federal excise tax on alcohol is down by two-thirds since 1950, while consumption is up. The presumption ought to be in favor of raising that tax in preference to other taxes, up to the point where moonshining becomes a problem again. As a premium Scotch distiller once advertised, "If you worry about the price of your whiskey, you're drinking too much." The same applies to tobacco.

Laws about sales to minors should be more rigorously enforced, particularly with respect to tobacco. Advertising should be restricted to information only, like securities ads. The objection to prohibition is that demand will find a supply; but there seems to be no reason in principle or practice for continuing to allow supply to create a demand. Allowing

informational ads should largely eliminate the anti-competitive effects of a straight advertising ban. At the same time, some portion of the increased tax revenues could pay for vigorous "negative advertising" of these two drugs. There is no reason to let the booze industry pretend that most of the problem with drinking comes from "problem drinkers" when millions of adolescents make a weekend ritual of drinking enough alcohol to measurably and lastingly reduce their intelligence.

2. *Ease up on enforcement against marijuana importation.* This would allow a small drop (10-20%) in the price of imported marijuana, not enough to markedly raise consumption. The price decrease would reduce the revenues of marijuana dealers; making criminals poorer is always a good thing. It would also limit the growth of domestic cultivation, which involves primarily high-potency weed likely to have worse effects on consumers than the weaker imported stuff.

Legalization is a riskier strategy. Simple arithmetic suggests that something like 3 million Americans spend most of their waking hours stoned. They don't complain about it much, or turn themselves in for treatment in any great numbers, or commit many crimes, or cause many traffic accidents that anyone knows about; all this is powerful negative evidence about the extent of the harm caused by the drug. Most people who realize that they are using too much appear to be able to quit without help.

Still, I for one would be reluctant to greatly expand the number of very heavy users, particularly among schoolchildren. If legalization of marijuana means what legalization of alcohol meant, we could expect a very substantial increase indeed; per capita alcohol consumption (and associated disease) is up by a factor of three since the end of the Noble Experiment. If marijuana legalization caused a 50% increase in very heavy use, it would be a good policy in light of the costs of prohibition. If it caused a tripling, it would be a bad policy by my lights. We can't know without trying, and once we try it we can't go back. The choice depends on your opinions about the drug, your guess about the consumption effects of legalization, and your tolerance for risk.

3. *Increase heroin enforcement, particularly at the retail level.* The major difference between marijuana and heroin is that heroin enforcement has been, by and large, a success, with heavy use of the drug restricted to a very small part of the society. No doubt, heroin prohibition has extracted a heavy price from the remaining users and their neighbors; whether that price has been justified by the benefits to potential users kept from the drug by prohibition we will never know. In any case, while the drug remains illegal, we are better off reducing its

prevalence where we can. There is now fairly good evidence that street-level heroin enforcement can reduce both drug consumption and property crime. Legalization of heroin, even if it were a good idea (which I profoundly doubt), isn't a live option. From our current position, tightening enforcement will reduce the number of regular users without much worsening the condition of those who remain, and we can effectively tighten enforcement relatively cheaply and easily. Let's do it.

A Proposal for Regulation and Taxation of Drugs

Lester Grinspoon, M.D.*

H. L. Mencken said of the alcohol problem during the 1920s that between the distillers and saloonkeepers on one side and the Prohibitionists on the other, no intelligent man thought there was any solution at all. The same may be true of the illicit drug problem, with its traffickers on one side and its moralists and police on the other. Only the problem is worse because the acceptable range of solutions seems to be so narrow. The report of the President's Commission on Organized Crime suggests the way things are going right now: there is no effective opposition to prohibition.

I would like to propose a utopian exercise that would take us in an entirely different direction. It would be foolhardy to suggest that it is currently a feasible policy, but I offer it to the conference tentatively, for discussion. The suggestion is that currently controlled substances be legalized and taxed. The taxes would be used for drug education and for paying the medical and social costs of drug abuse. A commission would be established to decide how much each drug should be taxed on the basis of its cost to society. The rate of taxation would be adjusted annually for each drug in accordance with the most recent data on those costs. Data may not now be available, but with modern data collecting and processing techniques, it certainly could be. In this way the government would acknowledge that inevitably some people are going to use drugs, and would try to shift them toward the use of safer drugs by means of taxing policy and education. In this system the currently legal drugs, alcohol and tobacco, would not be distinguished from the others.

The advantage, obvious to most of us here, is that we would no longer have the expense, corruption, chaos, and terror of the war between drug traffickers and narcotics agents. Steven Wisotsky has exhaustively explored the economics and politics of the War on Drugs in the case of cocaine in his recent book *Breaking the Impasse on the War on Drugs*. One of the byproducts of Drug Wars is, as most of the participants in this conference will recognize, a threat to civil liberties. Where the current line of thinking is leading is suggested by the propo-

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sal of the Organized Crime Commission for random urine testing of federal employees and of those of companies contracting with the federal government.

As Professor Wisotsky has pointed out, it is possible that a self-reinforcing cycle is beginning to develop, as drug enforcement operations begin to pay for themselves by funds confiscated from the drug traffickers whose operations they make enormously profitable. The utopian taxing system suggested here would establish a different kind of revenue cycle, in which society would pay for the costs of drug abuse by extracting them from the drug users in proportion to the amount they contribute to the problem. The commission that supervised this taxing system would also serve as an educator and guide to society — an educator not constrained by the present totally unrealistic assumption, built into the criminal law, that any use of certain drugs must be evil or dangerous, while other drugs have a range of benign and harmful uses. Honest drug education would become possible.

Is it plausible to think that this arrangement would work? Would it be possible to tax drugs enough to pay for their costs? Even if it were possible, would drug abuse increase so much that we would be paying too high a price in personal and social misery? Is the elasticity of demand great enough so that taxing would substantially influence the amount of drugs consumed, especially by heavy users? Evidence on all this is very uncertain, even in the cases of alcohol and tobacco, where most research has been done. There is a large literature on the distribution curve of alcohol consumption among individuals in society, most of which concludes that any policy designed to cut total consumption will at least proportionately reduce alcohol use among problem drinkers and therefore the medical and social costs of alcohol abuse. That is, the demand is elastic enough, even among alcohol users who create problems by their use, to be affected by a rise in price. In fact there is some evidence that in countries where the price of alcohol is relatively higher there are fewer alcohol problems, and the same is true for states within the United States.

There is also some evidence of elasticity of demand for heroin addicts. Several studies suggest that addicts adjust the size of their habits to the price of heroin. One authority on heroin control has said that the criminal law would be effective in cutting down heroin use if it raised the time needed to get a dose of heroin from five minutes to two hours. This is the "crime tariff." The criminal law makes it risky to manufacture and distribute the drug. This raises its cost to the consumer, who therefore needs more time to earn or steal enough money to obtain it,

and restricts accessibility, so that the consumer has to spend more time finding out where to get it. The question is whether through taxation we could impose a limitation similar to the crime tariff but more efficiently and with fewer monstrous side effects.

Inelasticity of demand is greatest in the case of tobacco, because nicotine is one of the most highly addicting substances. Nevertheless, it is clear that even here raising the price by taxes has considerable effect on consumption. Research suggests that for every ten percent increase in cigarette prices consumption will decrease about four percent. Some studies suggest that the price affects mainly the decision to start smoking regularly rather than the quantity smoked by an already addicted smoker. Thus the short-run impact of extra taxation would be small, and it would reduce cigarette smoking only in the long run. Other studies find that as the average cost of tobacco is raised the income elasticity of demand increases; that is, poorer people are more deterred from cigarette consumption than richer ones.

It has been estimated that the direct health care costs plus the indirect losses in productivity and earnings due to cigarettes amount to a total of slightly over two dollars a pack — 22 billion dollars in health care for smoking related diseases and 43 billion dollars in productivity losses. This is only an illustration of the kind of calculation that would be involved in trying to set a taxing policy. Such a taxation policy might be regarded as a way of making people buy insurance for the risks to themselves and others in their use of drugs. Life insurance companies already offer substantial discounts in their premiums for non-smokers, and this insurance preference is slowly being extended to fire and other insurance policies.

A problem raised by any system of authorized sales is the black market. The tax would have to be set low enough so that a black market would not be profitable. It is possible to do this and still reduce demand for the drug considerably, as the case of alcohol seems to show. On the other hand, it is not clear whether any tax low enough to prevent a substantial black market would be high enough to pay for the social and medical costs of the drug use. Certainly present taxes on alcohol are far from doing that. It might prove impossible to create a system that would make the abusers of a drug, or even its users, pay for the full costs of abuse. Maybe this problem is practically insoluble. Certainly the criminal law approach offers no solution for it.

We simply don't know the amount of drug use and the seriousness of drug problems that would exist under this kind of system — whether a legal taxation system would have the same effect as the crime tariff

or not in this respect. Even if drug use increased with legalization, the Oregon and Alaska experiences with decriminalization of marijuana suggest that the increase might not be nearly as much as anticipated. And in order to undertake such a bold move, society would have to decide that the deprivation of freedom and the damage wrought by prohibition is less than the damage attendant on an increment of drug use, much as it did in the decision to repeal the Volstead Act. One way to study the issue might be to examine the effect on gambling habits of the institution of state lotteries in competition with illegal numbers games. But there is a great obstacle to even thinking about this as a serious alternative: No one in government wants to give up the symbolism of the criminal law or the commitment that has been made over the last seventy years, not only in the United States but all over the world, to treating drugs as a criminal problem. It is sometimes said that the pendulum of public attitudes swings back and forth between harshness and leniency in drug control. If there was some swing toward leniency in the early 70s, it now appears to be going the other way, as indicated by the report of the President's Commission.

Nevertheless, there is a great deal of public ambivalence or to put it less kindly, hypocrisy, where this issue is concerned. On the one hand, it is accepted in public discourse that everything possible has to be done to prevent everyone from ever using any of the controlled substances. On the other hand, there is an informal lore of drug use which is more tolerant. At one time it looked as though the forms of public discourse and this private language were coming closer together. Now they seem to be drifting apart again. A type of pretense that we have long abandoned in the case of alcohol is still considered the only respectable position where other drugs are concerned. Would a policy of legalization and taxation change these ambivalent (or hypocritical) attitudes? Unfortunately, it is hard to see how the legal change can come about until attitudes change.

The War on Drugs: Predicting the Status Quo

John Kaplan*

I regard the chances of a major breakthrough which will dramatically change the amount of drug use and abuse among the citizenry or the problems caused by it at the governmental level, as somewhat between small and non-existent. It seems to me that such a change can occur only in two large areas: supply or demand. I see no prospect, however, that the present ability of our government to prevent the supply of drugs will increase so dramatically as to make a major difference.

As I have written elsewhere in more detail with respect to heroin,[1] insofar as the supply from abroad is concerned, this would mean preventing the cultivation and production of drugs in nations that have insufficient control of their own populations or are not kindly disposed toward the United States. Alternatively, it would mean that somehow we would vastly increase our ability to keep these substances out of the United States through interdiction at our borders. Both improvements I regard as extremely unlikely with respect to heroin and cocaine, though the second is theoretically, if not practically, solvable with respect to marijuana.

If supply is not interdicted outside the United States, the only possibility is interference within the United States. Here the problem is simply that the criminal justice system is so grossly overburdened now and for the foreseeable future that we lack the resources to do a much better job of suppressing the drug traffic than we do today. Indeed, this is even more true now than it was in the past, since our enforcement efforts have grown somewhat more sophisticated in recent years.

With respect to demand for illicit drugs, as I wrote with respect to marijuana in 1970,[2] the situation is one of only slightly greater hope. Though there could be a religious or cultural change in America which would greatly lower the willingness of the population to use drugs, the chances are that in a society which has already made socially acceptable two recreational drugs of significant danger to the user, alcohol

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1. J. KAPLAN, THE HARDEST DRUG: HEROIN AND PUBLIC POLICY (1983).
2. J. KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970).

and tobacco, we are not likely to achieve this. Indeed, some have argued that it is basic to the nature of man to choose altered states of consciousness through drugs. Whether it is or not, I do not see in the foreseeable future the citizenry of the United States changing so drastically as to markedly lower the demand for the presently illegal drugs that plague us. Indeed, if I were to guess as to the most likely change in our drug problems, I would predict that a new synthetic drug of some kind would become popular and add to, rather than decrease, our problems.

The National Strategy — An Overview

Leon B. Kellner*

I. Introduction

Over the past two decades, the use of illegal drugs in the United States has spread at an unprecedented rate and has reached into every segment of society. Illicit drug use is, in my view, the most serious social as well as law enforcement problem facing the United States today. As the chief federal prosecutor in the Southern District of Florida, I deal on a daily basis with the impact of the illegal drug trade on the federal criminal justice system.

This paper will briefly summarize the Administration's National Strategy for Prevention of Drug Abuse and Drug Trafficking promulgated in 1984. Before I discuss the national strategy, I would like to provide some statistics illustrative of the impact that drug abuse and trafficking has had on the criminal justice system in South Florida.

South Florida's drug trade has been documented in every major publication and television network in the country. It has been featured in numerous articles and television stories. South Florida is the point of entry for more than 80 percent of the marijuana and cocaine imported into the United States from South America and the Caribbean.

In large part, as a result of this trafficking, the federal courts in South Florida are faced with a burgeoning caseload that is larger than in any district in the United States. The United States Attorney's Office for the Southern District of Florida indicts more cases involving more defendants than any other district in the United States. Today, we have pending for trial more felony defendants than the Southern District of New York (New York City) and the Northern District of Illinois *combined*. Almost fifty percent of this extraordinary caseload is drug related. The violent nature of this problem is made apparent by the fact that this district also has the dubious distinction of having the largest number of weapons violations in the United States.

At the outset, the Administration recognized that in order to successfully contain the drug crisis, a systematic approach would have to be employed. It was simply not enough to rely on law enforcement or

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even the resources of the federal government alone. An interdisciplinary and intergovernmental strategy would have to be devised.

II. The National Strategy

The National Strategy promulgated in 1984 goes beyond Federal responsibilities and establishes a comprehensive national strategy where all individuals, all business, civic and social organizations, all levels of government, and all agencies, departments and activities within each level of government are called upon to lead, direct, sponsor and support efforts to eliminate drug abuse in the family, businesses and communities.

The Strategy is a comprehensive approach aimed at reducing the availability of illicit drugs and reducing the adverse effects of drug abuse on the individual and society. The five major elements of the Administration's drug program are:

— Drug abuse prevention through awareness and action;
— Drug law enforcement;
— International cooperation to control narcotics;
— Medical detoxification and treatment; and
— Research directed at causes, treatment and understanding.

III. Drug Abuse Prevention

Drug abuse prevention — through awareness, education and action — is the key element for success in stopping drug abuse and drug related crime in our society. Prevention must begin with public awareness of the problem, an understanding of what can be done to improve the situation and a willingness to do something about it. The prevention strategy includes educating young children to actively resist drug-taking behavior and convincing those of all ages who are currently involved in drugs to stop.

In the past four years, community groups have recognized that their involvement is essential to combatting drug abuse. Spear- heading the national effort are organizations such as National Federation of Parents for Drug-Free Youth and National Parents Resource Institute for Drug Education, Inc. In addition, organizations have been formed at the state and local levels in practically every state.

IV. Drug Law Enforcement

The drug law enforcement strategy is designed to destroy criminal

drug trafficking networks, both international and domestic, and to intercept and eradicate illicit drugs enroute to consumers. Effective drug law enforcement reduces the availability of illicit drugs in the United States, deters drug-related crime and, most importantly, creates an environment favorable to the implementation and development of long-range programs to eliminate the production and abuse of illicit drugs.

The intensified effort has involved a number of interlocking parts: (a) an expanded interdiction effort; (b) increased efforts to identify, penetrate and prosecute major international and domestic narcotics organizations; (c) increased efforts to target, penetrate and prosecute the major money laundering enterprises which enable foreign narcotics cartels to launder and remove billions of dollars from this country; (d) increased investigation and prosecution of foreign officials from source and transshipment countries involved in the international chain of drug smuggling; (e) intensified prosecutive efforts in the area of violent crime inexplicably tied to narcotics; (f) increased investigation and prosecution of officials and political corruption; and (g) increased emphasis on the forfeiture of narcotics dealers' assets, including cars, planes, boats, real property and proceeds.

Because no single agency — be it state, local or federal — can successfully deal with the enormous and unprecedented law enforcement tasks spawned by drug trafficking, the Administration in 1984 created the thirteen regional Organized Crime Drug Enforcement Task Forces. These regional task forces bring together the various federal agencies who deal with narcotics law enforcement problems. Different agencies are now working together under a single organizational structure to provide better communication and coordination. Each agency draws on the special expertise of the other to attain our ultimate goal of putting an end to narcotics trafficking. Equally important, federal, state and local law enforcement are closely working together to insure that our scarce resources are utilized as effectively and efficiently as possible.

V. International Cooperation

The Administration has implemented a foreign policy that vigorously seeks to interdict and eradicate illicit drugs, wherever cultivated, processed or transported. The international effort is an integral part of the total effort by the U.S. Government to stop drug abuse by reducing both availability and use of illicit drugs in the United States. Fundamental to the overall supply reduction efforts is the elimination of ille-

gal drugs as close to their source as possible. The major gains will be realized in the longer term by reduction in the availability of illicit drugs.

There have been significant achievements during the past five years. Key source countries have acted to stop drug trafficking. For instance, major law enforcement and eradication efforts have begun in Colombia; Pakistan has taken steps to gain control over the outlying opium-producing areas; Thailand's military forces have attacked opium traffickers on the border areas of their country; and, closer to home, the Bahamas has been working closely with the U.S. Coast Guard to assist in the interdiction of transshipments of narcotics passing through that country's waters.

The United States is also encouraging foreign governments to control cultivation, production, and refining of illicit drugs. To assist them in narcotics control, the U.S. Government is providing aid for crop control and other law enforcement activities, complemented where appropriate by development activities.

VI. Medical Detoxification and Treatment

The National Strategy recognizes that detoxification and treatment of individual drug abusers is a critical element in the comprehensive strategy aimed at reducing the effects of drug abuse in the United States. These treatment programs, in part funded through matching grants, have been directed at overcoming the physical problems of drug addiction and providing psychological and social counseling to help the individual drug abuser live without drugs.

The treatment strategy is based on:

— Recognizing the existence of a national network of drug treatment programs and establishing referral systems;
— Continuing the evolution of effective drug and alcohol treatment delivery systems by encouraging the states to allocate an appropriate level of funding based on local needs and priorities;
— Seeking less expensive, more effective treatment alternatives;
— Integrating drug and alcoholism treatment services into the general health care system;
— Encouraging private industry, religious groups, private organizations and state agencies to work together to support treatment programs; and
— Promoting drug-free treatment programs.

VII. Research

Research, carefully planned and widely undertaken, will reinforce all efforts to prevent, treat and control drug problems.

The research strategy emphasizes:

— Investigating the biological interaction between the combination of marijuana and alcohol and between other drugs and alcohol;

— The development of chemical agents that will block or change the expected psychological effects of a drug or provide pharmacologic support during treatment;

— The development of an effective system to monitor the composition and potency of illicit drugs;

— Longitudinal and other epidemological research to expand knowledge of drug and alcohol use patterns, risk factors and long-term health consequences;

— Basic research on the biological and psychological determinants of drug and alcohol abuse;

— Studying the effectiveness of prevention and treatment approaches; and

— Stimulating interdisciplinary research which allows the integration and analysis of data from the criminal justice system, social sciences, biochemistry, etc.

VIII. Summary

The strategy outlined above represents a comprehensive program geared to reducing drug abuse in the United States. The program relies on the integrated and cooperative efforts of federal, state and local governments, as well as on the close involvement of the private sector — through the business community, social and civic organizations, and volunteers. No one piece of this effort is the panacea. Drug abuse is a national epidemic and despite the record number of seizures, arrests, and prosecutions, drug availability remains high.

There are some who say that this effort is already lost and we ought to give up. I believe that the stakes are too high for us to take that attitude. We are dealing with the lives and well-being of our children — this country's future. Moreover, we must continue to refine and develop new methods to deal with this national problem. We must keep reminding ourselves that this is a long term project that began only a few short years ago. The problem has developed over the past two decades and it is only in the past few years that we have recognized that

there is a crisis which needs a comprehensive long term approach. There have been successes as well as failures in this effort. However, I believe that a combination of efforts outlined in the National Strategy can diminish our drug problem.

Symposium Proceedings: Roundtable Discussion

On April 18, 1986, the authors of the preceding papers assembled in Fort Lauderdale for a day-long symposium on the War on Drugs. The transcript of the discussion has been minimally edited to preserve the conversational format of the symposium.

Professor Kaplan moderated the morning session, and was succeeded by Dr. Grinspoon in the afternoon.

A short biography of each participant precedes the edited remarks.

Lester Grinspoon, M.D., Associate Professor of Psychiatry at Harvard Medical School, serves on the Advisory Boards of the Center for the Study of Non-Medical Drug Use and the National Organization for the Reform of Marijuana Laws (NORML) and the Editorial Boards of the *Journal of Psychiatric Research* and *Social Pharmacology*. He has testified before the National Commission on Marihuana and Drug Abuse; the House Select Committee on Narcotics and Drug Abuse; the Controlled Substances Advisory Committee; the Drug Abuse Research Advisory Committee; and the Senate Judiciary Committee.

John Kaplan, Jackson Eli Reynolds Professor of Law at Stanford University, is a past member of the National Research Council of the National Academy of Science Committee on Substance Abuse and Habitual Behavior and a current member of the National Council, National Institute of Alcohol Abuse and Alcoholism, Panel on Criminal Careers and the Committee on Problems of Drug Dependence. He also serves on editorial boards of the *Journal of Drug Issues* and the *Journal of Marijuana and Health*. Professor Kaplan testified before the President's Commission on Organized Crime.

Leon B. Kellner has been United States Attorney for the Southern District of Florida since 1985. He supervises the prosecution of thousands of drug-related criminal and civil cases filed every year by the United States Government in South Florida, the most active venue for drug cases in the United States.

Mark A.R. Kleiman, Research Fellow in Criminal Justice Policy and Management at the John F. Kennedy School of Government at Harvard, is a policy analyst and microeconomist specializing in studies of the impact of law enforcement policy on the structure of illicit industries. As Director of the Office of Policy and Management Analysis for the Criminal Division of the United States Department of Justice, he was the division's chief drug pol-

icy analyst. His recent work includes a study of the effects of intensified retail-level heroin enforcement on the level of heroin consumption and property crime.

David A.J. Richards, Professor of Law at New York University School of Law, was Vice-President of the American Society for Political and Legal Philosophy in 1984. He won the prize for Best Book in Criminal Justice Ethics for 1982. Professor Richards is a prolific author of books and articles in the field of moral philosophy.

Thomas Szasz, M.D., Professor of Psychiatry at the State University of New York, Upstate Medical Center at Syracuse, serves on the editorial boards of the *International Journal of Addictions*, *Journal of Law and Human Behavior* and several others. Dr. Szasz's work has earned many honors, prizes and lectureships, and he has written prolifically in the fields of law, psychiatry and ethics. He is most well known for his iconoclastic advocacy of a theory of individual rights that opposes "benign" governmental "treatment" or other coercion of those thought by society to be mentally ill or addicted to drugs.

Steven Wisotsky, Professor of Law at Nova University Law Center, teaches criminal law and the law of drug regulation. He conceived and organized this symposium. His research on the effects of the War on Drugs has attracted wide attention.

Norman E. Zinberg, M.D., Clinical Professor of Psychiatry at Harvard Medical School, has served as Special Consultant to the President for the Drug Abuse Council, Inc. and as Coordinator to the Task Panel on Psychoactive Drug Use/Misuse for the President's Commission on Mental Health. He has also served on the Committee for the Study of Drug Dependency for the American Psychoanalytic Association and on the National Advisory Council on Drug Abuse for the Department of Health and Human Services. He currently serves on the Advisory Board of the Center for the Study of Nonmedical Drug Use and the editorial boards of many professional publications including *Contemporary Drug Problems*, *International Yearbooks of Drug Addictions*, and *Society Journal of Psychoactive Drugs*. Dr. Zinberg is a prolific author in the field of drug abuse and is well known for his thought-provoking research on long-term, non-addictive opiate use.

Prof. Wisotsky: Distinguished visitors, ladies and gentlemen, on behalf of the Nova Law Center, let me welcome you to this symposium . . . .

The purpose of this symposium is to search for a breakthrough in the War on Drugs. You may ask, why is there a need for a break-

through? The very presence at this symposium of so many public officials — federal law enforcement agents, members of the judiciary, members of the executive branch, members of the legislature — along with legal and medical professionals, substance abuse counselors, teachers, students, and lawyers, suggests a widespread perception that something is very wrong with the War on Drugs.

My own view, of course, is the same. My research has brought me to the conclusion that the War on Drugs is a serious mistake of social policy. It has produced the worst of the two worlds of drug abuse and drug trafficking: a rapidly rising flood tide of cocaine imports, compounded by the destructive effects of black market pathologies that we all know too well in this community: cocaine cowboy killings, street crime by addicts, corrupt public officials, and narcoterrorist alliances of drug traffickers and guerrillas in South America that threaten the national security of the country. Indeed, the more enforcement we have had, the worst things seem to have gotten. And I think that under these circumstances it's only reasonable to ask the question whether the cure may not be worse than the disease.

Yet, there is very little real discussion of this fundamental issue. Sometimes there's a parody of debate in which crude calls for a crackdown such as a full-scale militarization of the War on Drugs are countered with somewhat simplistic rejoinders to decriminalize drugs and be done with it. There is little, if any, critical thought in this domain. We are thus immobilized from constructive reforms. Certainly we are not making any headway in controlling drug abuse or drug trafficking.

Perhaps one way to produce some movement in this situation is to ask how we came to this present state of affairs? How did we reach an impasse in the War on Drugs?

Well, some years ago the president of the United States, in response to spreading fears about drug abuse, sent a message to Congress. In that message he said that drug abuse had reached the dimensions of a "national emergency," that drugs were "public enemy number one," and that we must wage "a total offensive" on drugs. Accordingly, he reorganized the federal drug enforcement agencies and added hundreds of agents to the drug enforcement program. He prevailed upon Congress for one-half billion dollars in funding, ten times that of the previous year. The war was on. The year was 1971. The president was Richard Nixon.

So, the War on Drugs is an old story. And we all know what happened during the 1970's. First marijuana, and not too many years later, cocaine, spread from the hippie culture or avant-garde fringes into the

very mainstream of society.

* * *

Given this social context, by the time President Reagan made his pledge "to cripple the power of the Mob in America" and to "do what is necessary to end the drug menace," it was utterly predictable that even a very aggressive program of law enforcement would prove powerless to change the private behavior of so many millions of American citizens who make up the mass market for illegal drugs.

Indeed, illegal drug use is no longer aberrational or deviant. Statistically speaking, it comes close to being the norm. About half of all people under age fifty and about two-thirds of all high school students have some experience with illegal drugs.

Nevertheless, the Administration was fully committed to a counter attack on the drug supply. As the President said, "the mood toward drugs is changing in this country and the momentum is with us. We are making no excuses for drugs, hard, soft or otherwise. Drugs are bad. And we are going after them." And the administration did just that, mobilizing an impressive array of federal agencies in a coordinated effort against drugs and drug suppliers both in the United States and in foreign countries.

* * *

The results of this mobilization were tangible. The Administration racked up record statistics in every category of measurement: drug seizures, drug arrests, drug convictions, asset forfeitures and so on. The drug agencies effectively utilized their expanded resources and powers and improved their operations significantly. But the acid test of the War on Drugs, as the Government Accounting Office asserted, must be its impact on the supply of illegal drugs. To use a business analogy, management cannot claim success with record sales or record gross revenues if they do not produce net revenues. Profitability remains the "bottom line." And the bottom line in the War on Drugs is that just as arrests, seizures, forfeitures, etc. have risen to record levels, so has the drug supply.

In 1976 an estimated fourteen to nineteen metric tons of cocaine were smuggled into the United States. By 1980, just before the Administration took office, it rose to forty to forty-eight metric tons. And by 1985 it had doubled again, exceeding 100 metric tons — 100,000,000

grams of cocaine before cutting, 300 or 400 million street grams. And the same expansion was true of marijuana, with record supplies cropping up, not from Colombia and Jamaica, but now from California, Florida, many other states in the Union. Worse, high-potency "designer drugs," such as china white, a heroin analog, made not in foreign fields but in the clandestine labs of creative chemists at home entered the market. LSD made a comeback, while highly pure "black tar" heroin came on the scene.

So, if one looks at the war in terms of its actual results, one must conclude that the War on Drugs has had very little impact in controlling the drug supply. What it has accomplished, however, is to impose a crime tariff for risk premium, inflating the price of drugs in the black market. Prohibition is a kind of alchemist's tool: Take a $60 ounce of pharmaceutical cocaine, make it illegal to distribute outside medical channels, and you tranform it into something more valuable than gold, $2,000 or perhaps $3,000 per ounce in the black market.

* * *

Because of the high (although unproven) probability that demand for black market drugs is highly inelastic, *i.e.*, not price sensitive, the social benefit in public health and safety of the crime tariff is dubious. But its social cost is not. The paramilitary pounding away at the supply of drugs inflates their prices in the black market and creates a vast pool of underground drug money. The government estimates the total at eighty to one hundred billion dollars a year, thirty billion of that from cocaine alone.

That money is the source of a lot of human misery. Black market mega-billions feed the growth of powerful crime syndicates willing to commit murder in order to protect their business operations. Bribery of public officials is so pervasive and the amounts of money so great that, according to former Attorney General William French Smith, "corruption threatens the very foundations of law enforcement in this country." The national security interests of the United States are also damaged by drug enforcement. The governments of friendly nations, in particular Bolivia and the Bahamas, have been taken over or subverted by drug syndicates. The survival of democratic governments elsewhere in Latin America is also jeopardized. The black market finances international terrorism and subversion by forging unholy alliances between drug traffickers and guerrillas, who protect drug operations in return for money to buy weapons to overthrow the government of the coun-

tries they operate in. Narco-terrorism thus undermines the stability of friendly governments in Colombia, Peru and elsewhere.

Within the United States, frustrated reaction to the defiant growth and prosperity of the black market leads to increasingly successful demands for unfettered police powers. The effect has been a gradual gobbling up of the civil rights of both criminal defendants and ordinary citizens . . . . As Justice Hugo Black (whose attitude about drugs was as strongly negative as any justice of the Supreme Court) warned, "the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden short cuts. . . . Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind."

But the political winds have already blown in especially punitive antidrug laws, pretrial detention, longer or mandatory prison sentences, property forfeitures, expanded powers of search and seizure, good faith exception to the exclusionary rule, highway check-points, drug detector dogs, a sixty percent rise in the number of federal wire taps, extradition treaties, computer data banks, currency controls, pervasive use of informants and undercover agents, and most recently the call for mandatory urinalysis tests of employees. The list of these anti-drug initiatives grows and grows *ad infinitum*.

And you know what? It's never enough to win the War on Drugs. Accordingly, some politicians now call for capital punishment for drug dealers, or a Gulag Archipelago.

Yet, as we have already seen, the more we intensify drug enforcement, the more we crack down, the worse the situation becomes. Both black market pathologies and the level of drug abuse increase, seemingly unaffected by the aggressive enforcement program. Many people agree with this analysis, but see no viable alternative. Is there a better way to meliorate the twin problems of drug abuse and drug trafficking?

* * *

If the Government were really interested in doing something constructive about what it calls "the drug problem," it would begin with the obvious first step — a serious, scholarly cost-benefit study of a full range of alternatives to the present approach to "drug control." Instead, the Government refuses even to *consider* any alternative. If I can return to a business analogy, the situation is as though corporate management, consisting of the President, the Attorney General, the Direc-

tor of the FBI, etc., reported to its board of directors record losses for 15 consecutive years, with each year producing larger losses than the year before. And when the board asks management about its plans to turn the situation around, management replies that it will continue (more of) the same failed policies. There's got to be a better way.

And that's the purpose of this symposium, to look for a better way. I have no illusions, by the way, about the political climate in this country or the prospects for policy change in the near future. At the same time, I feel that the American public has relatively little tolerance for inconclusive wars. I doubt very much whether we will be fighting the War on Drugs in the year 2000. The strong American tradition of pragmatism will sooner or later demand a more effective approach.

In addition, the War on Drugs makes no cultural sense for the generation that will come to power in future years. The generation under 40 is not only more familiar with drugs, but less moralistic about them, more willing to tolerate diversity and individual choice. Adhering to an ethic of self-discipline, achievement and personal responsibility for fitness and health, I think drug laws will become increasingly irrelevant to their lives. They will stay away from drugs if they choose to do so, and law enforcement will not make much difference in that decision.

So, I view this symposium as the beginning of a beginning — of a long term process of creating a new context of understanding in which a more principled and effective system for the regulation of drugs can emerge.

To that end, we are privileged to have with us today a distinguished panel of experts, brilliant scholars, and experienced professionals in the field of law enforcement. . . . Moderating this morning's discussion will be Professor John Kaplan . . . .

We will begin by having each panelist make an opening statement . . . .

Prof. Kaplan: I would like to begin by directing attention to our questions for this morning: What accounts for the failure of the War on Drugs to stop the influx of drugs and the free wheeling operations of drug traffickers, and do the benefits of the War on Drugs nonetheless outweigh its costs or is the cure worse than the disease?

I think the sensible thing to do is to begin with the person who is actually fighting the War on Drugs here, the only one of us, as it were, in the trenches and that's the United States Attorney for the Southern District of Florida, Leon Kellner . . . .

Mr. Kellner: Thank you, Professor. In the past few weeks when the

brochure was handed out and I gave it out to all my assistants, quite a number of them came to me and questioned my sanity. They compared me to Daniel going into the lions' den, and why was I letting myself in for seven or eight hours of attack by a group of people who are better qualified than I am to discuss this issue.

Well, my answer to that question was, at least I want to show the panelists here that I'm not a puppet being pulled by some unnamed, unseen policy makers in Washington, who are directing what I do . . . .

I represent the people in my office and law enforcement people that are here thankfully to give me their support . . . .

But we are people that are deeply committed to attempting to resolve a problem, one that I believe is the most serious facing this country, and that's drug abuse . . . .

As the chief federal law enforcement officer in this area, I spend a good portion of my day directing the enforcement of our laws against drug abuse, drug trafficking. As a result, I think about the problem quite a bit. I think about it not only in terms of whether I am doing something, but I think about it in terms of my own life.

I have committed a substantial portion of my life to this effort. And I have to think about, when I look back on this period of my life in 20 years, if I live that long, have I done anything good? Have I done anything worthwhile?

We all recognize that law enforcement alone can't solve the problem that we are faced with. We only deal with the supply side of the equation. That's just not enough. We must also deal with the demand side. I'm not going to describe to you in detail what the national drug strategy is. I'm not sure I could give it to you in the succinct manner that Professor Wisotsky did in any event. But enough has been written about it. Enough has been said about it. And my fellow panelists are here to criticize it.

The only thing I really want to say in opening remarks is that it is a comprehensive plan. It attempts to deal with the supply side and trafficking in the streets, the source countries, the transshipment countries, the movement of money, the attempt to take the profit out of it, but it also has an outline of how to deal with the demand side, research and education.

I truly believe, and I say this sincerely, that I wouldn't be doing this job if I didn't believe this, that over the long term I think the problem is soluble. I think that there is a strategy that has been developed that has a chance of working. I am not going to sit here and tell you people that we are winning this war and I see the light at the end

of the tunnel.

I can't say that. I am hopeful that this strategy will work. I think the key to this effort is at the community level. And I saw before I came up here Admiral Van Edsall, who is the executive director of Miami Citizens Against Crime . . . . [I]f there's any one community group that you can identify as having caused the increase in law enforcement resources in South Florida, it is that group.

It is groups like that. It is community level. It's the public. It's parents. It is local governments, local organizations that have an equal responsibility of dealing with the problem on the demand side. I recently attended a Conference of United States Attorneys in Tampa, Florida . . . . [T]he purpose of that conference was not to discuss law enforcement. It was not to discuss how do we better prosecute people, how do we put more people in jail.

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The purpose of the conference was to discuss the fact that we were only doing half our job, the law enforcement side. The ninety-four of us had gotten together . . . to discuss what was really our failure as community leaders to participate, to offer our services, to act as a catalyst on the demand side.

What impressed me most about the three-day conference was the number of national representatives — [of] parent groups, of teacher groups, of community leaders — who are extraordinarily concerned about what the increase in drug use is doing to our youth, is doing to our next generation who are going to lead this country.

. . . I am greatly concerned about the extraordinary explosion in drug use . . . . I personalize it. I have a 19 year old daughter. I don't want her to use drugs. I don't want her life at this young stage to be irretrievably lost because of what society has done or has failed to do.

I think there's a difference. Professor Wisotsky talked at some length about the seventy year [drug enforcement] effort. Well, I haven't been around for seventy years. I have been doing this thing for four. But I'm part of the generation that grew up in the '60's. I was in law school or just graduated when President Nixon reorganized the drug effort. And at least from my perspective, I see a difference between what is going on today and what was going on in the '60's and 70's. And the difference is this meeting. I don't recollect this level of involvement of community groups, of judges (and I see two federal court judges in the audience) . . . so deeply interested in this problem in

the 1970's as we have today. I think that with this kind of involvement we have a chance at solving the problem . . . .

The last reason, most important reason, that I came here, that I wanted to participate in this seminar is that . . . in all the time that I have read and been interested in this problem, I have not heard of another alternative to what we are doing.

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I look forward to today's discussion. I look forward to trying to hear and listen to a rational alternative to what we are doing because I think that we all, as Professor Wisotsky has said, we all recognize that there is a problem. The issue is how to deal with it.

Prof. Kaplan: Thank you. The next person that I would like to call on is Mark Kleiman.

Mr. Kleiman: Thank you, John. Let me start by raising what seems to be the fundamental question, which is whether the question as presented to us about the War on Drugs is well-stated. I think it isn't. I think the first mistake we make in thinking about drug policy is imagining that we can talk in the abstract as if heroin and cocaine and marijuana and PCP all presented the same problem or the same kind of problem or are likely to yield equivalent benefits to the same kind of policies. I think that's wrong.

I think those drugs differ among themselves more than they are alike. And I think that as a group they resemble the licit substances of abuse, most prominently alcohol and nicotine, more than they differ from them.

One keeps reading [in] the newspaper about drugs and alcohol as if somehow alcohol were a different problem. It's not. It's in the same family of problems of intoxicants or addictive substances that people get in trouble with, that people do damage to themselves with and which cause people — pardon me, Professor Szasz — to do damage to other people.

So, I think the first step we ought to take is to consider the legal and illegal substances of abuse together and we ought to then differentiate among them according to their characteristics.

Now, the only recent experience we have with the legalization of a substance of abuse is alcohol. It's not, I submit, a happy experience. Since the end of Prohibition, American alcohol consumption per capita has tripled and the deaths from alcohol related diseases, particularly cirrhosis of the liver, have followed right along.

Alcohol appears to be responsible for about a third of all our highway deaths, for about a half of all our violent crimes. That's based on survey work among state felony prisoners. They were asked, were you drinking at the time you did whatever you're now in for? And more than half said, yes. More than half of that half had had more than eight ounces of absolute alcohol in the 24 hours before they did whatever they were currently in for. So, the notion that, well, we legalized alcohol and that worked, let's try it again with something else, strikes me as not a powerful argument: in fact, a powerful argument on the other side. It doesn't prove that we would be better off keeping all substances illegal, but it does demonstrate that no matter how bad the picture is, it can always get worse. We found that with the end of Prohibition.

How do we differentiate among drugs? It seems to me there are two obvious ways for the purpose of making policy. One is that some drugs, either because of their pharmacology or because of the way that they are actually used are more harmful, both to their users and other people, than other drugs.

I would put alcohol very high on the harm side. It appears to me from all the evidence that it's a much more dangerous drug than, for example, marijuana.

Given its current use, but not its pharmacology, I would put heroin very high on the harm side, and PCP as well. So, if we have a finite amount of resources to devote to drug policy, we ought to devote more of those resources to the most dangerous drugs. But if we are going to talk about enforcement, which I take to be our basic topic here today, there's another equally important principle: We ought to devote our enforcement resources to those drugs where enforcement will have a major impact.

The larger the market for a drug is, the more people there are who want to use it, and the more money they are willing to spend to get it, the harder it is for law enforcement to make a difference. Two thousand DEA agents cannot get between twenty-four million marijuana users and their chosen drug. And I submit that the same is now true of cocaine.

If Americans are, in fact, spending twenty billion dollars a year on cocaine, which seems awfully high, but may be right, then the ability of federal law enforcement to add enough to the cost of being in the cocaine business to drive cocaine off the market is virtually nil.

There are some things which would be nice to do, but which are not, in fact, do-able. And once an intoxicant gets to be a mass market

substance, the ability of law enforcement to restrict access to it is very limited. No conceivable enforcement program behind the Volstead Act would have abolished alcohol use during the period of the 1920's.

I think the wrong lesson was drawn from that: the lesson that Prohibition wasn't doing any good, and we ought to repeal it. The increase in alcohol consumption after Repeal showed how mistaken that view is. There is danger of learning the same wrong lesson today about marijuana and cocaine.

I don't think that, just because increasing enforcement resources won't lead to a proportionate decrease in consumption, legalization has no effect. Think for a moment about the difference between legal and illegal substances in terms of users' ability to get their hands on them. If a substance is legal, you can walk down to the corner store and buy it. You buy it in a package that tells you what's in it. You know it's not adulterated. You're not afraid of being ripped off. You're not breaking the law.

The sheer difference in the time required to buy a pack of cigarettes as opposed to a gram of cocaine, perhaps only the difference between five minutes and half an hour, can make a noticeable impact on how frequently people decide to use a drug.

Thus the difference between legal and illegal may be much more important than the difference between high enforcement and low enforcement. Professor Wisotsky suggested that the War on Drugs, by which I take it he means the increase in drug enforcement resources over the first five years of the Reagan administration, has not been successful. I take that to be true. But it is invalid to draw from that premise the conclusion that the policy of keeping some drugs illegal is without effect. That conclusion is unsupported by either logic or fact.

Where does that leave us? I think it leaves us looking at the resources we put into drug enforcement, drug by drug, and saying, what happens if we do more? What happens if we do less?

With respect to marijuana, which is the drug I know most about, I submit that enforcement has primarily bad effects. It increases price, but not very much. I calculate that federal drug enforcement is responsible for about 20 percent of the price of marijuana. That increase in price necessarily decreases consumption; if something costs more, people buy less of it. But marijuana is so cheap that it seems unlikely that a ten or twenty percent increase in price will decrease consumption very much. It costs fifty to seventy-five cents to get stoned. A ten percent increase in price is not going to lead many users to get stoned less often. Somebody who smokes a joint, gets the "munchies," and eats

two candy bars will spend more on the candy bars than he did on the marijuana.

That is not an attractive target for price increase as a way of reducing the quantity consumed. But what's the other effect of increasing federal marijuana enforcement? It is, I suggest, to make the market more lucrative. That is, total revenues will increase because consumption goes down less proportionately than price goes up, so there's more money on the table for criminals.

Worse, as enforcement goes up, it is the more dangerous drug dealers, those more willing and more able to use violence and corruption to protect their activities from enforcement, who will be advantaged, who will become the low cost suppliers of the drug. So, not only do we put more money on the table for criminals, we make it available to the more dangerous criminals and we encourage drug dealers to make themselves more enforcement resistant.

On the other hand, if you look at street level heroin enforcement, I suggest the effects on consumption and the effects on drug-related crime are all to the good. To answer Professor Wisotsky's two questions: What accounts for the failure of the War on Drugs? The failure to target our resources well. Do the benefits of the War on Drugs nevertheless outweigh its costs? For high-level marijuana and cocaine efforts, no. For street-level heroin enforcement, yes.

Should we end the War on Drugs by legalizing everything? I submit to you the answer is again, no.

Prof. Kaplan: Thank you, Mark Kleiman.

The next person I would like to call on is Lester Grinspoon, who will also go into the issue of what our War on Drugs costs and what it is doing . . . .

Dr. Grinspoon: Well, I will address the title of this conference, "In Search of a Breakthrough." I would like to present a somewhat utopian notion . . . .

Now, H. L. Mencken said of the alcohol problem during the 1920's that between the distillers and the saloon keepers on one side and the prohibitionists on the other, no intelligent man thought there was any solution at all. The same may be true of the illicit drug problem, with traffickers on one side and moralists and the police on the other. Only the problem is worse because the acceptable range of solutions seems to be so narrow.

The report of the President's Commission on Organized Crime suggests, the way things are going now, there is no effective opposition to prohibition.

I would like to propose a utopian exercise that would take us in an entirely different direction. The idea is not new and it would be foolhardy to suggest that it is currently a feasible policy. But I offer it to the conference tentatively for discussion.

The suggestion is that the currently controlled substances be legalized and taxed. The taxes would be used for drug education and for paying the medical and social costs of drug abuse. A commission would be established to decide how much each drug would be taxed on the basis of its cost to society. The rate of taxation would be adjusted annually for each drug in accordance with the most recent data on those costs.

Data may not now be available, but with modern data collecting and processing techniques, it certainly could be. In this way the government would acknowledge that inevitably some people are going to use drugs and would try to shift them towards the use of safer drugs by means of taxing policy and education. In this system the currently legal drugs, alcohol and tobacco, would not be distinguished from the others.

The advantage, obvious to most of us here, is that we would no longer have the expense, corruption, chaos and terror of the war between drug traffickers and narcotic agents. One of the byproducts of the drug war is, as most of the participants in this conference would recognize, a threat to civil liberties. As Steven Wisotsky has pointed out, it is possible that a self-reinforcing cycle is beginning to develop, as drug enforcement operations begin to pay for themselves by funds confiscated from the drug traffickers, whose operations they make enormously profitable.

The taxing system here suggested would establish a different kind of revenue cycle in which society would pay for the costs of drug abuse by extracting them from the drug users in proportion to the amount they contribute to the problem.

The commission that supervised this taxing system would also serve as an educator and guide to society, an educator not constrained by the present totally unrealistic assumption built into the criminal law that any use of certain drugs must be evil or dangerous, while other drugs have a range of benign and harmful uses. Honest drug education would become possible.

Is it plausible to think that this arrangement would work? Would it be possible to tax drugs enough to pay for their costs? Even if it were possible, would drug abuse increase so much that we would be paying too high a price in personal and social misery? Is the elasticity of demand great enough so that taxing would substantially influence the

amount of drugs consumed, especially by heavy users?

Evidence on all this is very uncertain, even in the cases of alcohol and tobacco, where the most research has been done. There is a large literature of the distribution curve of alcohol consumption among individuals in society, most of which concludes that any policy designed to cut total consumption will at least proportionately reduce alcohol use among problem drinkers and, therefore, the medical and social causes of alcohol abuse.

That is, the demand is elastic enough, even among alcohol users who create problems by their use, to be affected by a rise in price. In fact, there is some evidence that . . . where the price of alcohol is relatively higher, there are fewer alcohol problems . . . .

There is also some evidence of elasticity of demand for heroin by addicts. Several studies suggest that addicts adjust the size of their habits to the price of heroin. One authority on heroin control has said that the criminal law would be effective in cutting down heroin use if it raised the time needed to get a dose of heroin from five minutes to two hours . . . .

The criminal law makes it risky to manufacture and distribute the drug. This raises its cost to the consumer, who therefore needs more time to earn or steal enough money to obtain it. It also restricts accessibility so that the consumer has to spend more time finding out where to get it.

The question is whether through taxation we could impose a limitation similar to the crime tariff, but more efficiently and with fewer monstrous side effects. Inelasticity of demand is greater in the case of tobacco because nicotine is one of the most highly addicting substances. Nevertheless, it is clear that even here raising the price by taxes has considerable effect on consumption.

Research suggests that for every ten percent increase in cigarette prices, consumption will decrease about four percent. Some studies suggest that the price affects mainly the decision to start smoking regularly, rather than the quantity smoked by an already addicted smoker. Thus, the short run impact of extra taxation would be small and it would reduce cigarette smoking only in the long run. Other studies find that as the average cost of tobacco is raised, the income elasticity of demand increases. That is, poorer people are more deterred from cigarette consumption than richer ones.

Now, it has been estimated that the direct health care costs plus the indirect losses in productivity and earnings due to cigarettes amount to a total of slightly over two dollars a pack: twenty-two billion

dollars in health care for smoking-related diseases and forty-three billion dollars in productivity losses.

This is only an illustration of the kind of calculation that would be involved in trying to set a taxing policy. Such a taxing policy might be regarded as a way of making people buy insurance for the risks to themselves and others in their use of drugs. Life insurance companies already offer substantial discounts in their premiums for non-smokers, and this insurance preference is slowly being extended to fire and other insurance policies.

A problem raised by any system of authorized sales is the black market. The tax would have to be set low enough so that a black market would not be profitable. It is possible to do this and still reduce demand for the drug considerably, as the case of alcohol seems to show.

On the other hand, it is not clear whether any tax low enough to prevent a substantial black market would be high enough to pay for the social and medical costs of drug use. Certainly, present taxes on alcohol are far from doing that. It might prove impossible to create a system that would make the abusers of a drug, or even its users, pay for the full costs of abuse. Maybe this problem is practically insoluble. Certainly, the criminal law approach offers no solution at all.

[W]e simply don't know the amount of drug use and the seriousness of drug problems that would exist under this kind of system, whether a legal taxation system would have the same effect as the crime tariff in this respect.

Even if drug use increased with legalization, the Oregon and Alaska experiences with decriminalization of marijuana suggest that the increase might not be nearly as much as anticipated. And in order to undertake such a bold move, society would have to decide that the deprivation of freedom and the damage wrought by Prohibition is less than the damage attendant on the increment of drug use, much as it did in the decision to repeal the Volstead Act.

Prof. Kaplan: Thank you very much, Lester.

Next, I would like to call on Norman Zinberg to continue the discussion.

Dr. Zinberg: Well, I would like to approach this from a slightly different perspective and take up the issue of whether there is such a thing as the drug problem.

Certainly, some people have terrible experiences with chemicals. But it seems to me the underlying assumption here is that there is a drug problem. And I'm not so sure that's true . . . .

I want to approach it just a little bit differently.

You see, there are no known cultures (with the possible exception of the far north Eskimos) that have not used intoxicants. And I think that this is being overlooked when people begin to talk about drugs as the problem.

And I think what we are seeing over . . . about the last thirty-five years is a huge social historical trend . . . . [T]here have been periods in this country, in the world, where intoxicant use rose and the problems from intoxicant use rose enormously and dropped again when intoxicant use did . . . .

The figure I like to use to describe this is to remember that we paid the people who built the Erie Canal a dollar a day and a quart of whiskey a day, beginning with four ounce portions at 6:00 a.m.

That was how intoxicants were used at that time in the United States. In the early 1960's, approximately 1962, began what we call "the drug revolution." I think that was preceded by another drug revolution, the revolution that began with licit drugs from a culture that really had only virtually one [uncontrolled] psychoactive substance [liquor] or prescribed phenobarbital, which was dispensed by the tons. Suddenly we became a culture where many, many consciousness-changing substances were available. Antipsychotic preparations, antidepressant preparations, antianxietic preparations of all sorts began to emerge.

* * *

I think this is a genie that cannot be put back in the bottle. First there was the psychedelic revolution . . . that was followed by the enormous upsurge in use of marijuana. There was the heroin epidemic of '69, '71, and now we have the cocaine epidemic. I think of this as a vast social experiment. And all in all — I know there are terrible tragedies; I am not being callous — I think it's going rather well . . . .

I think particularly this is the result of some relaxation of law enforcement efforts in the '70's, the beginning of the decriminalization of marijuana . . . . In the late '60's, the National Coordinating Council of Drug Education insisted on an absolute embargo of all drug education materials [because] they were all scare materials. They were incredible. For a period when we relaxed, [authority regained a] certain amount of credibility and greater drug education [was promoted].

I think the improvement . . . has resulted from that. By improvement, I think that marijuana use is down. The age of users has risen for almost seven years now. The age of first use of all these drugs,

including alcohol, is rising. Heroin use is down. Alcohol use, while up in quantity, in fact is better than it's ever been.

By the end of Prohibition, use was way, way up and climbing .... [F]or the last three years there has been more beer and white wine sold in the country than hard liquor. The proof of hard liquor is down. More people are drinking less and in a more controlled way. I think we are attempting to be more controlled in a number of ways, including fitness. I think there is a shift.

I think this has not been true of cocaine, but I think that has begun to happen, too. I suspect after cocaine there's going to be something else. And I think we are trying to sort out, as a culture, how we can deal with certain substances.

I think it's true that some we can't deal with. Cocaine, I happen to think, is an extremely dangerous drug. And maybe we are going to have to deal with the drugs that are dangerous. I don't know yet. I don't think anybody does. I do think that creating the war climate, a total law enforcement climate, . . . will upset that [positive] trend and start things off once more in a bad direction. I think what we need is disengagement. I think it has to be slow. I think we have lived through an enormous period of time where people have actually believed that they were going to stamp out drug use; they could have a war and win it.

I have been through a number of wars now and it's not a winnable war. The genie is out of the bottle. We are now, as a culture, playing around with how we can use these substances. I think that disengagement should be gentle. I think decriminalization of marijuana would not be a bad place to start. It's a legal fiction. It's complicated, but it gives us a chance to see how it works .... [S]o far the states that have decriminalized it have no different use pattern than the states that outlaw it .... I think we should begin to use heroin for terminal illness and intractable pain. I think that's a very reasonable aspect of it. It doesn't condone illicit heroin use, but it begins to bring things into a more rational context ....

And this is what I consider disengagement, rational learning, thinking through how these things work, what works and what does not work .... I do think the most important thing is the philosophical shift — this is with us and it's a question of how we live with it, not our stamping it out. Thank you.

Prof. Kaplan: Thank you, again, Norman .... Next, I would like to call on David Richards.

Prof. Richards: [Professor Richards read his paper. *See* p. 909.]

Prof. Kaplan: [O]ur final speaker in the first round is Thomas Szasz.

Dr. Szasz: Thank you. At this point I would like to offer a few informal comments to amplify my written statement [*See* p. 915].

First of all, I would like to re-emphasize that there is no War on Drugs. There can be no such thing. Drugs, so long as they remain outside our bodies, are inert substances. The War on Drugs is simply another of those self-legitimizing slogans that George Orwell satirized so well.

Secondly, the term *drug*, in our context, is largely a political concept. That is to say, the distinction between what counts, and what does not count, as a drug is primarily political. For example, until a few years ago, alcohol and tobacco were not considered to be drugs; now they are. Of course, in the American colonies, tobacco was the single most important product. It was our first export. It was like cocaine is now to the Bolivians. But how many Americans look at cocaine that way?

That is why I see the War on Drugs as a modern version of the old religious wars. *We* worship the only true God; *they* worship false idols. *We* promote therapeutic agents; *they* traffic in dangerous drugs. This hypocrisy is, for me, the crux of the whole so-called drug problem. May I say something a little more personal here. As I look around, it occurs to me that I am probably the only person on this panel who was not born in this country — and who, therefore, perhaps appreciate this country the most keenly. I mean to give no offense, of course. I believe, however, that when the Founders envisioned the government of the United States, it never occurred to them that the government would have the *right* — would possess the *legitimacy* — to tell its citizens what substances they may or may not put into their own mouths!

Which brings to mind again Randolph Bourne's statement that "war is the health of the state." That's pretty obvious if we think of Napoleon or Hitler. It's just as obvious concerning the War on Drugs. So the assertion that the War on Drugs is failing, or is not working, is — in a fundamental sense — false. It is terribly misleading. The War on Drugs *is* working just fine, thank you. It's primary purpose is to elect politicians. Hasn't it done wonders for Governor Nelson Rockefeller and many others? When confronted with social policy, we must always ask: "*Cui bono?*" The War on Drugs is not supposed to help the addicts, or the people who get mugged by criminals on the street, or the patients who get AIDS from contaminated blood because selling clean syringes is illegal in America. It is supposed to help professional ex-

ploiters — whether political or psychiatric. The American Psychiatric Association is very happy with the War on Drugs — with the view that taking illegal drugs is an illness. It is the story of masturbatory insanity all over again — the imagery of drug abuse replacing the imagery of self-abuse. Let me read to you something I brought along because I thought it might come in handy. It is from the *Confessions of Saint Augustine*, written in the fifth century:

> I was bound down by this disease of the flesh, its deadly pleasures, with a chain that dragged along with me, yet I was afraid to be freed from it. . . . I was a prisoner of habit suffering cruel torments trying to satisfy a lust that could never be satisfied. . . . I had prayed to you for chastity and said, "Give me chastity and continence, but not yet." For I was afraid that you would answer my prayer at once and cure me too soon of the disease of lust, which I wanted satisfied not quelled.

Countless articles and books are written on drugs, but self-discipline is rarely if ever mentioned. Instead, we hear about "kids" — that's the code word of the lobby whooping up the drug hysteria. They say we shouldn't give drugs to kids. Big deal. We shouldn't give lots of things to kids — from stocks and bonds to automobiles.

Of course drugs cause problems. Everything causes problems. And solves problems. Remember that religion was thought to be a solution. Then came Marx, and he said it was a problem, it was the opiate of the people. And then came Freud, and he said it was a mental illness, a mass psychosis. So which is it? Is religion a problem or a solution? Are drugs problems or solutions?

The fact of the matter is that you can only wage wars on people. You can't wage them on inert substances. Therefore, the War on Drugs is a war of the American government on its own people — which may now be the best thing possible. After all, we have gone for 45 years without a major world war. Maybe the idiotic drug war is worth it. We can't really pick on Blacks anymore or Jews or women; but we seem to need to pick on someone.

Prof. Kaplan: Thank you, very much. It's traditional at this point to throw open the meeting to the panel first and then to the floor. So, let's try first and ask, Mark Kleiman, do you have any comments?

Mr. Kleiman: I have comments. They are not well organized so let me just sort of tick them off. I want to applaud Dr. Grinspoon for raising the question in what I think is its logically correct form: What's the appropriate level of taxation for these substances?

But I want to suggest that the answer for many of them will turn out to be that the appropriate level of taxation is higher rather than lower than the current black market price. I wouldn't like to see the price of heroin fall and that means that a taxation system requires as much enforcement on it as the current black market requires. So, though I think the appropriate level of taxation is the right thought experiment to do, I'm not sure it leads to the policy that Doctor Grinspoon may intend it to lead to.

After all, since prohibition can be thought of as just one extreme on the continuum of regulation, saying we ought to have a regulatory policy rather than a prohibitory policy may not have much content. One strong point I would like to make about the taxation idea with respect to heroin, the one drug, after all, we are having a lot of success with at the moment, is that increasing the price in dollars is not the same as increasing the price in search time. It is one thing to say to a heroin user, all right, it will now cost you $15 instead of $10 to get your fix, it's another thing to say, you also have to spend half a day searching for a dealer who knows you and is willing to sell to you.

It may be the case that increasing search time, which only prohibition does — the tax system merely increases the dollar price — is more powerful. And it has an additional advantage: if what users are up against is a high search-time price rather than a high dollar price, mugging you will not solve their problem. So, those are really my only comments on the question of taxation.

On the question of education, there's real evidence now with respect to tobacco that drug education — or to be honest, anti-drug propaganda — can work, but it can work only if it's done right. I agree with Dr. Zinberg that the scare tactic appears to be very unsuccessful. In fact, there's some evidence that drug education of the here's-a-green-pill-and-it-makes-your-head-grow-bigger type turns out to be consumer education *for* drug use.

The key question for 14-year-olds is, how can I turn down a proffered cigarette or beer or joint without committing a social gaffe. After all, 14-year-olds are very unwilling to offend their friends or appear different, so the task of drug education is to extend to them a social skill that they now lack of gracefully declining a cigarette or a joint or a drink. It's not just kids who need help with this. As a non-drinker, I have some problems at parties where people are offended if I turn down a drink; saying "no" gracefully is a skill I would like to know more

about.

* * *

Dr. Grinspoon: [W]ith respect to Mr. Kleiman's comments about heroin, it's a point well-taken. As I offer this proposal, I do it with all humility that there are many problems with it. It seems to me that inasmuch as most of us will agree the War on Drugs is a failure, we are compelled to look at other possibilities. We ultimately are going to have to do some grand social experiments . . . .

Now, with respect to the question of heroin, that is one of the problems. When you look at the proposal that I have made, you have to look at what are the positive aspects of it and what are the liabilities . . . [E]ven if we look at the question of heroin, it's true that heroin use in Harlem, for example, is diminishing; but as a researcher . . . has demonstrated, it isn't because of the draconian Rockefeller laws. It has probably more to do with youngsters observing what difficulties their older brothers and sisters got into with heroin. This kind of learning process appears to be going on now with PCP.

The other thing about heroin is that — and this may seem somewhat shocking — when it comes to the opiates, if you take away the social costs of using opiates, there are very few biological costs.

Take, for example, William Halstead, the father of American surgery who in 1884 got stuck on cocaine after he invented nerve block anesthesia with cocaine. . . . He was taken to the Windward Islands by his friends on a cruise. He was hospitalized. He had all sorts of difficulties, and then was observed suddenly to have given up cocaine . . . . [T]he price of his giving up cocaine was 200 milligrams of morphine every day, but he functioned perfectly all right. Not only did he function all right, but he went about doing his work and continuing to be a leader in American surgery.

* * *

Now, as to what Mark says about drug education, . . . I think it's crucial that we . . . do honest drug education. We are not educating youngsters honestly about drugs in this country. For example, if you take marijuana, the kind of things that we are saying about marijuana to young people are very largely untrue, . . . but the point is that they then go on and discover . . . it isn't as terrible as they have been told. In fact, maybe even some aspects of it are useful. They then conclude that everything else that had been taught about drugs is untrue and

they have no confidence in what they have been told by the authorities about these drugs. They then disbelieve what we say about cocaine, amphetamines, PCP, and so forth.

Prof. Kaplan: Thank you, very much. Yes, Mr. Kellner.

Mr. Kellner: I thought I was here to be a target and I listened to some of the panelists and I'm the wrong target. I'm the wrong person to be up here. . . . [U]p here in my place [should be] a majority of people in this country as well as all the politicians who have passed the drug laws which I enforce.

What I am hearing is not that drugs are bad; that, hey, sit back and enjoy it. Well, I don't agree with that as a citizen and as a parent, and it's something different than what I thought we were discussing.

I really thought that most of the people, if not all of the people on this panel, recognized there was a problem with the use of drugs. I do. I firmly believe that. And I thought we were here to discuss how to resolve that problem. And one person, Mark Kleiman, said, what we are here to discuss is law enforcement. Well, I didn't see that either. Law enforcement is one component of an overall effort.

The issue I was hoping to discuss is whether the law enforcement effort is too emphasized as opposed to others. But apparently there's a more fundamental disagreement among the panelists, and that is whether or not we should have any law or any prohibition or do anything in terms of drug education to instruct people on the dangers of drug use. That's a very different question to me. I am prepared to discuss it, not as a law enforcement person and not as an expert, but as a citizen, as a working member of the society, and as a parent.

Prof. Kaplan: Dr. Szasz.

Dr. Szasz: Well, I certainly do not want to be identified with the view that has been articulated that drugs are not so bad and it's okay to take them.

My view is that anyone who takes anything he doesn't need is stupid. But I also believe in the old *caveat emptor* principle; if you want to poison yourself with tobacco and heroin, by all means, the faster, the better, and the rest of us can live in peace and quiet. And I also believe that there are two different types of bad things in the world — namely, the stupid things that people do to themselves and the even more stupid things that politicians and law enforcement people do to us.

Doctor Grinspoon talks about education. Well, forgive me for quoting Thomas Jefferson, but he said something like, I firmly believe that the truth can stand by itself; it's only error that needs the protection of government. I think he should have said lies. Lying is the name

of the game.

Drug education in the United States is the same sort of thing as political education is in Russia. It is the systematic spreading of lies. When I first became interested in writing about this and I saw how many millions have been spent on so-called drug education, it occurred to me that, after all, students are supposed to know how to read, why not xerox Goodman and Gilman [*The Pharmacological Basis of Therapeutics*] — the old edition, of course — and give it to children. Why not? Because it doesn't say what the government wants to hear. Have you looked at it, Mr. Kellner? It says, alcohol and cigarettes are worse than opiates. That's not what Jesse Helms wants to hear.

Then we keep hearing how the War on Drugs is failing. But it's not failing. It is succeeding — let me show you how. This little piece is from the *Fort Lauderdale News*. Now I happen to —

Prof. Kaplan: Be a regular subscriber?

Dr. Szasz: No — a regular noticer of such seemingly unrelated items. I quote: "Tel Aviv, Israel. [No offense to any Jews.] Observant Jews in major Israeli cities may not have traditional Sabbath chicken this week. . . . Jews alert to non-kosher chicken scam." The Orthodox Jews are afraid of non-kosher chicken. If they are afraid of it, they don't have to eat it. This is the old symbolism, the old religion. The new one is about kosher and non-kosher drugs.

Prof. Kaplan: Norman.

Dr. Zinberg: I will try to be very brief because I figure the War on Drugs should not extend to depriving people of coffee.

Mr. Kleiman: Are you sure? It's a very addictive drug.

Dr. Zinberg: I do feel that Mr. Kellner raised a red herring. Nobody is condoning free and easy drug use. . . . I personally know that cigarettes are by far the most dangerous drug. . . . Really, there's no second place.

It's not even much fun. For most people that smoke, they just can't stop. And over 95 percent of the users are addicted, as compared to almost any other drug, including heroin, a higher percentage is addicted. I'm against them all. I'm particularly against cigarettes. But I do think that that's not what we are talking about.

I think the issue about education . . . [requires] change in the social climate . . . . You could do a different kind of education for a while in the '70's when it almost looked like there would be a federal marijuana decriminalization bill; and you could actually talk about how to use the drug safely — don't use it if possible, but if you use it, use it in ways that are more likely to promote controlled use than

abuse, occasional use, and eventually give it up.

And, as I said before, that was Professor Kaplan's point 15 years ago; and it's just as true of everything else, even the dangerous drugs, which is the point I'm making in my book [about heroin].

I think if you try to shift drug education to "decision resolution," and all these fancy words, it comes out the same way: "If you were smart, you would say 'no.' " You've got to be taught to say no. It comes out the same hardline stuff, so it's a change in the social climate that seems to me to be crucial to any effective educational methods. Other than that, you will get the same kind of business that we are getting now.

Prof. Kaplan: Okay. David.

Prof. Richards: I would just like to address briefly Leon Kellner's remarks that he felt that we are more concerned with an issue that doesn't concern him. I think it is true that in America there's a tremendous gap between medical opinion about the harms of drugs and public opinion. It's an extraordinary gap . . . .

I think part of the problem in the area is that American drug policy has been very uninformed by medical knowledge and has been very much motored by a prosecutorial perspective, historically. Not to say that prosecutors don't have an enormous knowledge in this area, but it's only one perspective. There are a number of others that have to be brought to bear on this sort of question.

. . . Second, . . . prosecutors in America have enormous discretion to choose what they will and will not target. And when Leon says, as he did to us, that the drug question is for him one of the central political evils of our society and that he targets his resources in that way, that's a choice he as a prosecutor makes. And it seems to me that's a choice that is up for discussion. Is that the best use of prosecutorial resources? . . . It should be open to political debate. It should be informed by a range of perspectives, including those of the panelists here. . . . That is as much a matter for political debate in American society as any else. After all, there are many areas in this country where we overcriminalize, where prosecutors no longer are prosecuting, in the sexual area and the like, because in their view these laws are pointless . . . .

Prosecutors make choices in this area. They have to ask themselves, are they making the right choices. . . . And you can't slough it off to the legislature . . . .

Mr. Kellner: That was an interesting point you made about prosecutorial discretion and you're right. Out of all the laws on the

books in the United States Code, prosecutors can pick and choose the statutes that they want to emphasize. They can also pick and choose the types of crimes they want to apply those statutes to.

. . . In the area of drug enforcement, much of that discretion has been taken away from them. That discretion has been taken away by the political process, by Congress. Professor Wisotsky mentioned the Organized Crime Drug Enforcement Task Force. Also he mentioned the increase in appropriations for the Drug Enforcement Administration and a variety of other tools utilized in the drug war.

That is a political statement that we are designated and directed to apply substantial resources [for] . . . the purpose of enforcing the drug laws. Therefore, while in many areas prosecutors do have a great deal of discretion, which I exercise in this district, in the area of drug efforts, there is a unified decision made by the executive branch as well as the legislative branch of government. It is a little bit different in terms of my prosecutorial discretion.

[The proceedings continued after a short recess:]

Prof. Kaplan: Very shortly we will be calling for questions from the audience, preferably fairly short and direct questions . . . . Some people asked me to say a couple of words just on the ground that so far today I could easily have been replaced by an alarm clock.

A couple of things I would like to point out. . . . The first question I would ask is, is this a question of legal philosophy, or is this a practical question we are dealing with? And different people can have different results. Personally, I regard it as an intensely practical question. Although I do not in any way discount notions of human freedom, I do believe that certain restraints may be necessary even if they compromise our ideas of freedom. In that case, I obviously have to part from Tom Szasz, though I enormously respect his position.

The second thing is, I see a distinction between two questions: whether somebody should use a drug or whether you want to use it or whether you want your children to use it, and whether the government should make that drug illegal. Those are two different questions. Many people move very quickly from one to the other.

The next question I would ask is whether there is something different, qualitatively different about the illegal drugs as opposed to the legal ones? Well, that's a very tough question . . . . All of these drugs are different, but the similarities in terms of pharmacology (not in terms of social effect, when one is legal or not) . . . outweigh the differences. And I guess the easiest way to do it is to say that there are five or six drugs we are concerned with and should well be concerned with on

pharmacological grounds. Anybody who doesn't understand that alcohol is a drug or doesn't understand that tobacco is a drug doesn't know where to begin here . . . .

The way I look at it, with respect to every drug, legal or illegal, you have two choices. You can have either a public health problem, or a criminal problem.

And when I say criminal problem, I mean civil liberties violations, corruption, violence, high prices which cause other kinds of crimes. That's the criminal problem. Or you can have a public health problem, cirrhosis of the liver, drunken driving. In some cases, of course, you get a little of both.

During Prohibition we still had a public health problem, but we had a much greater criminal problem. Now, we have still a criminal problem . . . (a lot of times liquor dealers cheat), . . . [but] we have a much greater public health problem.

With respect to each of these drugs, when you prohibit it, you get a criminal problem, and when you don't, you get a public health problem. The Lord did not put these substances on this earth to make life easier for man. And we have to make a decision; to my mind the decision has to be a fairly specific one with respect to knowing a great deal about each drug. And we will talk more about that this afternoon. But this is where you have to know something in order to make sensible judgment.

Now, I would like to throw the microphone open first.

* * *

Questioner: How many of the panel think narcotic addiction or alcoholism is a disease?

Prof. Kaplan: Okay. An eminently sensible question, or at least one that's often asked . . . .

Dr. Szasz: . . . Don't leave because I can't answer it until you define what you mean by disease.

Questioner: The traditional definition of a disease, the dysfunctionality, physical, biological changes, on and on . . . .

Dr. Szasz: The most authoritative pathology text used today in the United States is by Robins and two co-authors, according to which alcoholism is not a disease. Alcoholism, manic depression, mental illness are not listed in the index and are not discussed.

Drugs can cause diseases, of course. So can knives, guns, war, famine, so on. Alcoholism is simply a particular habit [of drinking],

except it happens to be ethyl alcohol instead of coffee or water that the person ingests.

Prof. Kaplan: Now, let me ask Norman Zinberg.

Dr. Zinberg: I find myself preferring not to be as strict as Professor Szasz is in this area. I think the important confusion is whether people have a disease that leads them to become alcoholics or narcotics addicts; or once you have serious alcoholism or narcotic addiction, are you then "sick," for want of a better word.

And I think the idea that it was a disease that caused alcoholism or addiction has created a lot of problems for psychiatry. An awful lot of psychiatrists for many years tried to indicate that these "diseases" developed because you had a bad relationship with your awful mother. As a result of that "disease" (whatever the hell that is, and I agree with Professor Szasz entirely that that's a crazy notion), you then drank too much, stuck yourself with needles, and what have you. I think that that's nonsense.

Once you're a serious alcoholic, once you're really a narcotics addict, in a serious way, are you in some sense sick? Most people who have it are, and most people then require whatever God knows we call "treatment." . . .

Questioner: I am interested in the substances or the things that can become addictive. And I think a good Swedish doctor by the name of Doctor Goldman has said that the opiates, the barbiturates, ethyl alcohol, nicotine, food, water, work, television and reading are [addictive] . . . .

Prof. Kaplan: Mark, you want to respond?

Mr. Kleiman: Let me try to respond to the first question, as someone who is not a physician, therefore, not a medical expert and not a lawyer, not a legal expert. I must be a general expert.

There are certainly people with addictions to various substances. There are people with a clinical addiction to alcohol who suffer withdrawal symptoms if they are cut off. That's true of barbiturates. That's true of heroin. That's true of some other things.

I think the mistake is in thinking that most of the damage that these substances do to users and to others are done with respect to people who have a clinical addiction, a disease that might be treated. Most of the damage that's done in this country by alcohol is not done to or by alcoholics. It's done by people who drink and then misbehave themselves.

And it is the genius of the booze industry in this country to have convinced the rest of us it's only the five or ten percent of the clinical

alcoholics, among our seventy to a hundred million alcohol users, who have an alcohol problem. A kid who drinks a six pack on a Friday night, who is not a clinical alcoholic, has an alcohol problem.

And so, I think the answer to your question, with due respect to my medical friends up here, is that, yes, there are diseases associated with drug use. There are addiction syndromes, but those are not the fundamental problems. The fundamental problem is that people voluntarily take these things and mess themselves up or mess the rest of us up.

Prof. Kaplan: Next.

Questioner: The panel has successfully addressed the problem of law enforcement. Has the panel considered addressing the demand side of narcotics, the people that actually go out and buy the drugs? What do you suggest we do about that — education? What is the answer there?

Prof. Kaplan: Thank you. A perfectly fine question. Anyone want to take a try on it? Yes, Mr. Kellner.

Mr. Kellner: One of the things I stated at the outset was the recognition in our work that there are two components to any effort to reduce the use of drugs in this country. That is dealing with the supply side, the law enforcement side, and equally, if not more important, is dealing with the demand side.

We recognize that the only reason there is an increase in the amount of cocaine entering this country [and the] . . . amount of acreage under cultivation for coca leaves in the source countries, is extraordinary demand. . . . The only way I believe that you can deal with this problem is to deal with that demand side through education. And as Mark said, it has to be a particular type of education. It can't be scare tactics. It has to be truthful. It has to be geared to the peer group or to the audience that you are teaching, and only through a long-term effort can there be any kind of demonstrable success in the reduction of the utilization of drugs.

Prof. Kaplan: Okay. Let me add three principles . . . . One, this area is complicated a great deal by the fact that the demand and supply are not two completely unrelated sides of the problem. To a considerable extent, supply creates demand . . . .

Second, demand is very hard to change deliberately. I think we should devote a great deal of thought to what extent that you're going to have to exaggerate the dangers of some drugs that are illegal, [and how this] will compromise your education with respect to other drugs.

In other words, when we stop and think what kind of education

would we use to get people to stop drinking beer, we have a very serious problem and, frankly, marijuana is more similar to alcohol in this respect than it is to any of the other drugs. This is not to say that demand is not subject to tremendous changes over time; but the changes involve things like religious revivals, changes in the consciousness of the country, a feeling that it is going to be a hard fight, and you need every bit of energy and brains you've got, rather than the feeling of the '60's that the world was handed to us on a platter. And being quite honest, I think the major input on demand right now is the health movement, which, of course, is not a creature of law or law enforcement, but has come along for reasons that we barely understand . . . .

Dr. Zinberg: I think you're right. Once supply has reached a certain point, then it interacts with demand. I think you're absolutely right about the health movement being the chief change of social climate. It made an impact on a lot of substances, including licit drugs, but you have to recognize that the initial demand did have nothing to do with supply. Supply came to meet the demand.

[H]aving lived through the '60's when Leary started the fuss about L.S.D., it was shocking how quickly and how great the demand was, and the supply came along. The same happened when marijuana got popular, and heroin, and now with cocaine. It's astonishing. There was no cocaine in this country. I testified for the Shaffer Commission and the idea of cocaine, you could hardly find it.

Prof. Kaplan: On the other hand, we do know that the addiction rate among physicians who have [a] supply of narcotics is a great deal higher than the rest of the population, as was the addiction rate in Vietnam where opiates were available.

Dr. Zinberg: There, too, I was in Vietnam and there were very, very few opiates around and no heroin when the marijuana thing was big. And it was really after the army began its enormous thrust against marijuana — in one month they made over 10,000 marijuana arrests in Vietnam — that heroin appeared like magic.

Prof. Richards: There was a shift from marijuana to heroin?

Dr. Zinberg: There was a shift from marijuana to heroin. It appeared like magic. And I went into it very carefully there. It didn't just appear in Saigon. It appeared in the North. It appeared in the Highlands . . . around the same time when suddenly there was a demand for another drug.

Mr. Kellner: You raised an interesting question. Hopefully, some of the medical people on the panel can answer. You say that there was a sudden shift in Vietnam from marijuana to heroin. In the United

States in the '70's there was very little cocaine, and all of a sudden, we now have a substantial increase in use. Why? Can any of the panelists say why there has been this shift?

Prof. Kaplan: Let Lester try that . . . .

Dr. Grinspoon: I think that the history of cocaine is inextricably involved with the history of amphetamines. There was much use of cocaine towards the turn of the century in this country. After cocaine was first synthesized in 1880, that is to say, isolated, it began to increase in use in Europe and in the United States. It was quite freely available.

Parke-Davis detail people would go knocking door to door selling cocaine. The bartender, if you asked him to put some cocaine in your whiskey, he would, and, of course, the Coca Cola Company was built on a coca extract. (It took cocaine out of Coca Cola before 1906 with the Pure Food and Drug Act. But, in fact, that was the real Classic Coca Cola.)

But cocaine began to get into trouble in the first decade of this century and it was lumped in with narcotics in the Harris Narcotic Act of 1914. It continued to be used into the 1930's.

Now, in 1928, Gordon Olis . . . took the compound phenothiazine propanamine from the shelf, discovered its stimulant properties, and called it amphetamine. The Smith, Kline and French Company bought the patent rights, and the cocaine rate fell off.

By 1971, it's estimated that there was licitly produced in this country eleven to twelve billion amphetamine pills. That's not to speak of the illicit production which was coming across the Mexican border in the form of "black beauties." And, you see, this was fueled by physicians who greeted amphetamines as a kind of panacea . . . . When the disaffection with amphetamines began to set in in the 1970's, cocaine began to grow and has continued to grow, as though the need for a stimulant has been uninterrupted. It's just that the actors have changed.

Prof. Kaplan: Tom Szasz.

Dr. Szasz: I have been very interested in this question of the demand because it's really more important than the supply. And, again, I found it necessary to get away from the ordinary prejudicial terminology of dangerous drugs, pushers, and so on.

So, let's shift gears back into ordinary English. There are only three ways in which a drug can get into the human body. One is that it gets into your body involuntarily. You can't help it because either the government puts it there or some industry puts it there, stuff from oil refineries, PCP, chlorine in the water. The second way is that you go to

a doctor and he prescribes it for you. The third way, for which there is a very nice English word which nobody uses anymore, is self-medication. There has been a war on self-medication. At the same time, there's a deeply felt sense in this country that a person's body belongs to him or her. What's wrong with self-medication? For the past 50 years the tendency in this country has been to take more and more drugs away from people and give them back something else through prescription. For example, methadone. Well, that to me means that a heroin addict has rights which I don't have. A heroin addict can get methadone and I can't.

Why can't I?

Prof. Kaplan: Because you're not a methadone addict.

Dr. Szasz: But why should he have more rights? You see, we have completely disjointed two very important legal-philosophical concepts — rights and responsibilities. We are giving people all kinds of rights and responsibilities, and are taking away all kinds of rights and responsibilities from them. Think of somebody like John Hinckley. He's not guilty of shooting President Reagan. Yet he is locked up for life. But he can vote in the next election. And *he* is crazy?

Prof. Kaplan: Now that we have handled that question to perfection, next question?

Questioner: I'm a judge in the County Court which deals with the lesser offenses, but, of course, one of the things that we are very much concerned about is what happens on the streets as a result of intoxication of various types.

Prof. Kaplan: We know all about the streets of Miami. I mean, we know everything we see on television.

Questioner: Well, the streets of Broward County are more our immediate concern for those of us that live here. I want to, first of all, without seeming to endorse the premise, congratulate Professor Wisotsky and Nova Law Center for bringing this up as a topic for discussion . . . .

Let's assume the legalization of all drugs. In other words, not only a decriminalization, but now suddenly all drugs are legal, and what would happen with respect to respectability and acceptability in a social setting? What would happen in places like bars and lounges, coffee breaks, like we just had, parties, home parties, and what would happen in terms of advertising, television in the newspapers, media, so forth?

Prof. Kaplan: Good question. Let me try that. The first thing is, merely because something is legalized doesn't mean that it has to be sold in candy stores. It can be sold only in drug stores. Merely because

something is legalized doesn't mean it has to be advertised, and it seems to me personally that our methods of advertising dangerous drugs, the legal ones, now is insane. That people should be permitted to push dangerous drugs on the population through advertising makes very little sense to me.

Prof. Richards: You mean nicotine, John?

Prof. Kaplan: Nicotine, of course, and alcohol. That's the first thing. The second thing is, what would happen? I think — I have written on this. With respect to marijuana, I think very little would happen because the people who are most likely to be injured by marijuana are the ones who already have the most access to it. High school kids. That's the place where you can get it most easily. In fact, I know people who have to depend on their high-school age children to get marijuana and it's humiliating for them. So, with respect to marijuana, I think no.

Now, with respect to cocaine and heroin, legalized with the kinds of reasonable taxes, . . . my guess is that for two generations we would have chaos with cocaine and heroin; they are both simply too socially destructive to release on a society which isn't used to them . . . . We'd have equivalents of what alcohol did to Indian populations in the United States and what was called the gin epidemic in England, where for over a generation there was drunken pandemonium until the society learned how to live in some kind of peace.

If we legalize cocaine and heroin today, if we managed to get through it, we would have a much healthier situation. In the meantime, I think there would be social chaos on even worse a scale than we have today being caught in the middle of a War on Drugs. That's only my opinion and we happen to have a lot of people here who know something about this, so let's start. Norman, why don't you take your scenario?

Dr. Zinberg: First of all, in this country, what we would have is a civil war. It would make the abortion controversy look like two bits.

Prof. Kaplan: Well, that's just a political judgment. Leave that part, just a pharmacological judgment.

Dr. Zinberg: We are beginning to develop a little evidence. For example, in the Netherlands, for all intents and purposes, all drugs are available and there's very little effort made at law enforcement. Marijuana, hashish, in various forms are sold openly across the counter in a variety of places. Other drugs are sold not quite so openly but there's little effort at law enforcement . . . .

Prof. Richards: Including heroin?

Dr. Zinberg: Including heroin; heroin, cocaine. You can buy anything at all in the Netherlands today.

Dr. Szasz: That is not legal?

Prof. Kaplan: No, it's not legal. In fact, you can do that in Miami probably, too, with a little more effort.

Dr. Zinberg: It's different. There's no effort, very little effort made at law enforcement . . . . I recently had a visitor, a professor from Amsterdam, who spent a couple of days with me and he went over the figures that they had . . . . His contention is that the rate has risen very little, if at all.

Now, that's interesting. I don't know if it's true or not. I think the Netherlands is a very different society. As he points out, they have had a history for quite a long time of having almost full availability, so this change in the last two or three years is not such a vast change.

The answer is that I don't know, but I think we have to begin to find out. I don't think we can start there and say, tomorrow we are going to legalize everything. I think we can take incremental steps . . . .

No one has more admiration for Professor Szasz' work, but I think that we do need regulatory aspects. I happen to put a lot of faith in the development of norms of social controls for handling things, even very dangerous substances, alcohol being the best example of that, with enormous casualties . . . .

And I would like to see what would happen, and in order for effective social norms to develop, there has to be a relationship between the regulatory apparatus, the legal structure, institutional structures, and the development of social controls. To illustrate social controls, the norm is it's unseemly to be drunk. It's okay to have a few beers on the way home from work, but you don't drink on the job; a variety of standards regulate how the drug is used.

I think that cocaine is closer to cigarettes than it is to anything else. My personal feeling is that that would be an extremely difficult drug to control. I personally think heroin would not be such a difficult drug to control. But that's another thing.

As I said earlier, I would like to see various things tried. As it is now in the present climate, we can't find out very much. We can't do the simplest kind of experiments of a fifty-patient heroin maintenance clinic, using heroin for terminal illness, things like that, and really see what kind of regulatory structure, what kind of social structure, has begun to develop . . . .

[W]e have to begin to slowly investigate how things can work. This is impossible in a climate where the president's wife is speaking to

social policy of the administration and the attorney general says that any use of any substance at any time, so to speak, will lead to the most intense destruction. That is our current position.

* * *

Prof. Kaplan: Now, Norman, there's one thing I would like a clarification on. When you analogize cocaine to cigarettes, you were not making the point that in total destructiveness . . . they would be similar, but rather in their ability to be used all the time when you are doing a lot of other things.

Dr. Zinberg: Yes. That you can use those drugs and function, at least, with cigarettes, until you begin to develop such a hacking cough that it interferes with your function, which occurs very late. Cocaine happens much more swiftly, but during the initial phase of use of cocaine, the idea that it enhances your functioning, that you can have a snort in the morning and get over the elevens, have another snort after lunch, and so on, is really how people begin. They have a snort if they have a tough deposition to do that afternoon or what have you.

Prof. Kaplan: Or it's a tough patient.

Dr. Zinberg: Each to his own. That is how people get in trouble with the drug, building it into an automatized behavior pattern because it doesn't get you high in the same way that heroin, marijuana, alcohol, and the other drugs do.

Prof. Kaplan: Yes, David.

Prof. Richards: I just would like to ask Lester how should one think in an empirical way about the effects of sudden legalization? . . .

I take it, the main example in our cultural history would, of course, be the ending of Prohibition. That would be the main cultural experiment that we have had, and from what people have told me, that was a disaster. Is that true or not?

Prof. Kaplan: No.

Prof. Richards: Or is that appropriate to think? I take it there are several parameters. One is, would use levels increase?

Prof. Kaplan: Absolutely.

Prof. Richards: Second, would the quality of the use change in some harmful or non-harmful way, and third, would there be other benefits that we could look to?

I think Lester mentioned these three features that we would have to look at. Now, how in an empirical manner would you develop any confidence in predicting what would happen in this country, given that

our culture is profoundly prohibitionist and does not have a cultural tradition of toleration?

Prof. Kaplan: There's a good book I can recommend to you on this very issue. First thing you have to say is, you have to think about it hard. In other words, you have to look at it very carefully and ask a lot of much more minute questions which vary from drug to drug, and that's very hard and it takes a long time. It takes a lot of work. Then when you really get down to it a lot of guesses have to be made, but at least they are intelligent guesses.

The second thing is, did we make a mistake in repealing Prohibition? Of course not. We had to because, although the public health problems have been getting much more serious since Prohibition ended, the criminal problems were destroying our society.

And Lester, I think, was speaking primarily rhetorically. He doesn't want to go back to Prohibition. He might go for an increase in taxes on alcohol. I think we have really screwed up there by basically not taxing alcohol nearly as much as we should for the purpose of restricting the social cost of alcoholism.

But there comes a point when you can't do that because of bootlegging and the like and it's a difficult situation; but my guess is that virtually nobody in the United States wants to go back to Prohibition of alcohol. We learned our lesson with respect to that and maybe we are going to learn a lesson with respect to other drugs sometime. Who knows?

Dr. Zinberg: Before Prohibition, we were very much improving in our relationship to alcohol. From 1890 to 1910 was the period of . . . the least alcoholism . . . .

It's very interesting that in a period of relative moderation in this country — the use of alcohol may be the most moderate in the whole history of the United States — that we move back toward prohibition. My feeling about what's happening with alcohol today in these last few years is that it's taken us sixty-five years to recover from Prohibition. We are only now beginning to come back to where we were in 1910. And I think that that's the kind of historical perspective that people rarely think about when they think about Prohibition.

Prof. Kaplan: Though be it said, you can't go automatically from alcohol to cocaine or heroin. We have hundreds of years of experience with alcohol before we had Prohibition and Prohibition was a relatively short and I think by and large unfortunate experiment. Just because it's true of alcohol does not ipso facto mean it's true of cocaine or heroin.

Questioner: I would like to direct this to Mr. Kellner. Please comment on the apparent historical unwillingness of the United States Government to fully apply its influence and resources to reduce drug trafficking from source countries, and possible trade-off for political alliances against Marxist-Leninist governments and movements.

Mr. Kellner: Could you repeat that question, please? I got the first part, not the second part.

Questioner: Well, very simply, it seems as though when a country goes Communist, the influx of drugs from that country tends to cease. Witness what may have happened in Southeast Asia with the heroin boom in the late '60's and early '70's; following the fall of Saigon, things rather changed. I'm commenting that it seems as though the United States tends to permit or condone drug trafficking from countries because it has a greater imperative.

Mr. Kellner: On the contrary. And I can only address that from the perspective of what my office has done over the past four years. In the past four years we have indicted people from source countries across the political spectrum. If one thing can be said about law enforcement in south Florida, it is wholly non-political when we come to the Marxist/communist/capitalist debate.

We really have taken a nondiscriminatory view of it. We have indicted officials from the Bahamas. We have indicted officials from Bolivia. We have indicted what we believe to be an official from Nicaragua. We have indicted a number of officials from Cuba. [Also] . . . the chief minister of the Turks and Caicos Islands, . . . a British Colony. On the contrary, there has not been . . . a utilization of the drug laws for geopolitical reasons . . . .

I have never been told, nor was my predecessor ever told, to direct our efforts against a particular political organization. On the contrary, they have simply stated to all of us that drug trafficking is a priority, and that [we] should interdict and indict and convict people that are doing it irrespective of their political views. That is the policy that is followed in this office.

Mr. Kleiman: I think it's a natural misunderstanding for anyone who reads the press releases from the White House on this subject to imagine that the United States Government is spending all its time worrying about drug trafficking activities by unfriendly governments and movements. That's not true on the law enforcement side.

What is true is that on the publicity or propaganda side, information developed about drug trafficking activities by friendly governments, until it gets to the point of a criminal indictment, tends to be

classified for the perfectly good reason that it would, in fact, damage the foreign policy of the United States to have us making rude remarks about our friends and their drug dealing activities. Therefore, it's the case that drug trafficking activities by the Cuban government are the subject of press releases in Washington and drug trafficking activities by, for example, Omega 7, are not. But that is a propagandistic use of intelligence developed in the drug war.

Prof. Kaplan: I think the Omega 7 business is not generally considered as a foreign government. In other words, the question was about foreign governments. What you managed to do is to provoke the United States Attorney into a reply. But I think the principle is quite different.

Mr. Kleiman: The principle is that when the Bolivian government was heavily in the dope-dealing business, we were investigating them hard. In fact, the United States Attorney's office . . . has wound up indicting a couple of ministers of that [former] government. But we weren't making a big fuss about it in the press. So, you got the impression that all we were worried about was the Cubans. That's true on the propaganda side, not true on the enforcement side.

Prof. Kaplan: Mr. Kellner.

Mr. Kellner: I have to categorically disagree. I read the newspapers also. I participate in congressional hearings. I also listen to what certain people in government say at these hearings about the involvement of officials of so-called friendly governments in narcotics trafficking. We have discussed openly in front of media people, not classified, the involvement of Bahamian officials. We have discussed openly the Mexican problem and Mexican corruption.

Last I heard, these were so-called friendly governments. And we have not been in any way limited in our criticism of their lack of efforts in narcotics enforcement. I don't think that who we are going to go after is in any way shaped by the political views . . . .

Prof. Kaplan: Next question.

Questioner: . . . I'm involved in a business that addresses the economic impact of drug abuse, particularly in the private sector. I spent 13 years with the Drug Enforcement Administration. Forgive me if my law enforcement mentality shows a bit. I would like a comment or some dialogue on an issue that perhaps you just touched upon and maybe this afternoon we will spend a little more time upon.

At this moment, on this Friday morning, on this day in April, probably 90 percent of the drug abusing population is at work right now. I wonder what the philosophical consensus is on the panel about

the movement, notwithstanding your views on drug testing as it relates to legalities, but your general feeling about the role of the private sector, not for social or moral reasons, but for selfish, self-serving capitalistic reasons to look at those 90 percent of the drug abusers in the United States and offer to them the following choice: drug abuse or the job.

Is that reasonable? Is that in conflict with the kinds of solutions that you have advocated so far?

Prof. Kaplan: Now, I would like to ask one question about what you mean by drug abuse. In other words, if somebody doing a job which doesn't require a high level of manual dexterity, et cetera, has a beer before he goes to work, so it's testable in him, but it doesn't affect his performance, would that be drug abuse?

Questioner: Well, drug abuse would be the kinds of chemical dependency problems that result in margin reduction. That could apply to a Chief Executive Officer and probably could apply to the man who cleans up the Chief Executive Officer's office, if he doesn't show up one day.

Prof. Kaplan: But the point is, you're not really concerned so much with the drug use as you are with the decrement in performance? That's the important part?

Questioner: That's correct.

Prof. Kaplan: If there's drug use without a decrement in performance, providing you're convinced it really is no decrement, you're not really interested in it?

You try this, Tom.

Dr. Szasz: Built into this question is a presumption that if you take a chemical, it's going to impair your performance. Clearly, that's not true, or have we forgotten about Sigmund Freud, who couldn't work without smoking? Or about the athletes who take steroids so they can perform better? Drugs are politically and morally neutral. They can make you work better or worse at a particular task.

Prof. Kaplan: Lester, you give it a try.

Dr. Grinspoon: More importantly, Freud felt that taking cocaine was helpful to him and —

Prof. Kaplan: During part of his life he did.

Dr. Grinspoon: Well, it's debated how long it was, but it certainly began before 1884, when he wrote his first paper, and certainly through his self-analysis in 1895.

I think [that] when you say drug abuse, that's the key to the thing. I think it's an important distinction, drug use and drug abuse. If

indeed the use of a drug is compromising a person's performance at work . . . , then the person has to be judged in terms of what he's doing at work, not whether or not he uses a drug. He may have a drink the night before or he may smoke a joint the night before, but if it has no effect on his work, why should that make a difference?

Mr. Kellner: Is it converse? Are you suggesting then that what private industry should do is forget about whether or not you are using drugs; forget about whether or not they should provide some sort of treatment; if the job performance is impacted, don't worry about it, just fire the man? Is that what you're suggesting?

Prof. Kaplan: Not necessarily.

Mr. Kellner: Don't worry about whether the person is using drugs; you get rid of them if it is affecting his performance? What do you do with that person? Isn't that the question? . . . Private industry now has an increasing problem with drug abuse that is directly impacting the work place.

Dr. Grinspoon: What do you do with a person who has some compromise in his performance for a whole variety of reasons? Do you get rid of them or try to help them with it?

Prof. Kaplan: There are many companies that tell employees, we don't know what's wrong with you (I might add, usually they do, and usually it's alcohol), . . . but you're not doing well, go down to our employee assistance program. There they tell you, "either you've got to shape up or you're going to get fired. It's my guess you're drinking too much."

Now, if the fellow says, it really isn't that; I don't really drink much at all, but I stay up most of the night because I love TV or I do something else; I don't get enough sleep. Then they say, well, look, get more sleep or you lose your job.

And strangely enough, this has happened to people and a lot of people have shaped up. Now, in other words, the argument is really that if you're worried about performance, maybe you should monitor performance more carefully. On the other hand, that may be a little too simplistic.

My guess is that if you find residues of heroin in your employees, if there is some kind of testing, or it comes to your attention that he's using heroin, I would worry a great deal. I would watch him a lot more carefully at the very least.

Dr. Szasz: I feel very strongly that it's intellectually dishonest to discuss this without noting how taking drugs can enhance performance. We know, for example, that amphetamines were introduced into the

modern world by the Nazis, so their troops could go for days and days in the tanks and have a blitzkrieg. They got better soldiers. Whether you like blitzkriegs is not the question.

Are we going to deny or forget all this? The fact is, drugs can do things for you which you would like to have happen. We are all human. We all want to do something. If we don't consider the issue of drugs enhancing performance, then we are simply not discussing the subject before us.

Prof. Kaplan: Okay. Next question.

Dr. Zinberg: I think it's a very important issue. Essentially, I think it's sophistry because I do not believe that urine testing is really being used chiefly to check for performance decrement . . . . By all means, performance decrements have to be picked up. Every Employee Assistance Program, every alcohol program that I know of, is spending a fair amount of time before the urinalysis in helping supervisors to be sensitive to performance decrement indicated by people coming late on Mondays, more accidents and so on. They can do something about that. Nobody is against that.

But, remember that urinalysis really doesn't pick up intoxication. With marijuana, it will show up as long as 45 days afterwards. And people who were in the room with people who smoked marijuana can have positive marijuana tests . . . . Cocaine will show up for 72 hours, heroin for 48, and so on, so that you're not testing decrement that way. And I think it's sophistry. I think it is an effort at a different level of control . . . .

Prof. Kaplan: Next question.

Questioner: I'm a psychiatrist. I would like to comment on the previous discussion of drug abuse and alcohol in the work system. When I was in Wisconsin, I worked in a large drug and substance abuse program in Kenosha whose primary contractor was American Motors. And the attitude of the employers in this particular setting was that they were willing to accept the fact that most people could not work on those assembly lines without using both alcohol and marijuana. And they provided this program for those people who got into trouble without a great deal of hoopla over the fact that it was pretty universal . . .

Prof. Kaplan: That was more a comment than a question . . . . One thing I can say is that the history of the American automobile industry may indicate that this was not the best behavior we could have gotten out of our work force.

* * *

Mr. Kleiman: I have heard now from people who are running court-associated urine testing programs on convicted criminals that they have "succeeded" in shifting people from marijuana to cocaine because marijuana is detectable for thirty days and cocaine only for forty-eight or seventy-two hours.

It's a real problem. It just happens that the sensitivity of these things on urinalysis does not at all correspond with the seriousness of the problem. And we may wind up setting up an incentive for people to shift from relatively harmless drugs like marijuana to much more serious drugs like alcohol and cocaine. And that would be a disaster from a performance viewpoint.

Prof. Kaplan: Well, this is not unheard of. If you smoke a drug like marijuana, you're much easier to catch than if you snort one. Therefore, cracking down in the army situation on people who smoke marijuana (where you can smell it and find out about them) will cause some of them to stop. But some of them will just drink more and more will snort heroin.

Dr. Grinspoon: Since the notion of urine testing has been brought up, I would like to just say that I think it's pretty much an absurd idea for at least three reasons. First of all, to the extent that we care about the fourth amendment, this is surely a travesty.

Second, the accuracy of these tests is so poor. As many of you know, the Air Force had to write to I think it was over 6,000 people to the effect that the less-than-honorable-discharge that they got because of urine tests may have been based on false urine tests.

Third, it just plain won't work. We can't even get George Schultz to take a lie detector test. How in the world are we going to get him to take a urine test?

Prof. Kaplan: Tom Szasz and that will end it.

Dr. Szasz: I agree with all three. There's also a fourth point. It is that there's patent dishonesty in the policy of routine urine testing — because if, in fact, work impairment was detectable, then nobody would ask for a *routine* urine test. They would ask only that those who are performing poorly be tested.

Prof. Wisotsky: . . . I would like to thank the panel for a very stimulating discussion. We will reconvene after lunch.

[Recess for lunch]

Prof. Wisotsky: I think we are just about ready to go forward with the afternoon session. I would like to start the proceedings with a ques-

tion that was asked during the lunch break. The question was really an argument that the panel had not taken seriously enough the physical impact, the emotional impact, or the addictive potential of drugs such as cocaine. One specific example used were the claims made by Dr. Mark Gold, the founder of the cocaine hotline, 1-800-COCAINE. He opened that hotline in 1983 or '84 and began receiving 1,000 telephone calls a day. Most of the callers regarded themselves as being addicted to cocaine. They could not stop the habit. They thought they were having problems. Many of them stole. I think twenty-three or twenty-five percent reported stealing from one source or another to support the habit.

In addition, there are animal experiments in which rhesus monkeys are held captive in a cage and catheters are inserted in their veins to deliver an assortment of drugs which the monkey can obtain by pressing a lever. In a variety of experiments, the rhesus monkeys seemed to prefer cocaine to all other drugs, including heroin, amphetamines, food and sex. And not only that, a certain percentage of these monkeys, if given unlimited access to cocaine, will press the lever and dose themselves to the point of respiratory collapse and death.

So, looking at the animal experiments, and then looking at the evidence of his clinic's experience, people like Dr. Gold claim that cocaine is the *most* addictive of all substances and that it would be extremely dangerous if it were to become more generally available to the public.

This question needs to be addressed by the panel. How do you view this evidence, including those who take a libertarian position, that the drug may be dangerous, but it's simply a question of individual self-restraint? I'm wondering if that kind of evidence, if you accepted it, would change your position. So I would like to put that question first to Professor Richards and then to Dr. Szasz and then to Dr. Grinspoon, who will then take over moderating the program.

Prof. Richards: . . . I think these questions are factual and ethical. They are mixed questions. And we therefore need, before we can make an ethical evaluation, to ask about the quality, the reliability, the independence of the factual evidence here adduced. I can't make an assessment until I would hear something about that . . . .

Dr. Grinspoon: Well, about Mark Gold's studies, it's true, since the hotline was opened, there are about a thousand calls a day now, and a recent study involved 500 randomly selected telephone calls. However, one has to keep in mind that this is a self-selected group. It's certainly not a random sample of cocaine users. It's clearly people who have gotten into difficulty with it. Those people who call the line, about

eighty-eight percent of these people are male. They spend . . . an average of over $600 a week on cocaine. About twenty-five percent of them report having convulsions. A very large number of them report the destruction of home lives, economic status, and so forth and so on.

If I can just go back to a couple things that Steve said, I have a little problem with the notion of using the word "addiction" with respect to cocaine. It's maybe just a little obsession on my part, but "addiction" is a messy word. It's not a good word to use. [I]n the 19th Century Gladstone could speak of his addiction to agricultural pursuits. Nowadays, addiction implies that with the withdrawal of a substance, there are physiological symptoms, abstinence symptoms, and this is for the most part not true with cocaine. It's more appropriate to say that cocaine is among the most re-enforcing of the drugs we know of, that, in fact, between five and ten percent . . . of people who use cocaine get into serious difficulty. Now, what are the difficulties they get into? One thing, as I mentioned, they lose control over cocaine. They find they have an inability to stop using it, and they go to all sorts of lengths to get cocaine.

I saw a patient not too long ago who free-based cocaine. In a period of seventy-two hours, he used almost 150 grams of cocaine. Now, if you look at that just from the point of view of cost, let alone what it did to his body and mind, that's absolutely extraordinary.

As for the study of monkeys and other animals on cocaine, it isn't just that some monkeys will die. When given injections of as little as .05 milligrams per kilogram for twenty-three out of the twenty-four hours of a day, all of them will die and they will die within five days.

So, surely, there are real risks to cocaine. It's impossible for us to predict in advance who will get into difficulty with cocaine. There are many who believe that the populations which are most at risk are people who suffer from the adult version of attention deficit disorder (ADD), which used to be known as minimal brain damage or hyperactivity in children . . . .

The second group of people who are thought to be particularly vulnerable to cocaine are people who suffer from major affective disorders like depression or bipolar illness.

And then, of course, each of these justifies a therapeutic approach to the problem. And then, of course, people who actually suffer from manic-depressive disorder are also vulnerable to cocaine use.

The fact is that about five to thirty percent of people get into difficulty with it, just as five to ten percent of the people who use alcohol get into difficulty with it, and most people can use alcohol without diffi-

culty, but, as I say, it's almost impossible to predict who will get into difficulty.

Does that answer your question, David?

Prof. Richards: Yes.

Dr. Zinberg: Brief comment. I'm a consultant to a group in Boston called Addiction Research Corporation. And they receive all of the hot-line cocaine calls from Massachusetts . . . , so I have had the opportunity to study the calls as they come in. And it's . . . very complicated.

The people that call are a self-selected group and they don't call accidentally. They call because they are feeling terrible . . . and they are looking for a recourse. Certainly, probably no more than about sixty-five or seventy percent of them are actually using cocaine, let alone being in trouble with cocaine. You get calls from heroin addicts, people with alcohol problems. You get all sorts of calls. I mean, it's a very odd situation and it's hard to really feel that it's a legitimate sample of users. It's a very important operation in the sense that I think it has helped many people get treatment . . . .

It's my impression so far that people get off the drug more easily than many other addictions, and I do think that it's an addiction. I disagree with Lester there. I think there is a withdrawal syndrome. I think Gold is right about that. And I think there is a psychological response which is fairly clear cut, not terribly severe, but I think it's there.

Then I would like to talk about the animal experiments briefly. I don't know how many of you know about the Simon Fraser University in Vancouver and their rat park. It's quite a remarkable place to look at. They have a huge area in which they have a colony of rats. And what they have done is to repeat a lot of these animal experiments in the rat park. And it turns out that rats have a social life, and that when they have a social life, they do not respond as they do in cages.

They have done the experiments with heroin and with cocaine. In fact, they can take addicted rats out of all of the cages and put them in the rat park, and over 80 percent of them get unaddicted. It's very hard to addict a rat in a rat park, [but] not impossible. A small percentage do get addicted, but only a small percentage. They have not done the experiments yet with primates, but they plan to, so that it is very important I think to make the distinction between a caged animal and an animal or a person who is in a complex social situation. Just how these things apply to humans, I don't have any idea. The other thing I think you have to keep in mind is that cocaine is a very complex drug. . . . You've got cocaine as a pure powder that people sniff. You've got free

base, which is a very different experience, a very rapid, short-acting experience which can be smoked. You've got injected cocaine. I mean, you've got really a variety of situations. Drugs can be used in a lot of different ways, and I think it has very different effects in these different ways.

So, it's not an easy question to answer if you don't really think through what you're talking about.

Dr. Grinspoon: Yes, please.

Mr. Kleiman: It seems to me that the evidence that's in on cocaine now is such that if you had a choice between legal, free availability of cocaine and no availability of cocaine, you would decide — unless you were really quite profoundly libertarian about these things — this is really a drug that we could do without. However, we do not have a choice between the free availability of cocaine and no cocaine. We have laws against cocaine. And despite that, we have a substantial cocaine problem. Now, one possibly correct policy would be to increase the enforcement of those laws. Seems like a perfectly reasonable idea to try. And, in fact, we have tried it. Cocaine enforcement over the last five years has intensified very substantially. The total federal drug enforcement budget has more than doubled, and the allocation of that budget to cocaine has itself increased, so cocaine has gotten a lot more pressure than it at one time had.

Nonetheless, the price of cocaine has fallen and its availability has increased. There may have been other factors at work, but we have done the experiment of increased cocaine enforcement, and gotten very, very little in the way of benefit out of it.

So, the fact that cocaine is a terrible drug doesn't tell us what we ought to do about it. I think it almost certainly tells us that we ought not to legalize it, but the appropriate enforcement approach depends *both* on how serious the drug is and on our ability to do something about it.

There are two possible bad effects of enforcement, other than spending the money. One is increasing revenues to organized criminals, not just in the upper case, but just large criminal organizations. That's one problem you get with more enforcement.

The other problem you may get with more enforcement is that if you succeed in increasing the price, but don't succeed in depressing consumption very much, you increase the total dollars spent on the drug. Much of the damage that cocaine does is not physiological, but economic. A lot of people used to have a trust fund and now have a punctured septum. And the septum may be easier to replace than the

trust fund.

To sum up: Now we have learned that cocaine is a terrible problem for rats and human beings, that still doesn't tell us what we ought to do about it.

Dr. Grinspoon: . . . I would like to ask the panelists to address, if they will, the main theme of this conference, namely, in search of a breakthrough.

That is to say, I made a proposal for a kind of breakthrough. I would like to hear what the other panelists suggest with regard to how they would address this question, not just cocaine. We shouldn't limit the discussion to cocaine. And then hopefully the audience will participate in this search for a breakthrough.

Dr. Zinberg: Just take one instance. A natural alternative was proposed by a friend of mine. I'm not suggesting it, but if it's true that in the form of coca it is not addictive or dangerous, . . . what he wants to do (and it's feasible) is to make a coca chewing gum so that you would make it available in a form that did not have the consequences of the more refined, harder, sharper aspects of it.

Dr. Grinspoon: Yes. And, in fact, the research which has been done among the coqueros, the people of South America who chew coca leaves, studies by Murphy and McGrath, have demonstrated very little, if any, of the kinds of pathology we see with pure cocaine. [I]t's clearly useful to these people. They say it helps them with hunger. It helps them with *soroche*, the altitude sickness. It helps them with fatigue.

Professor Richard Schulte, Professor of Botany at Harvard, who spent eight years in South America, tells us the following story: He and his assistant used a canoe along various rivers to gather their botanical specimens. On two different occasions they capsized. We won't speak to their capacity as canoers. But in any event, on one occasion, they lost all of their food and coca and they were without food and coca for three days. On another occasion they lost all their food, but they didn't lose their coca, for four days.

He said it was much easier to deal with the four days without food with coca leaf than it was for the three days without coca leaf. He believes that the use of coca leaf is something that is quite beneficial to the coqueros and does not have the liabilities that the pure cocaine does for our citizens.

Mr. Kellner: I think sometimes we forget that we are dealing in this country with pure cocaine and other, in my view, more dangerous forms. I want to address for a moment the premise that, well, we have tried law enforcement for five years; we have spent a couple of billion

dollars on it or more, and we are a failure. Well, I'm not prepared to accept that proposition yet.

The drug problem in this country — and by that, I don't mean what some of the panelists call a WPA project for government employees — the social effects, the societal effects and the family effects that drug use has been causing, have been around and been allowed to fester for quite some time.

Five years ago we began, I believe, a coordinated effort for the first time to deal with this problem. It is not a problem of law enforcement. It is a problem that goes across the spectrum. I think the returns still have to come in on that issue. I believe that, as I stated at the outset, there is a substantial portion of this community . . . who are violently opposed to drug use.

[State Senator Jack Gordon, the luncheon speaker] and a number of the panelists here suggested that the reason why we don't legalize or decriminalize drugs is because of this great conspiracy from on top where government, because of its own need to continue itself, or government employees' need to continue themselves, have foisted these laws on an unsuspecting American public.

I don't believe that. I don't agree with it. The laws that are in place and have recently been strengthened — on the federal level as well as the state level — with respect to the use of illegal drugs, were brought about in large part because of a deep sense of fear in the community, a deep sense that this is a problem that is impacting very severely on society. It seems to me that when the body politic, when the voters, when the majority of the people believe so strongly in something, in order to change that, it is not something that you go to the legislators to do. The job is to go to the people who make the decision, ultimately the voters.

There are many people in this country who have accepted medical opinion other than what has been stated on the panel today and have made their independent conclusion that drug use is wrong. My job is to implement that. Professor Kaplan mentioned to me at one of the breaks that when I was asked about prosecutorial discretion that I was really being a little bit —

Prof. Kaplan: Disingenuous.

Mr. Kellner: — disingenuous, thank you, in saying that in the area of drug law I don't exercise prosecutorial discretion.

I said that in certain areas, that with respect to the Organized Crime Drug Enforcement Task Forces, with respect to certain appropriations, I do not have discretion. However, I do have discretion in the

targets that I pick, the people that I arrest, and the people that I indict. I exercise that discretion by determining that with my limited resources, I will go after [major] traffickers. I go after the people who, I believe, if I indict and arrest and take off the streets will have the greatest impact. That's my job.

Dr. Grinspoon: Well, first of all, about people's attitudes toward drugs, I would suggest that twenty-four million people are voting with their lungs, so to speak, as they smoke marijuana, and more and more of them are doing so. But do I understand you to say that your sense of the way to approach this, the breakthrough, is to do more of what we are doing now?

Mr. Kellner: No. I am suggesting that if it is accepted on the panel — and I'm not sure that it is, that utilizing narcotics, utilizing cocaine is something that should be discouraged and that it does have a deleterious effect on society and individuals. I'm not sure that that is the position of most of the panel.

The issue is, how do we stop the demand? I am not sitting up here and stating that by doing more law enforcement, by continuing to try — and I think we should continue to try to double and triple the effort against supply — that by doing so, we will alleviate the problem.

What I am suggesting is that we are only at the incipient stages of dealing with the demand side. And, apparently, the members of this panel believe that the medical evidence doesn't indicate that we should deal with the demand side. I am listening to statements saying, well, you can take cocaine and it won't affect the way you do your daily business. I'm not a doctor, but I have read a number of studies. I have listened to a number of experts as well.

Prof. Kaplan: Who said that? Was that you? Did Norman say that?

Mr. Kellner: Norman. Norman said —

Prof. Kaplan: Norman, shame, if that's true.

Mr. Kleiman: There are two propositions. One is that no one is damaged by cocaine, and the second is that some manage to use cocaine and not be in any measurable way damaged by it.

Mr. Kellner: And there is —

Mr. Kleiman: The second is true.

Mr. Kellner: And there is another view that most of the people who utilize cocaine are damaged.

Dr. Grinspoon: Well, that —

Mr. Kellner: Let me finish.

Dr. Grinspoon: Sure.

Mr. Kellner: Now, I am not a medical expert. However, that is, in my view, a debate that should be conducted. But if it is accepted that we must deal with demand, the issue that I see is, how do we deal with that demand? And I haven't heard any discussion of that. I am interested in that subject. I deal with it on a daily basis. I understand that there are a great number of people who dedicate their lives to dealing with the destructive effects by trying to deal with the demand.

Now, I haven't heard any discussion of how you deal with it. If you make it legal, decriminalize it, regulate it, what are we going to do with the children who have this? And I heard some funny comments, "oh, that's ridiculous." I have children. And I have also seen other children who have been impacted, impacted permanently. It is not something that you just wave off because it can't happen. Hell, there are studies that it does happen.

If you can conclusively show that it doesn't happen, I'll believe that. I am open-minded, then I'll say, "I'm wrong." But I haven't heard that. And I think that's where the debate goes. As long as there is a substantial body that says that people are permanently impacted by this, I would like to hear that debate.

Prof. Kaplan: Well, it seems to me we have had two different kinds of arguments here from the United States Attorney. The first is this: The public has made a decision. This is a democracy and we have to do what the people say. I think that's true. But this *is* a democracy. We don't have to think what the people think, and the real issue is, are the people right or wrong in terms of the long-run benefit of the country in what they think.

Now, to my mind, that is the question we are talking about. It does no good to say that people have decided and they are the boss. Of course, they are the boss. But the people have by and large marched us over a cliff and marched themselves over a cliff on previous occasions. It will not be the first time that something is done with great popularity that has turned out to be a disaster . . . . The fact that the American people have decided one way or the other, I think, is irrelevant if the issue is what we as free and sensible thinking people want to do.

The second confusion I think that we have heard is the distinction between whether somebody should use a drug — whether it's harmful to them — and whether it should be legal and how it should be legally regulated.

Now, the interesting thing to me is, I have children, too. My children went to a high school where, of course, it was against the law to sell marijuana and to smoke it at the time, as a matter of fact. That

was not my problem. They could get it with no trouble at all. My problem was to make sure they didn't injure themselves with it. It's a problem that a parent has . . . . It is a very sophisticated and difficult one. Some of their friends ruined their lives with marijuana. That's a very bad thing to happen to people, but they ruined their lives in a situation where marijuana was strongly illegal. This was before decriminalization in California. And these people still ruined their lives with the drug.

Now the question is, will there be more or fewer such cases depending on legal issues? I know some who had their lives ruined, not because of the damage that the drug did, but the damage that the law did to them when it caught them with the drug. Now, these are tough and complicated questions. They require thought. They require a kind of balancing. The answers will be different depending on which drug you talk about.

Even when we decide that we are going to use the criminal law as the major method of drug education, which is basically what it is in the United States, there still is the issue about whether a drug should be legalized or decriminalized. Now, you may believe that the drug should be legalized — marijuana particularly is the one — or that it shouldn't. In either case, I think you can make a very good argument that the user of the drug should not himself be punished. In other words, even if you regard legalization as a good idea — and decriminalization is not much of a step because it still leaves all of the profit and you still have all of the problems of suppressing trafficking — nonetheless, any public policy which saves about 400,000 annual drug arrests in the country without increase in drug use is something that reasonable people may want to look at very carefully.

We do know, and it's interesting why we know, that decriminalizing a drug — *i.e.*, no penalty for the user — makes sense. We know that some states have done it, and have monitored very carefully drug use in those states. They went up when the nearby states went up and they went down when the nearby states went down. As far as we can tell, with the most careful social science research we have on the issue, there is no change in drug use when you simply say, no penalty for possession.

And then if you stop and think about it, if you ask people who don't use marijuana, why don't you use it, you get answers like: "It's bad for you, it causes health problems, I'm not interested in it, I'm a Mormon and I don't use any drugs of any kind." You get a large number of answers, and the illegality of use in those states where it's illegal

ranks about number nine among the reasons for not using it.

In other words, basically the law is marginal. So, you would expect decriminalization to have no real effect on use. On the other hand, there are more people arrested for simple possession of marijuana in the United States than for all other drug crimes combined. And the problem, of course, is that if you stop to think about it, the police have a lot of other things to do, like going after traffickers, if that's what you want them to do, or to go after robbers and rapists. It is a very difficult, expensive, and untherapeutic distraction for them to be involved in the processing of simple marijuana users.

Now, I do have to add one thing. I can make a counter argument that people will understand if you decriminalize marijuana and they will think that that's a statement that the drug is all right and they should go use more. Being quite honest, that's . . . a great slander on the intelligence of the American people to . . . assert that they can't tell the difference between saying, "Look, you shouldn't use it, but we are not going to throw you in jail for it," and saying, "We are not going to throw you in jail for it, therefore, it's terrific."

My guess is that this is a minimal argument. I think also you can make the argument that until we come to terms with marijuana, which is the drug against which the health argument is weakest . . . (you can get very few health experts to say that, on balance, though there are some differences in effect, marijuana is more dangerous to the user than alcohol), that the problem will be that as long as you have criminalization, a prohibition of marijuana, drug education is going to have to defend it. And as long as it defends it, it is going to have to misrepresent things about marijuana. As long as it misrepresents things about marijuana, it will lose credibility as to cocaine, where I am convinced they are telling the God's truth and then some.

Dr. Grinspoon: Well, I'm glad John brought that up. It is not only that we have arrested more than 400,000 people this year, but for the last twelve years we have arrested on an annual average of about 440,000 people on marijuana charges, most of them on possession. When I first went up to Texas in 1972 to testify on this issue, there were 990 odd people in Texas jails with a mean sentence of 9.7 years for marijuana charges. Now, I can tell you there is no inherent psychopharmacological property of marijuana which is nearly as harmful as what our society, what the law does to these people. And so, when we talk about the harmfulness of these drugs, we have to talk about the other side of the coin. David.

Prof. Richards: Lester, when this got started, Steve Wisotsky

asked me a simple question. And I think I'm now ready to address it. That is to say, he gave a scenario of certain facts about the addictive effects of cocaine, and then asked me to comment. And I asked a number of people whose judgment I trust on the factual issues, people of enormous integrity, what they think. What, in fact, emerges . . . is a striking example of how argument moves in this area. My own view is that harm is, of course, relevant on whether you prohibit or regulate. I mean, I'm not to that extent a libertarian. But it appears that the factual evidence about cocaine as we've now learned is that it's clearly harmful to some and not harmful at all to others. The analogy was drawn to alcohol, in which respect it appears to me . . . that regulatory schemes of the kind we use with alcohol would be a much better way of dealing with the harms incident to this use than the general prohibition.

Lastly, it was indicated by several people that, in fact, our laws with respect to cocaine have worsened the situation. I repeat, have worsened the situation. More Americans are using cocaine since these prohibitionist laws took effect. Therefore, it would seem to me, a prohibitionist policy in the cocaine area doesn't correspond to any theory of harm and in fact, may have worsened the social situation in this country. And that alternative regulatory schemes might be worth thinking about, . . . including sound public education . . . about what the real harms and liabilities of the use of this stuff is or may be. I think the question was also asked of Tom Szasz.

Dr. Grinspoon: Yes. We are going to get to Tom Szasz. But, again, I emphasize that honest drug education is a keystone of this whole thing. Tom.

Dr. Szasz: First, the empirical evidence about rats is irrelevant. Human beings are not rats. We are human beings who *know* things, who are supposed to *think*, who can *reflect* on our condition and behavior.

Without doing a single experiment I can prove that the statement of a cocaine addict, "I can't stop," is a lie. Now, may I try it? I have been hearing now for decades about how many millions or billions of dollars addicts steal to buy more drugs. I have never heard of an addict stealing money to use to go to a wonderful drug clinic to be cured.

Addicts may indeed want two things — to use drugs and to stop using drugs. But if they really want to stop, there's nothing to prevent them from stealing to pay for "treatment" — from going to a clinic and saying, stop me, I can't stop myself.

I don't believe that people can't stop themselves if they *really* want

to. My authority here is *The Autobiography of Malcolm X*. If Malcolm X could stop himself, if Sigmund Freud could stop himself, then others can also. Of course the statement "I can't stop" conjures up a powerful rhetorical image. It is an invitation to somebody. It means, I'm not responsible. It goes back to Adam and Eve and the apple — to temptation and the ability to resist temptation.

Concerning the dangers of drugs and drug education, I will not repeat myself, but I believe very strongly that all too often the business of government is to lie. That is why we have a free press and why we think it is important to have one. That's why we don't have Pravda. That's why the State Department doesn't print the morning news. My initial premise is that there is no reason to believe the government ever tells the truth. The only answer to this problem of information is a pluralism of sources, a pluralism of choices.

Another relevant argument about the dangers of drugs is to note that we have a free market in, for example, Drano. How much harm can Drano do to little kiddies? So, why pick on cocaine? Nobody has to take it.

One final comment: We are afraid of some drugs because we are skittish about suicide. The fact is, a lot of people are ambivalent about living. Now, when barbiturates were first stigmatized and substituted for by valium, I remember Peter Bourne said that — how many? — 200, 300, or 3,000 persons a year commit suicide with it. What's the difference? Don't you have a right to commit suicide in America? Is that illegal?

Prof. Richards: You mean in Florida?

Mr. Kellner: Well, you don't get put in jail.

Dr. Szasz: You don't get put in a *prison-jail* for it. You get put into a *prison-hospital*. I simply want to call attention to the argument against drugs that people may harm themselves with them. But it seems to me that in a modern, sophisticated society our only hope lies in encouraging people to exercise more and more self-control and rely less and less on inherently deceptive governments and government agents.

I don't mean you, of course! I mean professors of psychiatry, professors of medicine, lawyers. If your money comes from the United States Government or the State of New York or the State of Florida, then you are not working for hypothetical patients. You are working for a bureaucracy. He who pays the piper calls the tune. It's a very old English proverb. We disregard it at our own peril.

Dr. Grinspoon: Steve, would you please be sure that Tom does not

get a check for a stipend for this symposium?

Mark.

Mr. Kleiman: If cocaine were made legal, under any regulatory scheme you want to propose short of requiring a prescription for it, I would predict that, over the next thirty years, the level of cocaine use would rise toward the level of alcohol use. After all, in many ways, cocaine is a more attractive drug unless you know about its dangers. With our legal regulated intoxicant, alcohol, we have twice as many people in bad trouble as we have *total* cocaine users. So I don't believe that criminalization, illegalization has been a failure in that sense. I just think that increases in enforcement probably aren't going to help very much.

Dr. Grinspoon: Well, first of all, there are fewer people in trouble with alcohol now than there have been in previous times in this country. I think as a culture gets experience with a substance, it domesticates it. It comes to learn to use it sensibly, not by everybody, but by most people, and it becomes, in general, less of a problem over time.

I would agree with you that if the price of cocaine were diminished, there would be much more use of cocaine. However, in my scheme, I make it clear that the taxation certainly would equal (it can't exceed) what the black market people do . . . . Insofar as price is an inhibitant, that's the whole point, to keep that price up there. But to use the money not to play cops and robbers, but for education, for rehabilitation, for treatment, and so forth and so on.

Now, it strikes me that we are hearing ourselves talk an awful lot. We are not involving the audience in this.

Dr. Zinberg: I was misunderstood. I would just like to clarify.

Dr. Grinspoon: All right. And then we will get to the audience, Norman.

Dr. Zinberg: I just want to clear up a misunderstanding that Mr. Kellner apparently had, two misunderstandings actually. One is, I did not say that cocaine didn't do anything. I said that it didn't get you high if snorted in the same way that the other drugs did. In fact, to go back to one of Professor Szasz' earlier points, in early cocaine use, it can be advantageous as far as performance goes . . . . [P]eople may be emotionally at sea about a lot of things, but they are not stupid.

[T]he Hastings Institute put together a study of the impact of these drugs, whether they were advantageous and improved performance. And there was a growing body of evidence that cocaine on a short-term basis with minimal dosing does improve performance. All the athletes that are taking it are not fools. And many of them, if

you've interviewed any of them, will tell you that indeed it is very effective, until they begin to get into heavier dosing. Then it becomes disorganizing and interferes with performance. So that the people who begin to use it are not wrong when they use it to do a deposition in the late afternoon. In fact, it perks up their ears . . . .

Second, I would say that at least in my remarks, and I think in several other people's, we did address the demand issue. I certainly tried to address the demand issue, and if I was obscure, I'll try to clarify it a little bit . . . . It depends on what you think is the demand issue. If your goal is to stamp out all drug use, then indeed I did not approach the demand issue. If you think you can do that, I'm reminded of the comment . . . [that] "to attempt something which is inherently impossible is a denigrating task."

If you think about the demand issue in the sense that you would like to really pay attention and do something serious about the kind of terrible troubles people get into, which requires a certain amount of differentiation between use and misuse, then I think we indeed addressed the demand issue. I think cocaine is an extremely dangerous drug, probably — with the possible exception of cigarettes — the most dangerous drug. But I still think it has to be approached from the point of view of really thinking about how people get into trouble, which people get into trouble, and how to do something important (and quickly) about it.

Dr. Grinspoon: Incidentally, in the only true experimental work Freud ever did, he developed a crude dynamometer and demonstrated that cocaine improved his muscle strength, particularly when he was fatigued. He also developed a reflex measuring mechanism and demonstrated that it shortened reflexes when he was fatigued.

Now, the whole question of drugs which improve performance isn't nearly as much with us now as it's going to be in the future. They are in the laboratory now. There are being developed; and it seems to me that this is the debate which we are going to confront five or ten years from now.

Hopefully, by then we will have made more progress with the drugs we have to deal with now, but I can tell you that the drugs we have to deal with now are in a certain sense child's play as compared to what will be coming out of the laboratory in the not too distant future.

Now, unless there's some compelling — yes, Tom.

Dr. Szasz: I would like to add to what Norm said. There is empirical evidence on the demand issue. After all, it's an old observation that forbidden fruit tastes sweeter. Now, maybe you don't believe that that's

empirically valid. I think it is. Why should authorities prohibit something — an ordinary person might think — unless it's good for you? Surely, if it was simply bad, a warning would suffice.

Dr. Grinspoon: All right. Now, with that, we will entertain questions from the audience, please.

Questioner: The money from marijuana and cocaine relative to the moral fiber of this community . . . , because of the money generated by that—the bribery, the amount of social fiber being destroyed, has not been addressed.

Dr. Grinspoon: Well, I did address it in my statement. I see that as an important reason to try and develop another way of approaching this. It's the erosion of civil liberties. It's the erosion of moral values. It's all these things that are so terribly crucial and compel us to think of different ways of approaching this.

Dr. Szasz: I think the question begs the answer. If there were a free trade in drugs, Miami would not be the drug capital. It would be Minneapolis or God knows where. The problem the question addresses is due to the drug laws, not to the drugs.

Dr. Grinspoon: Well, I think he meant a larger community than Miami . . . .

Prof. Kaplan: I see the corruption and the example we set for young people that you can make lots of money and drive around in a Rolls Royce or a Porsche if you're willing to violate the law. These are very bad. They are the costs of prohibition . . . . We have to think about the other side, too. What is the kind of public health problem you will get if you give up the prohibition?

And what I'm saying, and as I've said over and over again, this requires hard work and hard thought . . . . You've got to look very carefully, and in the cocaine area, you're going to want to know how many people would use it if it were available in different regulatory schemes, what harms they would do to themselves and to other people, what would be the social dislocation. Then having done this, you have to figure out what will happen a generation down the pike . . . . Then you have to ask yourself on the whole, which is worse? Neither of them will be good. In other words, there will be no solution to the problem of drugs any more than there will be a solution to the problem of poverty or evil. You know, these unfortunately are with us. We have to reach the best kind of method of handling them that we can.

Now, one reason for the political arena . . . having an incapacity here is, as Tom Szasz pointed out to me in a whisper, and I will save him the trouble of repeating a brilliant point, that there is a kind of

escalation going on in the political arena. If somebody says he will reach an accomodation with drugs, the next person will say, well, I'll do better; I will make sure that there are no drugs. And the person who wants to prohibit will always be able to promise more than the person who wants to regulate. Sooner or later, we will learn that that's too simple.

Dr. Grinspoon: Other questions?

Questioner: I wonder if I may ask two questions, and then have a seat. Number one, . . . my sense is that the panel does not believe the pharmacological impact of marijuana is severe. The most recent information that I had heard, and this was just a week ago, was that there are about 150 carcinogens of the 450 odd chemicals in marijuana, which happens to be twice as many as in tobacco. And I wonder if the panel is relying on the 1982 information . . . or information that is more recent. And, number two, totally unrelated, we all pay about a dollar and-a-half to support DEA. That's their budget.

Dr. Grinspoon: Dollar and-a-half over what period of time?

Questioner: Per year. We pay $370 just to pay for the health consequences of drug abuse, legal and illegal. Is it the panel's consensus that if we take back that dollar and-a-half, that there would be a reduction, a straight line, or increase in the health care costs to the society?

Dr. Grinspoon: Well, let me take a first crack at the marijuana thing. Now, it's not new information that there are carcinogens in cannabis. It's been known for a long time that there are tars which contain carcinogens. Nobody is trying to make the point that cannabis is harmless. That's not true. Like any other drug, it has a potential for harm.

The important point is putting the harmfulness into perspective. One perspective is, given the inherent harmfulness of carcinogens, do they add up to the kind of harmfulness which is done to the 440,000 people a year who are arrested? . . . Or what it does to law enforcement in other areas? In the early 1970's it was estimated independently in both California and Illinois that it cost about $1,300 per cannabis arrest. Now, I don't know what that is in 1986 dollars, but it's clearly more. There is an enormous price. It is not harmless. But where does the balance come out?

Now, also, with respect to carcinogens in cannabis, they do not have nearly the importance of the carcinogens in cigarettes because it's estimated that it takes twenty pack years to arrive at the precondition which allows for the development of cancer of the lung. That means, smoking a pack a day for 20 years or two packs a day for ten years or

what have you. No marijuana smoker . . . smokes the equivalent of a pack a day . . . .

Do you want to speak to the second question, Mark?

Mr. Kleiman: Well, I don't think anybody regards the three hundred million dollar DEA budget or even the $1 billion to $1.5 billion total federal drug law enforcement budget as a strong reason to cut back on drug enforcement. (Though I would point out that it's a multiple of what the federal government is now spending on the AIDS problem, which is what we are going to be having a seminar on ten years from now.) It seems to me that the billion and-a-half dollars is relatively small change for this problem.

On the other hand, there are other problems for which we don't appear to be willing to spend that kind of small change. This is one of the few areas in which the Reagan administration has been prolific with federal money. I would not want to cut down on the total drug budget. I would want to redirect towards heroin and PCP and some of the diverted drugs which I think we can do something about.

The argument against drug enforcement is not what the federal government spends, but the side effects. It does seem to me that the side effects of marijuana and cocaine enforcement — increasing the wealth of criminals, by increasing the total revenues taken out of these black markets, and the side effects of violence and corruption and so on — are the things to be concerned about.

I wouldn't want to cut back on federal cocaine enforcement in order to save a couple of bucks. I want to cut back on federal cocaine enforcement because I think that the contribution of increased enforcement to preventing people from damaging themselves with cocaine are slight, and the consequences of increased enforcement in increasing the crime problem associated with cocaine may be more substantial than that. That would be the kind of argument I would make both about marijuana and about cocaine. Not that we want to save the bucks. We want to avoid the side effects.

Dr. Grinspoon: Also, one has to keep in mind that the drugs which cost the most money in terms of health care and loss of productivity and so forth are cigarettes and alcohol. Tom.

Dr. Szasz: This last question about hidden health costs reveals a tremendous selectivity, which is why I call the drug problem a scapegoat problem. If you look around, what do you see people do that really creates health care costs? Well, let's go outside this hotel. People lie in the sun. That causes basal cell carcinoma and it depresses the immune system. Now, that's just from sunbathing. How about diving into the

water? How about the hang-gliding? Skiing? How much do insurance companies, the government — directly or indirectly — pay for ankle injuries, for back injuries? Where does this chain stop? Why pick on cocaine? Human beings are engaged constantly in trying to overcome boredom and the best way to overcome boredom is by endangering yourself or other people. That's part of human nature.

Dr. Grinspoon: John.

Prof. Kaplan: Although on philosophical grounds I agree with what Tom says, the real problem is that . . . — and these are questions of degree — . . . drugs are different. What I mean to say is that . . . virtually no activity I can think of that is legal causes us as much trouble as alcohol use in terms of health care. Similarly, virtually no activity I know will cost us as much as illegal cocaine or illegal heroin, at least as I project it . . . .

If you take the number of people that we see at risk for . . . socially destructive kinds of things, it looks to me as if the kinds of drugs we are talking about are different . . . . Drano is something you can injure yourself with, but experience shows that by and large it doesn't really grip the public imagination. Cocaine is, I think, . . . different. So, although in principle I associate myself with Tom Szasz, when it comes down to the hard questions, I'm on the other side. I'm prepared to do something provided that its . . . benefits are not out of proportion to its costs . . . .

Dr. Grinspoon: Another question, please.

Questioner: Maybe I'm suggesting that we can talk for a moment about some good news. It was suggested this morning by several speakers that there's less problem with the opiates, heroin in particular, than there was some time ago. I remember in the '60's that the number one crime concern in the country was the pressing need to commit crimes to pay for heroin by addicts. Also the PCP thing was going on. I would like to hear a little more discussion about why the speakers think that may be and whether it is true and whether we can look for that to improve.

Dr. Grinspoon: Norman, do you want to address that?

Dr. Zinberg: . . . [A]s John Kaplan was just saying, I agree with Tom Szasz philosophically. I often feel a little different operationally. . . I hate to keep repeating myself, but people are no fools.

PCP was, I think, a made up problem. It had a blip, a very small blip, . . . much less than the publicity would have you believe; it's really not anybody's favorite drug. PCP is cheap. It can be eaten. It can be smoked. Anything can be done with it. So that when you couldn't get

anything else, you got PCP. For years it was sold as THC. It was sold as something else, because people really didn't like it very well. There are people, particularly young people, who just want to get high and get high on damn near anything, and then they would use PCP. But I think that the drugs that get general use and stay popular are popular for a reason: people do like them, often too much in a painful way, but they do provide something.

As far as the opiate use goes, it's a complicated, interesting question. Certainly, the treatment demand is down. There . . . is some evidence that the actual amount of opium in various forms, of heroin, being imported to this country is down . . . . [T]he Drug Abuse Warning Network reports about accidents, emergency room visits, and so on are down. Just how much use is actually down is the question. My own studies have been on controlled use. I have been studying so-called [heroin] chippers, people who use it occasionally. If I had to take a guess, I would guess that addiction is considerably down, but controlled use is probably not down. And that there are a significant number of chippers of opiates in this country . . . .

Dr. Grinspoon: Do you want to define chippers, please?

Dr. Zinberg: Chippers are occasional users. Chippers are people who use it once in a while without becoming addicted. In my study, I tried to answer the question whether all chippers are simply at an . . . early stage of addiction where people play around and eventually become addicted. This is the question, of course, everyone has asked. So, our study actually covered seven years following the people, and they had been using it two years before that. I think that's long enough to answer the question that chipping can be a stable form of use and is not simply a step on the road to addiction.

And I think as with most of the drugs in this country, marijuana, alcohol and so on, that there has been over the last six, seven years a greater move toward controlled use; that is, use within certain rules of use, use for a special occasion and so on, and not runaway compulsive use. And that's what I think has happened with the opiates.

Dr. Grinspoon: Just let me go back to PCP for a moment. You know, as Norman says, people are not fools. They learn. Now, PCP was first introduced as a drug on the streets in the summer of love in 1967 in Haight Ashbury, as a pill.

The results were so devastating — I mean, all these people were becoming psychotic — that the drug-using community immediately abandoned it completely until they learned that you could sprinkle it on parsley and marijuana and more or less control the dose.

However, that community is now discovering that the window for PCP which, as Norman says, is not all that desirable, is only between four and ten milligrams. That's very hard to control. They are observing that lots of people become psychotic or, as they say, crystalized, and I think it is again one of these slow learning curves. PCP is falling off because people are observing for themselves that this is a nasty drug. I predict that it will continue to fall off and just go out of existence before very long.

Mr. Kleiman: I would like to follow up on that. I wish I were as sanguine as you and Norman are about PCP. In fact, the most recent numbers I have seen on people showing up in hospital emergency rooms with bad PCP experiences doubled from 1980 to 1984. So, I don't see any evidence it's tailing off. They doubled to a fairly high level. There are 4,500 emergency room reports every year for PCP. It's not an enormous number compared to other drugs, but remember how bad a PCP experience is likely to be. Of those 4,500 reports, 250 are deaths.

So, I'm not at all sanguine about the future of PCP. It's true that sophisticated drug users, if you will, know better. But 16-year-olds frequently aren't sophisticated drugs users. And it looks like every new crop of sixteen year-olds can be relied on to make the same mistake.

Dr. Grinspoon: Well, I think that's 1984 data. The fact of the matter is that right now PCP users are definitely on a decline and that's true of — pardon?

Dr. Zinberg: I was agreeing with you.

Dr. Grinspoon: Yes. There's no question about that.

Mr. Kleiman: You mean, back to '80 levels or still above?

Dr. Grinspoon: Well, I don't know exactly what level, but clearly the curve is coming down and it's coming down quite rapidly.

Mr. Kleiman: Okay. On the opiate issue, things are a lot more complicated. A lot of what happened I think was simply on the demand side, that is, the younger brothers of the 1969-71 generation of heroin users said, "not me." And, in fact, the age of heroin users has been steadily increasing by almost one year per year since, so where a typical heroin addict in 1971 was 19, he's now 29.

Basically, you're dealing with the same cohort moving through the system. Increased availability over the last couple of years, partly having to do with world conditions, partly having to do with a shift of federal enforcement resources away from heroin toward marijuana and cocaine, seems to be both bringing some old addicts back, and for the first time over the last couple of years you have seen younger people getting back into the heroin system. And that's worrisome. It's not by

any means epidemic yet. The 400,000 or so chronic intensive heroin users, the junkies that we have left in the country, are still a massive social headache.

I've been involved in a couple of studies of the effect of street-level heroin law enforcement on property crime in two cities of Massachusetts, and the answer is that burglary and robbery went down about 40 percent as a result of street level heroin enforcement. So, I think it's the case that our residual heroin problem is still a massive headache in the cities where it occurs. But I think probably the best solution to that is intensive street level, that is retail level, law enforcement.

Dr. Grinspoon: Yes.

Questioner: . . . I'm a substance abuse counselor. If illicit substance abuse is a public health problem, rather than say a case of moral or spiritual or character deficiency in individuals, then why aren't more of the proceeds of seizure and forfeiture channeled toward treatment and education? Shouldn't those who profit from illicit drugs underwrite societal causes of treating those individuals and families who are damaged by drug abuse?

Dr. Grinspoon: Well, that's exactly what I put in my proposal. I agree. Other people. Leon.

Mr. Kellner: I agree, also. It is being done somewhat. The law that Congress passed did not provide for it. There is pending in Congress amendments to change the law to allow the use of forfeited assets to be used for drug abuse education, research and treatment. I agree one hundred percent. And it has been done already in New York.

Dr. Grinspoon: Yes.

Questioner: I'm with Upfront Drug Information in Miami, Florida. And my question is a multiple choice one, to make it a bit easier. During the past few years, one of the few real debates among politicians in Washington about what we should do about drug policy is whether we should have a drug czar or not. . . . [U]sing that concept, I would raise the question, if there were to be one person in the federal government, in the administrative, in the executive branch of government, to be charged with finding a breakthrough in this society's drug abuse problem, would you as members of the panel select the attorney general or the surgeon general?

Dr. Grinspoon: Like all multiple choice questions, how about "other"?

Mr. Kleiman: Can I have a third choice? I want to add Lowell Jensen, the deputy attorney general, who is one of the most sensible people in the country on this subject.

Dr. Grinspoon: Other answers? John.

Prof. Kaplan: It's sort of like asking which leg of the three legged stool is most important. The fact is that this problem has some facets which urgently require a health approach and a treatment approach and others which require law enforcement, and yet others which require just staying out and not making things worse . . . .

Dr. Grinspoon: Yes.

Questioner: One of the bases of drug policy is that the government is concerned with people taking drugs because of the risk to health, . . . yet the government puts paraquat on pot and people end up smoking poison . . . .

Also, without ether or acetone, the manufacturers are putting more poisons in the cocaine. And, also, without methaqualone people are making it with valium and PCP. Designer drug people keep on manipulating the molecular structure of drugs so that these chemicals are outside the law. With all these restrictions that are put on the manufacturing of drugs, it seems like it's putting people in more jeopardy . . . . How can the government justify these measures?

Dr. Grinspoon: It's a good question. Who would like to answer it?

Prof. Kaplan: I will try . . . .

That's one of the costs of criminalizing. There's no doubt about that. One of the costs of Prohibition was that you more often got methyl alcohol in the alcohol and that blinded people. When you repealed Prohibition, you got Schenley making liquor and they didn't put methyl alcohol in it and it didn't blind people. On the other hand, you got a very substantial increase in the cirrhosis of the liver, which was also bad.

So, the answer is, yes, I think we could pyramid the number of health issues. One of the things I find most worrisome is the fact that so long as marijuana is illegal, it will be sold by drug pushers. And this has two disadvantages. They are the same people who are much more likely to sell other more dangerous drugs, and, therefore, smoking marijuana becomes more of a gateway than it would be otherwise. . . . Secondly, when you put PCP on the stuff to make it taste better, you are likely to — for one reason or another — miscalculate the amount and then you have involuntary PCP intoxication.

One consequence of all of this is people use less marijuana than they would because they don't want to be poisoned. They don't want to take a chance . . . .

Dr. Szasz: I interpret this question, as I think it's fair to interpret it, in the framework of political philosophy. The question was very ele-

gantly framed to show the inconsistency of the government: If it is so concerned for our health, how can it put poison into something?

This points to the classic question: Do we view the state as a necessary evil, the less the better — or as a protective therapeutic agent, the more the better. Reagan keeps talking about getting the government off our backs. But that's pure rhetoric. He doesn't mean getting the government off our backs when it comes to drugs. Virtually everyone talks about having less government, but, in fact, wants more government of his own kind . . . .

The history of the world shows that the major thing from which people have died — more than from plagues, than from drugs — is from the actions of their own government. Think of the great religious wars; now it's the War on Drugs.

Dr. Grinspoon: Well, another question. Yes, please.

Questioner: The use of opium products is, I think, increasing worldwide; is it not? Britain is having an epidemic, France and even Italy for the first time; is this correct?

Dr. Zinberg: Yes.

Prof. Kaplan: I'm not sure about the first time for Italy.

* * *

Questioner: [Regarding addiction] the medical model was taken up and the disease concept . . . . I think you said, Doctor Szasz, that it's a mental illness; is that correct? No? It's a psychiatric problem?

Dr. Szasz: [Shakes head in the negative.] It's not a *problem*. It's a *phenomenon*. It's not a problem until somebody calls it a problem. Obviously, addiction is not a problem to the user. If it was, he would do something about it. . . . If somebody would think it's a problem, then they would try to fix it. The fact that they don't fix it means to me that *for them* it's not a problem, it's a solution.

Questioner: What Dr. Szasz says is, "no problem."

Dr. Szasz: I didn't say that, either. I said that when you talk about the problem, you have to identify the moral agent who *defines* the problem. A classic problem used to be a religious problem. Jones would say that Smith has the wrong religion. Smith wouldn't think he had a problem, but Jones would insist that Smith had a problem. Okay. So, what is the problem?

Questioner: I don't understand.

Dr. Szasz: Problems don't float around in nature. Problems are defined by human beings, and that is the beginning of our trouble: We

talk about a problem as if it was a natural phenomenon, like lead is heavier than water. . . . A "problem" is not a phenomenon in nature. It's a *social construct*.

* * *

Questioner: I'm a psychiatrist. If the methadone clinics have helped to decrease the problem of heroin, could that be an alternative to the problem of cocaine or marijuana?

Prof. Richards: You mean, maintenance of some form?

Questioner: Yes.

Dr. Grinspoon: Does anybody want to answer this question? The question was, if methadone clinics have helped with the problem of heroin, could there be some equivalent help with cocaine and marijuana?

* * *

Dr. Szasz: I answered that question about 25 years ago when I said that curing heroin with methadone is like curing addiction to scotch with bourbon.

Dr. Grinspoon: Yes, John.

Prof. Kaplan: Well, I have to know where to start. First of all, I think Tom is just dead wrong. It is not like curing addiction to scotch with bourbon because methadone is a different drug from heroin. It has two great advantages. It's much slower acting and, therefore, you don't have the problem of wide swings of mood and the like that tend to disable one, . . . nodding at the beginning and going into withdrawal every six hours. Second of all, it can be taken orally, so that you can have even less violent mood swings.

In other words, I think methadone is a very good drug for those heroin addicts who will stand for it. The problem with scotch . . . as a maintenance for bourbon, or vice versa, is that they both wreck your liver. Heroin . . . and the opiates happen to be relatively benign drugs. . . Heroin is quite socially destructive, partially because it's very short acting and, of course, most of all, I regret to say, because it's illegal, but —

Dr. Szasz: John, how can you do this to me? I thought you had a sense of humor? An aphorism has been defined as either a half-truth or a truth and-a-half.

Prof. Kaplan: Well, the trouble is that this is closer to ten percent. You know, this isn't half. If it were half, I would have laughed.

Dr. Szasz: It's better than half. It's one-and-a-half.

Prof. Kaplan: No, it isn't one-and-a-half.

Dr. Szasz: It is one-and-a-half in one particular way, which you are slighting. Heroin is anathematized by our government, whereas methadone is blessed. So there is a parallel: Scotch is foreign, alien, ergo no good; bourbon is domestic, familiar, ergo good.

Prof. Kaplan: Oh, I should never have underestimated the subtlety of the Hungarian mind.

Dr. Szasz: That's more like it.

Prof. Kaplan: Yes. Forgive me. It's still dead wrong, but there's a very interesting point to it. No, the problem though is that we don't know any drug that will, as it were, replace cocaine without being as destructive as cocaine or replace alcohol without being as destructive as alcohol . . . .

Dr. Grinspoon: There's another problem here, that is to say, a heroin addict who gets into a methadone maintenance or methadone detoxification clinic has to decide he wants that . . . . With marijuana, there are very few people who say, this is so destructive to me, I want to be able to do something about it . . . .

Yes, David.

Prof. Richards: I do regard maintenance as one of the regulatory alternatives worth thinking about. It obviously doesn't work in all fields, but it could work in some and, of course, we have, aside from methadone, no permissible maintenance in this country, which I think is very ill-advised.

There are lots of debates in the country over the English experience with heroin maintenance as to whether it would apply here, but it seems to be one of the range of regulatory alternatives which should be debated in this area . . . to move off the prohibitionist rhetoric, which I think is so self-destructive, self-defeating in this country . . . .

Dr. Grinspoon: Well, there was heroin maintenance in this country in 1924.

Prof. Richards: Sure.

Dr. Grinspoon: It worked so well, for example, in Shreveport, Mississippi, that the police chief who was very much opposed to it at first was very distraught when the government said we have to close that down.

Well, we have time for one more.

Dr. Zinberg: One more thing. I think one of the things that should be kept in mind is that detoxifying people from cocaine has so far been fairly easy as opposed to detoxifying them from heroin. While there are

relapses, all in all, efforts have been pretty successful. It doesn't feel so far like there's really the need for a maintenance drug for cocaine as there seems to be (correctly or incorrectly) with heroin addiction.

Dr. Grinspoon: Mark, briefly.

Mr. Kleiman: Let me make myself unpopular by speaking of antabuse. For those who aren't familiar with it, antabuse is a fairly old drug which reacts with alcohol on the blood stream to release formaldehyde. It is a sort of *Clockwork Orange* solution to the alcohol abuse problem. It just makes somebody who drinks feel very bad about drinking. I would never recommend it for someone merely who has a drinking problem. On the other hand, it seems to me that for those whose drinking is a problem to others — particularly people who get drunk and beat up somebody or drive their car around at a hundred miles per hour — it could be an alternative, for example, to imprisonment for driving under the influence of alcohol. Requiring someone to take the antabuse, that is in effect sentencing him. Not being able to take a drink for the next three years may be a good solution to protect the rest of us. If it's somewhat punitive for the drinker, that seems to me not a bad thing.

Prof. Wisotsky: I just want to set the agenda for when we return. It seems to me we have canvassed a pretty broad range of alternatives to the status quo. They include everything from a regime of stricter and more intensified law enforcement to decriminalization, to legalization . . . and taxation, to medical (prescription) dispensation and . . . to addiction maintenance.

And what I think we need to do when we come back . . . [is to] get down to the hard work of talking about movement. How do you produce some social or political movement away from the status quo if, as I sense, there is substantial consensus that what we are doing now is either unprincipled or ineffective or both. So, the question is, where is the path for the breakthrough?

And we will come back at 4:00 o'clock.

[Continuing after a short recess]

Dr. Grinspoon: We would like to begin now the final session of the symposium. And, as a way of beginning, we would ask . . . each of the panelists to give us, as someone said, his Betty Crocker recipe or his prescription for what should be done about this situation. And we are going to start at one end of the table and just move across. So, let's start with Mark Kleiman.

Mr. Kleiman: Recipe with no analysis. Increase spending on antidrug propaganda in the schools, concentrate on the two gateway

drugs, nicotine and alcohol, with a lesser emphasis on marijuana. Cut back very substantially on Coast Guard interdiction activities; switch Customs drug activities from trying to interdict dedicated smuggling airplanes and vessels (usually loaded with marijuana and cocaine), back into the ports and airports, where they may pick up some heroin. Worry about passenger body carriers and about shipments in freight. Cut back in other ways on high level marijuana and cocaine enforcement. Put the resources into street level heroin enforcement, into worrying about PCP labs, and cracking down on abuse by physicians and pharmacists.

Dr. Grinspoon: Did you mean propaganda in school, or education?

Mr. Kleiman: Well, propaganda. That is to say, regarding cigarettes I would hit some on the informational side with respect to effects on athletic performance and on appearance. No point telling a 14 year old about lung cancer; it's just not effective. And I would hit fairly hard on emotional things, essentially playing on their sexual insecurities; tell them they are never going to get laid if they smoke.

Dr. Grinspoon: Even though that is against the common wisdom and perhaps even the truth.

Mr. Kleiman: I would remind you of what Oscar Wilde said after the Boer War. He said, you will never eliminate war by telling people it's wicked, you will only eliminate war when you convince them it's vulgar.

Dr. Grinspoon: I think that we will just . . . sweep through the whole panel with prescriptions and then open it to discussion. Norman.

Mr. Zinberg: I would like to put the greatest emphasis on the demand side in the sense of finding ways to reduce demand for abuse. . . . I would like to see the excessive use of any substance be made unseemly; that rules for use be propagated; that we try disengagement from the war by trying to see what works in this direction and try to minimize the attempt of law enforcement to be destructive; to try to bolster the attempts of people to find reasonable ways to use intoxicants; and to do away with those intoxicants which are very difficult to be used reasonably, such as cocaine.

A long time ago I wrote that a good law is a law that deters as many as possible and punishes as few as possible. A bad law is a law that deters few and punishes many. I think that's still true.

Dr. Grinspoon: Leon.

Mr. Kellner: First, I would increase our diplomatic efforts, especially with source countries in order to reduce the supply that is coming to this country. I would maintain our law enforcement efforts, both in

an effort to reduce the supply and . . . as an educational tool. And most importantly, I would employ every possible method . . . to educate and teach people about the harms of drugs. I am not as pessimistic as some. I believe that use can be reduced, rather than simply abuse.

Dr. Grinspoon: As for myself, I have already presented my prescription this morning and it's published in the little book. . . . [A]s something which could be done immediately to alleviate the situation, . . . I would legalize the use of marijuana for people over the age of twenty-one tomorrow.

Tom.

Dr. Szasz: Well, I very much welcome this chance to answer this particular question because, from what I have said, it may not be so easy to infer what I had in mind.

I have two related recommendations. One, long range, and the other, short range, that is, what can be done tomorrow. I think what can be done tomorrow has to be highly practical. The long-range goal is ideological; it has to do with the kind of society we want or want to move toward. I think it would be desirable to move toward a society in which we have citizens who exercise a maximum amount of self-control with respect to what they ingest, inhale, and inject, and who are placed under a minimum amount of external coercion. This seems to me the original American ideal of the kind of society we should have. Accordingly, long-range, I would like to see virtually all drugs treated the same way we now treat food — which does not preclude certain kinds of regulation. But the regulation would not be ad hoc; and it would be minimal. It would be enforceable. There would be nothing sensational about it, nothing hysterical. It could not be used by anyone seeking political office. It would be something quite uninteresting and relatively technological, like prohibiting putting some obvious carcinogens in bacon or something like that. That's the long range goal.

Now, what could be done tomorrow? This is a very interesting question because this country is, for better or worse, a democracy, which means that democracy rules: which means the rule of popular prejudices and stupidity, at least in some areas. Now, the fact is that most Americans seem to want some kind of drug prohibition. So we have to start there. All right. If they *really* want prohibition, then let them pay for it. Directly. Not through taxation. So we should try to get the government out of this business of "drugs." If the American people are *really* so concerned about drugs, then they ought to be willing to pay for drug education themselves, just as they pay now for illegal drugs. There's an old saying, you value what you pay for and you pay

for what you value.

If people would not voluntarily pay for whatever it is that they call drug education, that would prove to me that they don't want it. We cannot know what education people really want until we get the government out of it. The government is a monopoly on coercion. It's not an instrument for education.

So, my immediate goal would be to get the government, however gradually, out of the drug business — which is exactly the opposite of what the gentleman on my left suggested. The more government we put in, the more we de-power, weaken the individual. I would seek to empower the individual.

Dr. Grinspoon: Thank you. John.

Prof. Kaplan: Okay. I have my prescriptions. First, unlike Lester, I would decriminalize marijuana yesterday — have no penalty for the user of the drug, no fear of arrest. To his tomorrow, I would license the sale of marijuana, simply because the harm that the law is doing is worse than the harm that the drug would be doing.

Dr. Grinspoon: How is that unlike what I said?

Prof. Kaplan: Well, you wanted to decriminalize marijuana tomorrow.

Dr. Grinspoon: No. I wanted to legalize it.

Prof. Kaplan: Yes. You were talking about a penalty for the user.

Dr. Grinspoon: No. No.

Mr. Kleiman: He wants —

Prof. Kaplan: The record will show I'm correct.

Dr. Grinspoon: Well, that's legalize.

Prof. Kaplan: Would the reporter read the transcript, please?

[I recommend] decriminalizing marijuana yesterday in the sense of no penalty for possession and legalizing it tomorrow. I would agree with Mark; there should be more street-level enforcement for the heroin laws.

I would allocate . . . far more money for treatment of what drug abuse we can, mostly for the drug that we are best at treating, heroin, even though it's not very good. For cocaine, well, we are better than we were. I would invest a good deal more, and more intelligently, rather than just spending more money, in education . . . about all drugs.

Alcohol and tobacco are clearly the places to begin because if you don't, your credibility on marijuana is destroyed, which in turn destroys the credibility of all drug education.

I would flatly forbid all advertising of habit-forming drugs in the mass media. Habit-forming drugs are, of course, the illegal ones, but if

marijuana were legalized, I would forbid advertising of it in the mass media. And I would also forbid advertising of cigarettes and alcohol.

Finally, there's an awful lot we don't know about this. And, therefore, the research component, finding out just what the laws are costing us and trying to make predictions as to which methods will in the long run be most effective against the more serious drug problems like cocaine and heroin, PCP and the like.

We have a lot more studying and thinking to do about these drugs before we really, with any confidence, can make changes. And though I think changes eventually will be made, I want to know what I'm doing before I try to do it. Finally, of course, there's an entirely different level of how we are going to talk the American people into doing it, you know, once you understand what the smart thing to do is, and the answer, it beats me.

Dr. Grinspoon: David.

Prof. Richards: I think my long-term goal would be to separate the question . . . of the use of drugs from the question of the proper use of the criminal law. It seems to me as regards the latter question the proper use of the criminal law . . . [would be] a neutral theory of secular harms of a sort of health-based kind.

It is, I think, just hypocrisy to justify American drug policy today on health grounds. It cannot be justified on such grounds . . . . I don't believe the criminal law has any proper place in this area when the health arguments are dubious, speculative, overdrawn and completely ad hoc and impressionistic, without resting on any neutrally applicable theory of harms.

On the other hand, the question of whether one should use drugs, how one should use them, in what circumstances, strikes me as a question which has to absorb everyone's interest in the value of living, and we all need the best information, the most honest information, a free and frank and not hypocritical dialogue on these questions; and obviously, drug use is not an answer to finding the meaning of life. I dare say it would be better to read Shakespeare than to get high on a lot of drugs. That's my own view in general.

And I think a society should make available to people a sufficiently rich conception of finding value and meaning so that drug use would not be an absorbing matter to most Americans . . . . An appropriate attitude to education, an appropriate attitude to the use of culture, an appropriate attitude to social policy in general makes life a sufficiently rich and various experience so that children would not find it plausible to take drugs. They would have alternative ways of engaging their im-

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agination and their sense of meaning in life.

To me, it's the sign of an impoverishment of a society when it believes it can justify prohibitory drug laws on the basis that it is the only way to stop their children from using drugs. That shows a certain ethical bankruptcy, it seems to me, in family life and in the capacity of the educational system to do their jobs in giving a plausible, rich conception of value in living to children. From that point of view, the invocation of this argument strikes me as tragic, empty and stupid . . . .

. . . This seems to me to be a long term goal. I think my own view as a short-term matter would be to try experiments in decriminalization. Obviously, it seems to me marijuana would be one experiment worth trying to see what it would do in terms of other kinds of decriminalization, and I would support that.

I would also think that experiments with heroin maintenance or the use of heroin for terminally ill patients, which Norman Zinberg has mentioned, is also something we should begin experimenting with to move the nation beyond this obsession with . . . prohibitionist drug policy, just to try to suggest to the American imagination that there are alternatives which may lower the level of harms, increase the level of goods, and not get us engaged in what I really believe to be . . . wars of religion, a highly controversial dispute over how you find value in living.

. . . In this, I agree completely with Tom Szasz: I don't believe the state has any proper role in adjudicating these disputes when there is no sound theory of secular harms on which it is grounded. This is essentially a kind of ideological dispute between different values, different generations, different visions of living. That is something that I think in a liberal society we cannot allow our society to impose on citizens. It is not a legitimate use of state power.

Dr. Grinspoon: Thank you, David. Steve.

Prof. Wisotsky: My primary interest is in achieving some kind of breakthrough . . . .

Any student of the martial arts knows that the way to deal with force coming at you is not to push back, but to go with it, to ride the horse in the direction it's going.

And so, what I suggest then is to take the rhetoric of the War on Drugs at its face value and have an outraged citizenry demand of their congressmen, [former] Senator Hawkins, and the others, that if we are at war, then why the hell aren't we fighting this war in a serious and systematic way?

Do you know the entire federal drug enforcement budget is only

$1.5 billion? That is a sum supposed to police an entire drug industry of one hundred billion dollars. And think about our trillion dollar budget. What are we dealing with? One tenth of one percent of the total federal budget? It's not even close in terms of the order of magnitude that would be required to address a problem of that size.

So, for the outraged citizens, for the parents who are concerned about the protection of their children, and for everyone else who wants to do something about the drug supply, clearly the way to go is to have more enforcement — more of it and have it quick, have a quick acceleration that will parallel the rapid decline of a cocaine addict who will suddenly crash and then seek some sort of treatment.

Part of this intensification I think has to include a full court press against the users of drugs. The quickest way to drive home the unpopularity of a law is to enforce it fully against the citizenry. As Dr. Szasz pointed out, the War on Drugs is not a war on drugs; it is a war on the American people by their Government.

Drugs are simply inanimate objects. It's the people that take them. You've got twenty-four or so million marijuana smokers, ten to twelve million cocaine users. I don't know how many heroin users and how many pill users. And when you put them all together, you've got a very substantial segment of the population. And not only that, it's a large percentage of the population under middle age, a large percentage of the youth.

I think nothing would quicker turn the War on Drugs around than to have our jails filled with eighteen, twenty-five, and thirty-five year-olds who are using illegal drugs. And we have had these drug sweeps recently in this community. In a single day, police can go and make hundreds of arrests for possession. It's very easy to do.

So, I think we ought to take all the police off all the burglary details, all the robbery details, all the murder details, and put them into very aggressive, very intensive enforcement against the drug "crisis" so that we can work the thing out to its logical conclusion.

Dr. Grinspoon: All right. Now that you have heard the array of solutions, what are your thoughts about it? Do we have some other thoughts and questions about it?

Questioner: As I listened today, I was really quite impressed by the amount of feeling that all of you have about this subject and how common this feeling is . . . .

Prof. Kaplan: You happen to have here people who have spent a very sizable percentage of their adult lives working on a problem of considerable public importance and one where at least many of them

believe that public policy is misguided . . . .

Dr. Grinspoon: David.

Prof. Richards: I think there's a deeper question involved that we really haven't discussed all day, and that is the social history of American attitudes to drug use, about which a number on this panel have written, although we didn't discuss it today.

It's not an accident that the drug issue is a potent political symbol in the United States and that politicians are absolutely enthralled with and can't really disengage themselves. It's impossible to take a responsible position on drugs as a politician in American today. That's part of our tragedy, I think that our culture is full of hypocrisy and deceit and we know it . . . .

Why does this issue have such extraordinarily potent symbolism, why are politicians currently able to use it in the way they do? I think that's a very deep question which goes very, very far back in American cultural history.

I think right from the beginning you find people like Rush, a signer of the Declaration of Independence, taking a profound view opposed to intoxicants. It's long been held in American Protestant culture that all intoxicants are bad and immoral because they violate a certain highly religious conception of the proper use of our bodies.

And that has been a recurrent theme in American religious culture. I think it led to prohibitionism, which was essentially motored by religious ideals of a certain very specific kind in this country. I think that view can still command a great consensus. By contrast, this is a country which has contracted the use of the criminal law in many controversial areas involving sexuality, involving the right to die, etc. . . .

It appears to cut against the very deep set of commitments that Americans have and that politicians can call upon involving questions about how you should live your life. If you are a good American, you may perhaps drink, but you don't take any of these other drugs which are illegal. The fact that that cultural history has such a potent hold on America is an important issue . . . .

And the theory of harms is completely hostage to our own patterns of drug use, . . . just one set of class attitudes dominating other attitudes. There is no neutral theory of harms underlying them. I think . . . the drug issue is a very powerful symbolic issue in America. Very deep.

Dr. Grinspoon: Steve.

Prof. Wisotsky: Yes. I wanted to comment about the feelings. A lot of what I just said, I said tongue in cheek, and it's animated by my frustration at what I see as really a terribly misguided force in the

direction of governmental policy for many, many years, and it continues to get worse and worse.

And the thing that bothers me most is that there's just no intelligence in it, nor any willingness to have any intelligence about the issue. You know, we are doing here today in this little symposium what the federal government should be doing. . . . [D]espite the fact that we have the leading thinkers in the drug control field in this room, still we don't have the resources of the government at our command. And there was such a tremendous opportunity for the President's Commission on Organized Crime to take a critical look at what could be done to reform drug control in a constructive fashion. And instead of doing that, they had these ridiculous dog-and-pony shows with hooded witnesses and you learned that so many pounds of $20 bills equals a million dollars. . . . [I]t just really bothers me that there's such a blindness to the consequences of drug enforcement and an unwillingness to ask whether we can't do better than this.

* * *

Dr. Zinberg: . . . I think Freud was right when he said that the two most important things were to work and to love, sex and the development of some functional capacity. If you go beyond that, particularly with the decline of religion, what we ingest is really the thing that spends most of our emotional energy. What we take in, with whom, under what conditions, how much and so on — an amazing amount of our time is really given over to that. . . . So, it's an emotional issue for everyone which remains hidden. I don't think we acknowledge how intense an emotional issue it is.

Dr. Grinspoon: Yes. Your question.

Questioner: I feel that the disease concept of this particular problem has been highly overlooked. . . . I think that this is a medically proven, scientifically established fact that the disease concept [applies]. . . . Insurance companies, doctors, and other people wouldn't be expending the funds they are if this wasn't validly established as a disease. . . . I think this deserves the highest consideration this nation can give it in order to get to the crux of the problem, and I would like to hear what the panel has to say about that.

Thank you, very much.

Dr. Grinspoon: Okay. Does anybody want to comment on the concentration of the disease or crime models?

Prof. Kaplan: Gee, if nobody else will, I will. What is a disease is a

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very complicated business. The question you really want to ask is, will it advance your thinking? And will it advance your public policy if you call something a disease? When you really get down to it, the Lord didn't make diseases and he didn't make categories in the world. Categories are made by human beings.

For our purposes, it makes sense sometimes to call something a disease and doesn't make sense for others. One very good reason for calling something a disease is that you can get health funds if you do. Another reason for calling something a disease is because, if you do, you can talk people into coming in for some kind of help. We call it treatment, but that's part of the same analogy.

[A]nother advantage of calling it a disease is that people who have a disease don't have to feel they are responsible for the harm that they did while they were diseased . . . . These can be advantages of calling something a disease, but there also can be disadvantages. There may be reasons why you want people to say, "No, this wasn't a disease, this was my doing, I did it, and I am responsible for it."

[T]he disease concept, most particularly with alcoholism, certainly commands the public ascendancy today. [But] a very substantial number of people, still fairly quietly, are saying that alcoholism is no more a disease than bad driving or a lot of other things that cause a lot of problems to people.

Now, Tom, why don't you take over here because you're Mr. "Not a Disease."

Dr. Szasz: Well . . . you have answered this brilliantly . . . . I agree.

Prof. Kaplan: Make sure we get that down on the tape, please.

Dr. Grinspoon: Yes.

Questioner: [Y]ou've said nothing about such drugs as MDMA [known as "ecstasy"], which some persons have used to explore, . . . not necessarily for recreation, but [to] learn something . . . .

Dr. Grinspoon: Well, let me comment on that. MDMA . . . was first synthesized in 1914 by the Merck Company and patented by the Merck Company as an anorectic drug. And, indeed, one of its consequences is anorexia for a period of about twenty-four hours. However, when the Merck Company discovered the other effects of this drug, they immediately abandoned their interest in it . . . .

Now, . . . the kind of interest that we have now actually began in the 1950's when the Department of Defense, in its never ending search for better ways of destroying people, looked at [it]. . . . [S]ome of these people taking it themselves discovered the quite unusual effects of

MDMA.

And over the course of the '70's and into the '80's, a number of therapists began to use this drug as an adjunct to insight-oriented psychotherapy and believed that it had a utility there. At the same time, mostly young people . . . have begun to use it on the streets. The DEA became interested in this drug last . . . year, and . . . in June of last year, on an emergency basis, put it in Schedule I [no legitimate medical use].

Now . . . when the DEA announced its intention to put it in Schedule I, four of us, believing that that there may be . . . some utility to this drug and in any event believing that it ought to be researched (and a Schedule I drug is very difficult to research), challenged the government. That challenge is now [pending] . . . . If the DEA prevails, it will remain permanently in Schedule I. If we win this case, then its fate is uncertain. The DEA does not have to follow the ruling of the administrative law judge, but if they do not, then they risk having us take it to a court of appeals . . . .

You see, it's curious because really the DEA and we have exactly the same kinds of concerns as far as young people using this drug before we know very much about it. Where we differ is how to get that information. We are interested not only in whether it does have a therapeutic utility, but, indeed, what are the deleterious effects. It's hard to imagine a drug which is as interesting as this is absolutely free of charge. However, . . . if it remains in Schedule I, we will not be able to do it in the laboratory. The data will come from the streets and street data is not very good data. Ultimately, it's a cost-benefit analysis and we believe the best way to do this is in the laboratory.

Mr. Kleiman: Can I follow up on that?

Dr. Grinspoon: Yes.

Mr. Kleiman: Given a decision not to place MDMA on Schedule I, what would that leave as a residual control regime? The problem is that it's not an FDA approved drug. There's no prescription regime for it. If it's not scheduled, then you can get back to the situation where people are selling distributorships in ecstasy [MDMA]. So, it seems to me, it's not entirely fair to say that DEA is not interested in research. It may be true, but it's not the only interpretation of their view.

Dr. Grinspoon: No. We never took the position that it should not be scheduled. My position was, it should be scheduled at the level of Schedule III, which gives the DEA the opportunity to arrest people who peddle it, and who use it, . . . but does not impede research into this drug. It certainly should be scheduled.

Mr. Kleiman: The legal problem with that is, how can there be an accepted medical use for a drug that's not, in fact, FDA registered?

Dr. Grinspoon: Well, then you get into the kind of tautology which I don't think we should get into how to define accepted medical use . . . .

Questioner: I'm a public defender and I guess in a negative sense I make my living out of the drug laws, although I suspect if we eliminate it, I would have to be an honest lawyer and make a living out of whiplashes.

This is directed towards Mr. Kellner, but it also follows up on what Steve Wisotsky said: Drug laws essentially are *malum prohibitum*. They are not in and of themselves acts, such as theft or murder that are *malum in se*, . . . bad *per se*. They are elective laws. And, therefore, we have to balance whether we want those laws based on . . . the price of trying to enforce the law.

I take issue with the fact that we are winning the war, other than using Vietnam kind of body count standards. If you got twice as much at half the price, it certainly sounds like you're losing the war. The question I ask you is, how much in resources would you want? What do you want before you will finally conclude that you either won this war or it can't be won? . . .

Mr. Kellner: I never said we were winning the war. I said we had a strategy that hopefully would reduce drug use. When you said, how much money do I want, you are, I assume, referring to how much I would want for law enforcement purposes.

. . . I stated that the most important thing that . . . must be done in order to successfully reduce drug use in this country is on the demand side. It is money to be used for research. It's education, not only at the federal level . . . but throughout the governmental spectrum and the social spectrum, that assets have to be used to educate to insure that drug use is reduced.

Now, how much money is necessary for that, I can't answer. I'm not a policy maker. I'm not in Washington. I don't have to weigh . . . the balances between a variety of competing goals that must go into the federal budget. If you ask me how much, in a utopian world, [I would say] as much as needed. But there has to be a balance. [T]here are other pressing needs at all levels of government that have to be taken into account. I would want every penny possible.

Questioner: Well, how about a hundred billion dollars a year? Would you like a hundred billion dollars if that's what you needed?

Mr. Kellner: That's silly.

Questioner: I am trying to understand how much you need. . . . I mean, what if we just simply had a constitutional amendment that repealed the fourth amendment? Would you want that? Is it worth it to repeal the fourth amendment officially, so as to achieve your goal? You're shaking your head.

There are many police that think it would be important to repeal the fourth amendment as a way of stopping that, and if you don't believe that, you don't talk to the police in this state. I know many police who think that the fourth amendment is a joke; if we could only repeal it, we could stop drugs.

Mr. Kellner: Well, I am one lawyer and federal prosecutor who doesn't believe that.

Questioner: Thank God.

Mr. Kellner: And I believe . . . that the Constitution is probably the most important tool that I have to use. I believe that the laws that we enforce obviously stand up to that standard. I believe, however, that drug abuse is a problem and I believe that as much money as possible should be accorded to that problem.

Questioner: And no amount of money would ever convince you that this is a losing proposition? Nothing the government could do could ever convince you it's a losing proposition?

Mr. Kellner: At this point, I'm not prepared to say that we have lost. I'm more optimistic. I believe in the general good and the general intelligence of people and ultimately through education I believe that we will reduce it.

Dr. Grinspoon: Steve.

Prof. Wisotsky: I . . . think the problem is really a philosophical one. When you say, Leon, that the answer really lies on the demand side and we are going to do something about it, we meaning the government.

Mr. Kellner: No. When I said we . . . I didn't mean the government. I said we, as a society, have to do something about it, the demand side.

Prof. Wisotsky: . . . An individual takes drugs or does not take drugs. And it seems to me there's a real fundamental conflict between an ethic that focuses on individual responsibility, individual accountability, self-restraint, and all of that, and one which says, the police, state government, local government, federal government, whatever, is going to make sure that you do what you're supposed to do.

Mr. Kleiman: It seems to me it's a little oversimple to say that individuals take drugs as if they weren't influenced by their society.

After all, individuals choose the clothes they wear, but you could have reasonable confidence this morning that I wasn't going to come in wearing a kilt or a toga because I would look out of place. In fact, you could have guessed relatively accurately what I was going to wear to this occasion, without knowing anything about my preferences. And it seems to me that just as what we wear is largely socially determined, what we do in terms of intoxication is largely socially determined.

Prof. Richards: Which way does this cut? I mean, I hesitate to mention this when Norman Zinberg is at the table, since it's one of the central points of his work . . . . Attitudes to drug use are heavily shaped by cultural attitudes. There's a big confusion of the pharmacological and medical evidence with cultural attitudes . . . . [If] different social attitudes to drug use would substantially ameliorate the harms of such use, . . . that would suggest you should change the laws in such a way that would change social attitudes or lead to the formation of cultural attitudes, whereby the forms of drug use would be shaped in ways which are less harmful and more beneficial.

Mr. Kleiman: Conversely, it's not strictly speaking the case that an individual's drug consumption, even if it has only subjective consequences rather than behavioral consequences, only damages that individual. Twenty years ago, 14-year-old girls didn't smoke. Today 14-year-old girls do smoke. Some of the damage today's fourteen year-olds do to themselves should be charged to previous cohorts of fifteen and sixteen year olds who, collectively, lowered the age of female initiation to smoking. There's a social process of learning to use drugs. I think it's much too simple to say, oh, well, individuals choose to use drugs, that must mean that is what they want to choose to use. Those choices are made in a social setting. One of the functions of prohibition is to cut down on the environmental level of drug use to make it easier for individuals to make a choice not to use. I don't claim that every act of prohibition is therefore valid. But it seems to me, you can't ignore that as a major benefit.

Prof. Richards: But if the social setting is not tuned to harms I think everyone on this panel has said that, more or less, the prohibitionist laws don't correspond to any acceptable theory of harms. You, yourself, conceded that.

Mr. Kleiman: I conceded no such thing.

Prof. Richards: In your opening remarks.

Mr. Kleiman: No. No. Hang on. What I said was that increasing the level of enforcement did not have a demonstrated effect on consumption. Therefore I thought that an *increase* in the level of enforce-

ment was unlikely to be a good policy. I don't for a moment think that we lack evidence about the harms of cocaine or alcohol adequate to support any level of prohibition we think we can, in fact, enforce.

Now, with respect to alcohol, that turns out not to be making it illegal. We tried that. It didn't work either. On the other hand, if I can get back to my Betty Crocker recipe, the one thing I left out was tripling alcohol taxes and getting the beer tax up to the booze level. Now, I think anything we can practically do to discourage alcohol use is fully justified both by the effect of alcohol or alcohol users, and the effect of alcohol users' behavior on other people. With cocaine, the behavioral effects are less severe, but the health effects appear to be more severe, and I think there's a perfectly adequate theory of harms to justify that prohibition.

Dr. Szasz: Well, I have just a brief comment. This may not be a very nice thing to say about America, but I'll say it anyway. It's not such a bad country, especially if you compare it to Russia or some banana republic. But if you don't, then it's not all that great. It seems to me that for far too long, the people as well as politicians in this country followed the rule that if you feel helpless about a social problem, then you might as well pass a law against it. Even Jefferson did this. He felt helpless about slavery; so he proposed, and brought into being, a law prohibiting the importation of slaves. That was around 1800. It was easier than abolishing slavery. It also left open an easy way to manufacture more slaves, right at home. That's what I call ambivalence. Now we, as a nation, display the same ambivalence about drugs. Everybody screams about how bad drugs are and how they should be prohibited. But then why are so many people taking drugs? The fact that so many do means that that's what they want. People from East Germany try to go to West Germany, not the other way. Similarly, Americans want marijuana and cocaine, not lithium and thorazine. Doesn't that fact count for something?

Mr. Kleiman: That's the same argument as saying that everybody in a football stadium prefers watching the game standing up to watching it sitting down because at the moment of the big play, everybody stands up to see better.

Dr. Grinspoon: Yes.

Questioner: I practice law in West Palm Beach and I have a couple of observations. Number one, I want to thank the panel in humorous and kind terms for waking me from my dogmatic slumber because I hadn't really considered an alternative to criminal sanctions. A couple of observations though. The general tone of the physicians on

the panel seemed [to be] that the recreational use of drugs is okay . . . . The chipper, that's the specific thing I had in mind. This seems to me to conflict with . . . [the idea] that the first stage of alcoholism, and I think this applies to any other addiction, is use for relief. I don't know anybody who uses cocaine or anything else . . . who does not use it for relief to feel better.

Dr. Grinspoon: Thank you. About your comment that the physicians think recreational drugs are okay, I think that that's not quite, if I may speak for the other physicians, not quite the way we feel. I think it's a question of what drug, under what circumstances, by whom. One can't make a general statement like that. Does anybody else want to respond?

Dr. Szasz: I had hoped that my position on recreational drug-taking was clear. Self-discipline means that self-damaging recreational drug use is no more okay than is any other kind of self-damaging behavior — such as pouring too much salt on your food or eating too much ice cream. Let me say, in this connection, that I am amazed how much the average American seems to have assimilated and made his own the awful joke about totalitarianism — namely, that a totalitarian government is one in which everything that is bad for you is prohibited, and everything that is good for you is prescribed. Think about it. How many Americans now seem to believe that if the government does not prohibit a drug, then it's "safe" to take it. For me, being in favor of getting the government out of the drug-prohibition business is like getting the government out of the religion-prohibition business was for Jefferson. He was not in favor of Americans becoming Mohammedans or Buddhists . . . .

Prof. Richards: [F]reedom isn't worth much if you don't have a choice between different patterns, some of which aren't very good for you and some of which are.

Dr. Zinberg: I certainly didn't mean to say that recreational drug use was or was not good. . . . I wanted to indicate the complexity of the issue of stamping it out. For example, let's take occasional recreational use of cigarettes. I think the evidence is very high that if somebody has smoked 14 cigarettes within a certain amount of time, their chances of becoming addicted are something like eighty percent. I'm not sure what that range is with cocaine at this point. I guess the five to thirty percent that Lester mentioned [is] . . . a fair percentage of those who use it recreationally. The issue is to learn something about how people sustain occasional recreational use, what are the factors involved.

Certainly, we have evidence that with alcohol, people are able to

maintain a sustained pattern of use as chipping, in most instances (ninety-five percent of it) without too much difficulty. That may be less true of other substances. But above all, I wouldn't want to oversimplify it, either to say that it's okay or that it's not okay, . . . and therefore we have to clamp down . . . .

Mr. Kleiman: Can I make a comment about recreational alcohol use? It does seem to be the case that only five or ten percent of American alcohol users are compulsive alcohol users. Either they have a clinical addiction — they get withdrawal when they stop — or they have psychological compulsions that lead them to drink more than they report that they want to drink. But I don't think that exhausts the problem population with alcohol.

What I understand from my undergraduate students is that they regard a six pack on a Friday night as a social level of alcohol use. Well, there's enough evidence to suggest that downing a six pack every Friday night reduces your IQ a couple of points. This suggests to me that they don't understand what controlled alcohol use would look like. And I think we have a much larger fraction of our hundred million drinkers — particularly the teenagers — in problem use patterns than the sheer clinical data would lead you to believe.

Dr. Grinspoon: All right. Yes. This may be our last question. Make it a good one.

Questioner: I'm a student at Nova Law School and I would like to direct this question to Mr. Kleiman. I would like to know where the prohibition based on harm stops. It seems to me that if the justification for the War on Drugs is to protect the American health and well-being, the government in its paternalistic wisdom will put me on a diet and mandate exercise for me to wipe out heart attack and stroke, or outlaw dangerous activities like motorcycle riding and the like to protect the health and well-being of the citizenship.

Mr. Kleiman: It seems to me to some extent you answered your own question. Think about the regulatory problems of putting everybody on a good solid 2,000 calorie diet and requiring a half hour of exercise every morning. It's probably easier to restrict access to a relatively limited number of mind-affecting substances than to do other health-related things. With respect to banning motorcycle riding, it seems to be pretty extreme. I don't have an objection in principle, and I don't know whether you do or not, to requiring helmets.

It seems to me that's a fairly similar case. The harms are obvious. The choice is also obvious. There are a lot of people who prefer to ride their motorcycles without helmets. And there are two arguments for

requiring helmets: one is that people just don't know how bad the harms are likely to be; and the other is that it costs a lot of money to support the vegetables. The answer to your question is that the time to stop prohibiting is when the costs get to exceed the benefits.

It's perfectly reasonable to conclude, as John Kaplan has concluded, that costs exceed benefits in the prohibition of marijuana. I would expect a bigger increase in marijuana use from legalization than John would, but he makes a perfectly reasonable argument. You can make the argument about cocaine, but I think the costs are just enormously higher. So, I think the answer is like all practical lines, it's drawn on practical grounds. It's obviously easier to say, look, there's a bright line, we are not going to restrict any private behavior, but I think that turns out not to work.

Dr. Grinspoon: Well, John.

Prof. Kaplan: . . . I regard freedom as a value, too. But regrettably in a complex society it's not the only value. . . . [I]t's not a purely practical issue of what you prohibit . . . but it is in great part a practical one. And when you consider human freedom a practical value, which I do, then it is an entirely practical issue, but with a somewhat more expanded definition of practicality, I think, than Mark wants to use.

Dr. Grinspoon: All right. This will be our last question.

Questioner: . . . I'm a lawyer in Fort Lauderdale here. . . . I think that a lot of people in this country want very much to have their government involved in helping them be free from what they perceive as the terror of drug use around them. Their children are exposed to drugs and they are afraid of the crime that results from drugs and associated activities . . . . I think that they feel that they have a right to have the government help them fight these battles . . . .

I think that's documented by the fact that people are very much in favor of some of the inroads that have been made into fourth amendment protections. I would like to ask the panel their view [about people who are] probably in the majority today at this time.

Dr. Grinspoon: John.

Prof. Kaplan: You are right that people want the government to help them. My only view is that if the government could help them, it should do it. The fact is, in my view on balance, the government is harming them, and when they understand this, maybe they will change their minds. If not, frankly, they deserve a certain amount of what they are getting. The government basically is the people, and the people in the long run deserve the kind of government that they are getting.

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Coda: What Impasse? A Skeptical View

Peter Reuter*

Certain substances are harmful to health but, at least after a while, become very attractive to their users. We have banned some of these and allowed others to be sold, subject to regulation and/or taxation.

Our current mix of prohibition and regulation is largely determined by historic factors. Certainly there is no principled defense for simultaneously allowing alcohol (indeed, even the promotion of that addictive and life-threatening substance) and prohibiting marijuana. It is simply a consequence of the almost accidental evolution of our society's habits and we should not be surprised to find other societies (predominantly Muslim) in which the opposite pattern is found.

But if there is no principled defense there is a pragmatic one. We should at least contemplate the prohibition of all *seriously* health-threatening substances that are not already in mass use. Reversing history by law, as was done during Prohibition, may simply pose too great a risk to the social consensus necessary for continuation of the nation. Reversing it by deliberately attempting to alter tastes seems much more acceptable, though it still remains to be seen whether that can be done on a large-scale basis.

But that of course begs the question as to when the threat posed by the substance is so great and the extent of use sufficiently small that we should incur all the costs of creating illegal markets in order to prevent more use. Our knowledge and our use patterns change in ways that can affect the decision. We have now learned enough about the consequences of cigarette use that a prohibition on its sale could be justified. On the other hand, marijuana use has expanded so rapidly in the last generation that one might reasonably ask whether discrimination between the legal status of alcohol and marijuana use can be

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Valuable research assistance was provided by Patrick J. Murphy.

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maintained.

Debates about changing the mix of prohibition and legal availability are divisive and rarely conducted. Discussions about drug policy are normally confined then to the appropriate level of enforcement (including the severity of sanctions) of prohibitions and stringency of regulation of those that are permitted. Since most of my own recent research is concerned with the first of these narrower issues (namely, the consequences of various kinds of drug enforcement) rather than the large questions of principle,[1] I shall focus on the implementation of our current legal policy, just occasionally sniping at the prohibition of marijuana use and the costs of our heroin policy.

Given a prohibition on the use of a drug, what constitutes success for the prohibition? With enough of a police state, we can reduce undesired drug use almost to zero; clearly we do not seriously consider that a desirable situation. Enforcement of prohibitions must not threaten the basic civil liberties of the nation. When drug enforcement agents started battering down the doors of innocent neighbors of suspected drug dealers in the early 1970's,[2] there was an immediate backlash against aggressive enforcement.

Beyond that we count among the costs of drug enforcement the direct expense of carrying it out (still a fleabite of public expenditures, at $1.7 billion federally); the creation of criminal incomes and gangs; and the labeling of individuals as criminals simply as the result of their consumption of a prohibited substance. Success for drug enforcement then is a net rather than gross measure; it is the reduction in use of the prohibited substance less the other costs of achieving that reduction.

In the following discussion I largely ignore the costs of enforcing drug prohibitions. Success here is essentially the gross concept, the reduction in drug use from what it might otherwise have been. That is admittedly a very partial way of analyzing the problem. My defenses are the standard ones; I lack the time to deal with the larger issue and almost everyone else contents themselves with a partial (though usually different) analysis as well.

The starting point of all the symposium's contributors, with the notable exception of Leon Kellner, the one government official in the group, is that the War on Drugs (hereafter WOD) is at an impasse. That in fact is a great simplification, leading many to believe that law

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1. These questions are admirably addressed in Kleiman, *Liberalism and Vice Control*, 6 J. POLICY ANALYSIS & MGMT. 242 (1987).

2. E. EPSTEIN, AGENCY OF FEAR (1977).

enforcement (the central component of WOD) has had, and can have, little impact. Its success has been highly variable.

WOD has been quite successful at restricting the spread of heroin, and may have had substantial impact on some varieties of synthetic drugs, such as methaqualone. It is currently failing to prevent increased use of cocaine and PCP, which may turn out to be the most dangerous drugs yet in popular demand. We will do a better job of deciding to what extent major changes in policy deserve serious consideration if we analyze WOD's successes and failures.

This article has three themes. The first is that policy and debate should make clearer distinctions among drugs. The current federal allocation of drug enforcement resources probably overemphasizes the least serious of drugs, marijuana, and fails to give adequate resources to the most effective levels of enforcement against heroin, namely street enforcement. Similarly, there is a good argument for legalizing marijuana and a very good argument for keeping cocaine illegal. Heroin presents the most serious analytical problem; recent history provides good evidence for both sides of the legalization debate, though political rhetoric has ensured that this debate is very muted.

Second, the current debate, with its resurrection of "demand side" measures (rhetorically at least), is largely irrelevant to drug use in the next five years. Current patterns of use are not likely to be changed by prevention/treatment efforts launched today. Treatment currently has significant impact on the use of only one drug, heroin. Though there are numerous patients supposedly in treatment for marijuana, the evidence is that they are in fact being treated for abuse of other drugs.[3] For cocaine and PCP, the treatment literature provides little basis for optimism.[3.1]

Prevention is almost a complete gamble. No one has demonstrated that prevention programs have any significant impact on drug use. It is certainly a sensible gamble to invest more in prevention than has been done previously, but we should not expect to see any significant impact on usage for many years, even if good prevention programs are

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3. WISH, DEREM & RAINONE, AN OVERVIEW OF PROGRAMS FOR CLIENTS WHO ENTER TREATMENT WITH MARIJUANA AS THE PRIMARY DRUG OF ABUSE (1983) (publication of Narcotic and Drug Research, Inc.).

3.1. Siegel, *Cocaine Smoking*, 14 J. PSYCHOACTIVE DRUGS 271, 359 (1982); Gorelick, Wilkins, & Wong, *Diagnosis and Treatment of Chronic Phencyclidine (PCP) Abuse*, in PHENCYCLIDINE: AN UPDATE (D. Clovet ed. 1986) (publication of National Institute on Drug Abuse).

developed.

But the third argument provides some reassurance after this pessimism. Drug use patterns change quite rapidly for reasons that we understand poorly but which appear not to be dominated by government policy. We should not assume that current growth patterns will continue.

I. Distinguishing Drugs

Current rhetoric blurs distinctions among illegal drugs. Indeed the Reagan administration has been extremely explicit about this; the difference between "soft" drugs like marijuana (perhaps exclusively marijuana) and hard drugs like heroin is mostly timing. In other words, marijuana is simply the first drug on the path to use of much more dangerous drugs and that is a justification for taking enforcement against marijuana use and trafficking seriously. In fact the justifications for intense enforcement of prohibitions are very different for marijuana and the other two drugs we shall consider, cocaine and heroin.[3.2]

A. *Marijuana*

The President's Commission on Organized Crime recently recommended that the federal government take active steps to reverse the permissive legislation of the 1970's with respect to marijuana use. Eleven states passed legislation decriminalizing the possession of small amounts of marijuana;[4] all of them still allow for civil fines, comparable to parking tickets. This decriminalization was probably the work of middle class parents, outraged that their children could acquire a criminal record for consuming a drug that seemed to be no worse than the alcohol they then drank, in pre-MADD days, with so little conscience. With 400,000 marijuana possession arrests each year, such stigmatization seemed a serious issue.

It is not only scolds such as the President's Commission that have turned against decriminalization. In the last decade, the percentage reporting in Gallup polls that they favor criminal penalties for possession

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3.2 I focus on these largely because they are the drugs about which most is known.

4. UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS (1985) (NCJ-93682).

of small amounts of marijuana for personal use has risen for all age cohorts; the most marked increase came from individuals age eighteen to twenty-nine, where the percentage favoring criminal penalties rose from 29 percent in 1977 to 44 percent in 1985.[5] One would expect these figures to continue to have risen in 1986 in light of recent events, such as the death of Len Bias, increased media coverage, and general WOD rhetoric from highly visible individuals. No state, to my knowledge, has yet reversed a prior decriminalization statute but the threat is undoubtedly there, given the political attraction of anti-drug stands nowadays.

One can argue that this reversal of attitudes is an extension of the growing American concern with personal health, rather than with a decreasing tolerance for differences in taste. The genie of alcohol has been let out of the bottle (no pun intended), but we can still do something toward stuffing marijuana back in. Given the growing evidence that long periods of heavy use of marijuana raise a variety of health risks,[6] that is clearly not an irrational position.

I think, though, that this interpretation is overly generous in its assessment of changes in public attitudes. The reversal is more reasonably attributed to the drumbeat of warnings of a drug "epidemic," the standard term of high level political rhetoric on the subject in the last few years. Indeed, what is somewhat alarming is the ubiquity of this phrase in political speeches during 1986, despite the clear evidence that use of most drugs is actually declining. The result of the rhetoric has been to lessen the willingness of the public to tolerate a policy which makes distinctions among drugs on the basis of their likely harms. The proposition seems to be that if we fail to act harshly against marijuana use (expulsion now being almost the minimum school penalty), then we will face a rising tide of use of more dangerous drugs.

There is little doubt about the etiology of cocaine and heroin use; they are preceded by marijuana use. That does not imply that major reductions in marijuana use will have major impacts on the use of these other drugs, for at least two reasons. First, those most likely to be de-

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5. G. Gallup, The Gallup Poll: Public Opinion 1985 (1986).

6. Addiction Research Foundation, Report of an ARF/WHO Scientific Meeting on Adverse Health and Behavioral Consequences of Cannabis Use (1981); Advisory Council on the Misuse of Drugs, Report of the Expert Group on the Effects of Cannabis Use (1982); National Academy of Sciences, Comm. on Substance Abuse and Habitual Behavior, An Analysis of Marijuana Policy (1982).

terred from marijuana use by heavy enforcement against marijuana are probably the large majority of users who do not go on to the "heavier" drugs; later cocaine users tend to be more committed and less deterrable in their marijuana use. Second, the existing etiology is partly determined by current availability. If marijuana did not exist, we would still see cocaine and heroin use but the path to their use would be different.

For the moment let us ignore the dynamic effects, so to speak, of marijuana use and focus on the harms arising directly from the drug. The harms are a function not only of its pharmacology but also of the modes and intensity of use. We do not have much evidence that marijuana users maintain heavy use for extended periods. Heavy marijuana use seems to be, for most persons, a relatively brief phase. Three times as many high school seniors report *having been* daily marijuana users in some previous three month period as report currently being in that state.[7] The heavy user population is very dependent on new recruits because marijuana use is not addictive and young adults move out of the heavy user pool fairly rapidly, probably because they move, after school, into a world that is not so full of "infected" people.

This is not to say that marijuana use is harmless. It only implies that we do not know whether current use patterns are sufficiently extensive and intensive to present significant risks.

The federal agencies have responded to the clarion call for enforcement against marijuana. A very significant share of the rapidly increasing federal enforcement budget now goes to investigating, prosecuting, and incarcerating marijuana dealers, as well as interdicting shipments of foreign marijuana on the way to the U.S. For example, the Coast Guard interdiction budget, which is predominantly for marijuana enforcement, rose from $194 million in 1982 to $326 million in 1986.[8]

What is the result of this focus on marijuana by federal enforcement agencies? The price of marijuana has gone up and its use has declined, but I shall argue below that the decline in use seems to come from factors other than enforcement. More plausibly the federal marijuana effort, most heavily focused on foreign sources, has helped foster

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7. L.D. JOHNSON, DRUG USE AMONG AMERICAN HIGH SCHOOL STUDENTS, COLLEGE STUDENTS, AND OTHER YOUNG ADULTS: NATIONAL TRENDS THROUGH 1985 (1986) (publication of National Institute on Drug Abuse).

8. PRESIDENT'S COMM. ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME (1985).

the growth of the domestic marijuana industry. It is tempting to note the irony of this; the free trade oriented Reagan Administration has managed to provide effective protection to the domestic industry to which it is most hostile, marijuana growers.

The domestic industry is probably more adaptive and enforcement resistant than the importing industry. With the spread of production to all fifty states there is no longer a need to assemble large shipments for cross-country sales; instead we probably have lots of small producers selling into local markets. This is just the kind of market against which federal efforts are least likely to be successful since there are no concentrations of power to serve as attractive targets for sophisticated enforcement efforts.

In fairness, it should be pointed out that the administration has tried not to discriminate in favor of domestic growers. The Attorney General has personally launched domestic eradication efforts each year, with highly publicized raids on domestic crops. The predictable result of that effort has been to force growers to adopt more technology intensive (and less obtrusive) growing techniques, which probably increase the potency of marijuana smoked in this country. A University of Mississippi project has monitored the amount of psychoactive ingredient (THC) present in samples of marijuana seized by law enforcement officials. They estimate that the THC level has risen from less than .5 percent in 1973 to close to 4 percent in 1984.[9] Indeed, that may be, as Mark Kleiman conjectures,[10] the major result of the marijuana interdiction effort, since foreign producers grow less potent marijuana than do their domestic counterparts.

So for marijuana, as for heroin, enforcement has heightened the health risks of drug users. Users now consume marijuana with higher THC content and are forced to smoke it rolled in cigarette papers, which is the form most dangerous to their lungs. Enforcement against head shops and the effort to make usage more clandestine have reduced the attractiveness of water pipes, though these would reduce the health risks of use, the principal marijuana carcinogens being water soluble.

B. *Cocaine*

We can now write with a clear conscience about cocaine enforcement. There is no longer any doubt that the drug is seriously addictive

9. UNIVERSITY OF MISSISSIPPI POTENCY MONITORING REPORT (1983 and 1986).
10. Personal communication to the author.

for a significant number of regular users, particularly in its newer forms of administration.[11] It poses very serious health hazards to its regular users, quite apart from its effects on their ability to continue normal social and work lives.

The spread of cocaine has been fueled by its declining retail price, disguised in the official figures by lack of data on the rising purity of retailed cocaine. It is also fueled by the availability of these new modes of administration which enable the user to get more of the drug more quickly and hence at lower cost.

Enforcement has been singularly unsuccessful. The explanation is not difficult to find. It is produced in countries relatively close to the United States, which have large numbers of nationals here; that simplifies both transportation (small planes and boats) and distribution to U.S. wholesalers. It is very compact per dosage unit.

At the retail level enforcement prospects look even bleaker. The markets for cocaine are predominantly private. Regular users are not to be found searching in street bazaars, where low quality and high priced drugs are to be found. That is for young suburban neophytes. The heavy user will purchase his drugs in the privacy of his office or his apartment, quite secure from police surveillance. Though large quantities are seized, they are seized at levels of the market at which their replacement cost is quite modest.

The decline in the price of cocaine since 1981 is a genuine mystery. The enforcement pressure against cocaine, even when one adjusts for growth in the market, has certainly increased in the last five years. The price should be rising, unless there has been a major erosion of some monopoly position in the distribution system or there are hitherto unrealized economies of scale in distribution. Neither of these seems very likely.

Mark Kleiman conjectures that we are observing the results of learning in the importing sector; smugglers have acquired experience that enables them to be more efficient in reducing risk. The same may be true in domestic wholesale markets as well. It may be a one-time phenomenon, with prices soon reaching a new equilibrium level and staying there. But there is little reason to think that cocaine enforcement is likely to be much more successful in the future than it has been in the past.

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11. R.M. Post, *Chronic Cocaine Administration: Sensitization and Kindling Effects*, in COCAINE: CLINICAL AND BIOLOGICAL ASPECTS 107-68 (E. Uhlenhuth ed. 1986).

For cocaine the term impasse may be appropriate. What can we do in the face of it? Certainly there is little to be said for taxed and regulated legal sale; we might indeed reproduce the disaster of our alcohol policies that way. I defer to the final section a discussion of the alternatives before us.

C. *Heroin*

John Kaplan's title for his book on heroin, *The Hardest Drug*,[12] provides a nice treble entendre. It is the hardest drug to obtain, the hardest in terms of the damage that our policy wreaks, and the hardest drug for which to make policy. The three are linked.

The central problem of heroin policy is easily summed up. Some significant share of urban crime is related to heroin use;[12.1] the very high price of heroin, and the particular effects of its use, ensure that regular heroin users must commit numerous crimes in order to support their habit.

Note that we need both conditions. High price alone is not enough. Cocaine was as highly priced as heroin in the early 1970's (the change in relative prices since then is itself an interesting phenomenon), but was never associated with street and property crime as heroin was.

The explanation probably lies in who was using cocaine then and, relatedly, the effects of that use. The fact is that those who can keep their use of cocaine moderate (and that seems to have been true of many regular nasal users) were able to perform adequately in their lives and jobs. Indeed there is alarming evidence that part of cocaine's attraction is precisely the ability that the drug gives some users to improve their job performance in the short run. I note that it was widely reported that George Rogers ran for the National Football League rookie rushing record while regularly using cocaine. Some of the National Basketball Association players expelled for cocaine use were performing near their career bests at the time of their expulsion.

Heroin is a narcotic, cocaine a stimulant. It is no surprise that they differ substantially in terms of the social consequences of their use. Those who use heroin, even in the debased form that it is available to American addicts, are not induced by the drug to perform at their

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12. J. KAPLAN, THE HARDEST DRUG: HEROIN AND PUBLIC POLICY (1983).

12.1 For a summary of the evidence concerning this see Wish & Johnson, *The Impact of a Substance Abuse on Criminal Careers*, in CRIMINAL CAREERS AND "CAREER CRIMINALS" 52, 86 (A. Blumstein, J. Cohen, J. Roth & C. Visher ed. 1986).

peak. Rather, they are able to escape the cares of life; it is a drug particularly attractive to those near the bottom of legitimate American society, for whom the allowed alternatives are rather bleak.

It has often been noted that the cost of heroin control is absurdly high. The social cost of crime — if one includes (as is proper) the decay of communities — is enormous, and a non-trivial fraction of that (at least in large cities) can be ascribed to heroin addicts. To many that is an argument for the legalization of heroin; to others it suggests the danger of the drug. For the drug itself does not contribute to crime; quite the opposite. It is only the very high price (roughly $2,000 per gram) that leads to addict crime.[12.2]

Regulated legalization, or even less enforcement, would probably reduce the social cost of heroin consumption. But it would dramatically change the distribution of that cost. Inner city minority populations would have greatly expanded heroin user populations, while the rest of the community would probably incur a much lower crime rate. Much of the resistance to the discussion of legalization seems to come from leaders of those communities which would in fact bear the cost of expanded use.

Heroin is drug enforcement's success story. It is absurdly expensive to obtain, and can be bought only in nasty parts of town from very dangerous people; it takes a long time to find the drug. Alas, successful drug enforcement, at least for an addictive drug that appeals to a criminally active population, looks like a socially expensive proposition.

II. Demand Side Measures

In face of the consensus that drug enforcement has failed, there has been a large shift in the rhetoric of WOD and a modest shift in its budget allocations. For the first time in a decade, serious attention is being given to "demand side" programs, prevention and treatment.

But there is little reason for optimism about these programs. We have turned to them mostly as the result of despair about drug enforcement, not because we have proof positive that such programs hold any

12.2 The relationship of cocaine use to crime remains relatively unexplored. Some studies have found such a relationship in non-random samples. *See, e.g.*, Collins, Hubbard, & Rachal, *Expensive Drug Use and Criminal Income: A Test of Explanatory Hypotheses*, 23 CRIMINOLOGY 743, 764 (1985). Crack, which attracts younger users because of its low dosage cost and high potency, may lead to a heroin-like relationship to crime.

significant promise to deal with our current problems. I shall refer heavily here to a RAND study which I co-authored.[13]

The treatment literature makes clear that heroin addicts can be substantially affected by treatment, particularly methadone. One cannot say "cured"; there is growing evidence that heroin addiction is a near permanent state. But those who are in treatment use very much less heroin and commit many fewer crimes. That is a substantial gain both for us and for the addicts. It is important to assure that there are enough treatment positions available for heroin addicts seeking treatment, since one of the major paths by which heroin enforcement benefits the community is through driving addicts to seek treatment.

So far cocaine treatment does not seem to offer much. We know a great deal less about such treatment for two reasons. First, large scale cocaine treatment has been operating only a relatively short period. Second, most cocaine addicts have been treated in private clinics rather than through publicly funded agencies of the kind that treat heroin addicts. Thus we have less access to the experience of such treatment programs.

But what evidence we have is not encouraging. Cocaine addiction has different roots than heroin addiction; a different group of persons is involved and the users seek something different from the drug. As yet there is no cocaine counterpart to methadone — *i.e.*, a substitute drug which reduces the craving for the initial drug and does not produce similar anti-social behavior on the part of the user.

Prevention may well be the "magic bullet" of the 1980's, the supposed panacea that everyone endorses prior to evidence that it works. RAND is involved in a major experiment aimed at testing the efficacy of some innovative cigarette prevention programs in drug prevention. The programs are school-based, offered to children in seventh and eighth grades. They emphasize developing resistance to social pressures, focus on short-term harms from drug use; some also involve older children to deliver the messages.[13.1] The results of the experiment will not be available for at least another year. Other large scale demonstra-

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13. M.J. POLICH, P. ELLICKSON, P. REUTER, & J. KAHAN, STRATEGIES FOR CONTROLLING ADOLESCENT DRUG USE (1984) (publication of the RAND Corp.).

13.1 P. ELLICKSON, PROJECT ALERT: A SMOKING AND DRUG PREVENTION EXPERIMENT FIRST YEAR PROGRESS REPORT (1984) (publication of the RAND Corp., N-2184-CHF); P. ELLICKSON, DESIGNING AN EFFECTIVE PREVENTION PROGRAM: PRINCIPLES UNDERLYING THE RAND SMOKING AND DRUG PREVENTION EXPERIMENT (1984) (publication of the RAND Corp., P-7068).

tions are also being carried out at this time.

These experiments are the first serious tests of prevention efforts. While school-based prevention programs have been around for at least a decade, there is no evidence to suggest that any of the earlier generation were particularly successful and even a little evidence to suggest that some were counter productive.[14] The newer demonstrations are generally based on sounder behavioral models and make better use of what we know about learning. But there is no denying that at this stage we simply do not know what works.

This is not a mere scholarly quibble; researchers can always be relied on to assert that "too little is known about . . . ." In this case we genuinely do not know. The focus on early socialization, which can take many operational forms, is plausible. I certainly find it so, having to put up with my nine year old son's protests about my (harmless) after dinner cigar. But we might be entirely wrong about this, just as we were wrong a generation ago in the effort to base prevention efforts on frightening (and exaggerated) statements about the consequences of marijuana use.

Certainly the federal commitment of $250 million in fiscal year 1987 for drug prevention is a large gamble. The money is to be distributed to schools which have few effective models from which to work. They will probably do no harm with the money. Alas, we are also unlikely to know whether they have done any good with it.

III. Of Times and Tastes

One does not have to be entirely pessimistic about drug abuse in this country. Use patterns change quite sharply without new government policies. The decline in reported heavy marijuana use among high school seniors is the most recent example of a positive change that appears to be unrelated to any government initiative. Pessimism about the prospects for government interventions should not be taken to be pessimism about the future use of illicit drugs in America.

In 1978, eleven percent of high school seniors reported daily use of marijuana, almost double the figure found in the first of the surveys in 1972.[15] This rapid increase has never been given a systematic explanation, but roughly speaking it could be seen as an epidemic phenomenon.

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14. Schaps, *A Review of 127 Drug Abuse Prevention Program Evaluations*, 11 J. DRUG ISSUES 17 (1981).

15. JOHNSON, *supra* note 7.

In other words, more seniors used marijuana in 1975 than in 1974 because the number in 1974 was higher than in 1973, so that each "uninfected" person was more likely to come into contact with a user in the later year and thus become a user him/herself.

But what then explained the sudden reverse? The downturn was as sudden as the increase. Daily marijuana use had declined by 1983 to almost the same figure as in 1974, about 5.5 percent. Analysis of the survey data suggests that the decline was the result of changes in the youth population's attitudes towards their own health and the health consequences of marijuana use. Certainly the percentage reporting that marijuana was readily available remained high (about 88 percent) throughout the entire period,[16] suggesting that enforcement was not the prime cause of the decline.

One could argue that this was a consequence of government policies, namely the increased emphasis in school curricula on personal health. But it would be stretching matters to call this a form of drug control policy in the late 1970's. The explicit integration of drug education into health curricula, still not completely accepted, did not become a mass phenomenon until the 1980's.

Nor is this the only instance of a rapid downturn in the rate of new infections. Heroin use extended rapidly in the late 1960's and early 1970's.[17] A rise in price and generally adverse market conditions, the products of policy, accounts for this initial cessation of growth. Heroin became more expensive and of lower quality, the time needed to find a dealer may have significantly increased, and methadone treatment provided for the first time a reasonable alternative for addicted users.

But when market conditions in terms of price and "availability" returned to their 1972 state, there was no further growth. The population of regular users seems to have stagnated with very little new recruitment into the user population. Indeed, what is striking is the evidence that we are dealing with exactly the same population that was being treated in the early 1970's. The proportion of heroin users in New York City treatment centers over the age of 30 was 31 percent in 1977; in 1985, that figure had increased to 65 percent.[18] Lester Grin-

16. *Id.*

17. DIVISION OF EPIDEMIOLOGY AND STATISTICAL ANALYSIS, EPIDEMIOLOGY OF HEROIN, 1964-1984 (1985) (publication of National Institute on Drug Abuse).

18. COMMUNITY EPIDEMIOLOGY WORK GROUP RECORDINGS, EPIDEMIOLOGY OF DRUG ABUSE: RESEARCH, CLINICAL, AND SOCIAL PERSPECTIVES (1985) (publication of National Institute on Drug Abuse).

spoon suggests that the decline of recruitment into heroin use in the last decade is the result of non-users in the same communities as users observing the degradation in the quality of life of users; of course one can argue that the degradation is itself primarily a function of effective enforcement.

The two changes we have discussed represent very different phenomena. The end of the heroin epidemic meant that the pool did not continue to grow but that it did not shrink much either; this is precisely because heavy heroin use appears to be a permanent condition. The figures on the aging of the population entering treatment is very persuasive on this point.[19] The numbers of heavy marijuana users may actually have declined because there has always been substantial turnover in this population.

IV. Conclusion

American drug use has been subject to unexpected shifts over time, shifts that we can only rather weakly relate to drug policy. In light of this we should be very careful about extending present trends into the future. The surge of cocaine use, even with falling prices for the drug, may not continue very long. If it is indeed as addictive in its new forms as the literature suggests, the recruits of the past five years may serve as effective warnings for the potential next generation of users. There is a silver lining to be found in even a phial of crack.

Heroin is clearly a drug in decline, perhaps a testimony to the eventual success of law enforcement, albeit at great social cost. Marijuana has probably found its place in American society as one of the ways in which a significant chunk of the nation's more rebellious adolescents establish their independence from their parents and other adult controllers. It will not make them better but, if I am correct about the short duration of intensive use, it won't leave a very large mark on them.

Some level of illicit drug use will always be with us and we should not measure success of a policy against an unattainable perfection. In that connection it is worth making some clearer connection to Prohibition. For though Prohibition has always been rated one of the great failures of American law, it did in fact accomplish a great deal in terms of its policy goals. The best evidence, which is not too bad, is that it at least halved the consumption of alcohol in the United States.

19. Division of Epidemiology and Statistical Analysis, *supra* note 17.

A comparison of per capita drinking levels in the area immediately prior to Prohibition and that immediately following Repeal shows the latter figure to be only half of the former.[20] It seems reasonable to assume that drinking at the end of Prohibition was less than that following Repeal, so that this comparison understates the extent to which Prohibition reduced alcohol consumption.

Despite this success, Repeal came easily. In contrast the debate about drug policy, which is generally seen to have failed just as substantially as Prohibition, is almost non-existent; it is a quibble among politicians about how much more to spend on different elements of the enforcement program. I believe that there are three factors which explain the difference in the response to the failure of drug and alcohol prohibitions.

First, the use of illicit drugs is still concentrated among the young and the poor. Most Prohibition era judges were probably well acquainted with alcohol use prior to 1919. Though Baby Boomers are now moving to judicial and congressional ages, their marijuana use is well behind them. Cocaine use on Wall Street notwithstanding, it seems unlikely that the senior partners of law firms and other contemporary dignitaries (as opposed to celebrities) number cocaine among their standard recreational outlets. They sentence from a distance. Probably a majority of the adult population sees drug use, particularly cocaine use, as someone else's vice.

Second, the corruption surrounding bootlegging was much more systemic and broad-based than that around drug dealing, *Miami Vice* notwithstanding. We do not worry that the city of Chicago is in the hands of the drug counterparts of Al Capone, if any exist. The privacy of most drug transactions makes it much less necessary to obtain comprehensive protection from law enforcement agencies and political authority.[21]

Third, the American people take health much more seriously than they did in the 1920's. The campaign for Prohibition emphasized abandoned children and labor absenteeism rather than cirrhosis of the liver. Though the drug crusaders of today are still moral entrepreneurs, the growing evidence that none of these drugs is good for your health is an important fall-back.

The effort to control drug use in America is, like all moral cam-

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20. D. KYVIG, REPEALING NATIONAL PROHIBITION (1979).

21. Reuter, *Police Regulation of Gambling: Frustrations of Symbolic Enforcement*, THE ANNALS, July 1984, at 36.

paigns, flawed by exaggerations and simplifications on both sides. Some prohibited drugs represent relatively slight dangers to their users in the quantities commonly used; others are dangerous mostly because of the conditions of use that society has created.

But the critics of our current policy who ignore the fact that the War on Drugs has significantly affected the extent of use of substances hazardous to the users' health do their cause no good either. Drug use is a permanent feature of American society. It is not a desirable one. But if we are realistic about what can be accomplished with the various tools that are available to the institutions of social control and we realize that cries of epidemic are counter-productive, a good deal more can be done to lower the costs in money and civil liberties of both drug use and drug enforcement.

Milestones in the War on Drugs

1914	Harrison Narcotics Act passed by Congress taxes transfers of cocaine and opiates and restricts transfers to medical channels on government forms.
1915	162 IRS agents placed in Miscellaneous Division of Treasury Department to enforce revenue provisions of Harrison Act.
1922	*United States v. Behrman* decided. Supreme Court denounced doctor's prescription of cocaine for an addict as unlawful "gratification of a diseased appetite for these pernicious drugs."
1920's	25,000 doctors prosecuted for violations of Harrison Act. Addiction maintenance clinics closed by Treasury agents.
1930	Federal Bureau of Narcotics established within Department of Treasury.
1937	Marijuana Tax Act passed to restrict marijuana under Harrison Act model.
1956	Narcotics Control Act imposes mandatory prison terms for offenders (later repealed).
1966	Bureau of Drug Abuse Control created with 100 agents to police supply of "dangerous drugs" (amphetamines and barbiturates).
1968	President Johnson submits Reorganization Plan No. 1 to Congress, consolidating FBN and BDAC into Bureau of Narcotics and Dangerous Drugs under authority of Department of Justice. BNDD has a total of 600 agents.
1970	Comprehensive Drug Abuse and Prevention Act passed by Congress, establishing present framework of five drug schedules and import/export controls.
1971	President Nixon sends message to Congress portraying drug abuse as "a national emergency afflicting both the body and soul of America." The same day he creates by executive order the Special Action Office for Drug Abuse Prevention to oversee treatment, rehabilitation, education and research programs.

1972 BNDD has 1361 agents and a budget of $64 million.

1972 By executive order President Nixon creates Office of Drug Abuse Law Enforcement (ODALE), to focus on street "pushers" and Office of National Narcotics Intelligence (ONNI) under FBI authority.

1972 National Commission on Marihuana and Drug Abuse recommends repeal of penalty for private possession of marijuana. In following years, repeal of penalties for private or public possession is endorsed by AMA, ABA, American Public Health Association, National Council of Churches, National Advisory Commission on Criminal Justice Standards and Goals, National Research Council and others.

1973 President Nixon declares "an all-out global war on the drug menace" and submits Reorganization Plan No. 2, consolidating BNDD, ODALE, ONNI and the Customs Service Drug Investigation Unit into the Drug Enforcement Administration (DEA) with 2,000 agents. DEA Budget approaches one-half billion dollars.

1976 Supply of cocaine to United States estimated by Government at 14-19 metric tons.

1977 President Carter recommends decriminalization of marijuana.

1979 NIDA household survey reports 9.7 million had used cocaine within the last year, 15.4 million had tried it at least once.

1980 Supply of cocaine to United States estimated by Government at 40-48 metric tons.

1980 Operation Greenback begins to trace money laundering operations. Government indicts 51 defendants and seizes $20,000,000 in currency in first phase.

1981 Posse Comitatus Act — Congress repeals century-old prohibition on military enforcement of civilian laws. Department of Defense administratively implements new statute, with special enlargement of Navy's role in drug interdiction. All branches provide equipment, training and other assistance to Coast Guard, Customs and DEA operations.

1981	Percy amendment (to Foreign Assistance Act of 1961) repealed. Spraying of herbicides on marijuana crops in source countries now encouraged.
1982	Tax Reform Act amended to facilitate disclosure of IRS file information to other enforcement agencies.
1982	"Artic Penitentiary Act" proposed for federal drug offenders.
1982	CIA brought into War on Drugs by Executive Order.
1982	IRS intensifies Special Enforcement Program aimed at drug offenders.
1982	NIDA household survey reports 11.9 million had used cocaine within past year and 21.6 million had tried it at least once.
Jan. 1982	President Reagan announces formation of South Florida Task Force on Crime under direction of Vice President Bush to fulfill federal government's "special responsibility" to control "massive immigration and epidemic drug smuggling."
Feb. 1982	Task Force begins operations under direction of Vice President Bush, with 337 drug agents from DEA and Customs serving as Joint Task Group.
Mar. 1982	Attorney General orders Director of FBI to assume authority over DEA. FBI given concurrent drug investigative jurisdiction.
Mar. 15-Dec. 31, 1982	GAO report on Task Force operations shows following results as compared to same period in 1981: Marijuana seizures: from 1,074,000 to 1,245,000 lbs. Cocaine seizures: from 1617 lbs. to 2891 lbs. Drug arrests: from 742 to 945. Price of cocaine drops and purity rises. Marijuana smugglers shift routes away from South Florida.
Mar. 9, 1982	3728 pounds of cocaine seized on a Tampa-Colombia cargo jet.
Mar. 12, 1982	Reagan Administratin retracts endorsements for stronger health warnings on cigarette packs.
May 18, 1982	1197 pounds of cocaine seized from a four-engine cattle jet.

Oct. 1982	President Reagan pledges "unshakable" commitment "to do what is necessary to end the drug menace" and "to cripple the power of the mob in America."
Nov. 1982	President calls South Florida Task Force "unqualified success."
Nov. 1982	Carrier Nimitz and escort cruiser USS Mississippi intercept a tug laden with 30 tons of marijuana.
Dec. 1982	Great American Bank (Miami) indicted for laundering $96 million in cocaine money in 14-month period.
Jan. 1983	Organized Crime Drug Enforcement Task Force program in 13 core cities begins with budget of $127 million. By year's end, OCDETF has staff of 1,000 agents and 200 prosecutors. Goal is to prosecute members of high level drug trafficking organizations and to destroy their operations.
Mar. 1983	NNBIS created in 6 border cities to coordinate drug interdiction efforts.
Apr. 1983	Contingent of ten marines arrives in South Florida to fly and maintain aircraft in support of United States Customs Service.
May 6, 1983	Cocaine Hotline opens (1-800-COCAINE) and receives 1,000 calls a day.
May 31, 1983	Confidential informant encounters Miami police officers on street and leads them to a boat on the Miami River carrying 1500-2000 lbs. of cocaine.
Summer, 1983	Price of cocaine dips to record low ($15,000-$18,000 per kilo) as result of worldwide glut. (1986 price rises to $35,000 per kilo, about two-thirds of 1981 price.)
July, 1983	USS Kidd, a Navy guided missile destroyer, chases and fires upon a marijuana cargo vessel, the first such military/civilian encounter in history.
Nov. 2, 1983	PBS Documentary "The Chemical People" broadcast. Public school officials in Broward County, Florida report "sparse" attendance.
Dec. 31, 1983	FBI has 1085 agents working 1692 "drug-related matters." Its fiscal year 1983 budget allocates $17.8

	million for drug enforcement.
Jan. 15, 1984	500 lbs. of cocaine seized from beneath deck of a 37-foot sport fishing vessel.
Jan. 31, 1984	United States Customs officers find 965 pounds of cocaine during a routine search of a 33-foot pleasure craft, the largest seizure of its kind.
Feb. 1984	Florida Highway Patrol sets up roadblocks at which drug sniffing dogs check cars.
Feb. 4, 1984	Customs agents seize 910 pounds of cocaine from a sailboat.
Feb. 10, 1984	14 packages of pure cocaine wash up on beaches near Vero Beach, Fla.
Feb. 24, 1984	Big cocaine processing plant discovered in Everglades along with 100 pounds of pure cocaine. Total of 21 drug laboratories seized in United States in 1984.
Mar. 21, 1984	Colombian authorities seize 13.8 tons of cocaine and cocaine base from a cocaine "industrial park" in the jungle.
Mar. 1984	Attorney General reports on activities of OCDETF, including the biggest drug case in United States history, in which Defendants are accused of smuggling over $2 billion worth of cocaine into the United States.
Apr. 3, 1984	Coast Guard cutter makes largest ever seizure of cocaine at sea, 2200 pounds.
Apr. 1984	Government concludes three-year investigation by indicting Joe Bonanno family with importing $1.68 billion worth of heroin into the United States. The Attorney General calls it the "most significant case involving heroin trafficking by traditional organized crime that the federal government has ever developed."
June 16, 1984	2500 pounds of cocaine found concealed in Panamanian shipment of freezers. As with the 3700 lb. seizure of March 9, 1982, no arrests are made.
June 1984	The Department of Justice reports a 60% increase in the number of wiretaps.
June 19, 1984	1700 pounds of cocaine discovered in containers of roofing tiles in Miami Warehouse.

July 1984 DEA reveals that it keeps computer files on 1.5 million persons; only 5% are under investigation or suspected.

July 1984 Attorney General announces "largest single seizure of cash bank accounts in any drug case in the history of federal law enforcement."

Aug. 1984 3,194 persons indicted and 1,068 convicted in OCDETF cases to date.

Aug. 8, 1984 Florida Department of Law Enforcement announces campaign against marijuana cultivation. Hotline established.

Aug. 13, 1984 Twin engine plane touches down briefly on unopened section of I-95 in Florida, leaving behind 1200 lbs. of cocaine. No arrests are made.

Aug. 22, 1984 Customs inspectors use detector dogs to uncover 2,754 lbs. of cocaine concealed inside 180 large industrial pulleys from Peru.

Sep. 24, 1984 President signs a proclamation for National Drug Abuse Education and Prevention Week. "We are on the right track," he says.

Sep. 27, 1984 White House Press Release summarizes accomplishments of War on Drugs:

Arrests of the top-level organizers and financiers of the drug traffic have increased 18 percent, from 195 per month in 1981 to about 231 per month in 1984. Total arrests averaged about 1,000 per month.

Convictions for all drug law violators have increased 90 percent, from 485 per month in 1981 to about 921 per month in 1984.

Convictions of top-echelon organizers and financiers have increased 186 percent, from 88 per month in 1981 to about 252 per month in 1984.

U.S. seizures of cocaine during the first seven months of 1984 are 216 percent greater than cocaine seizures during all of 1981. Heroin seizures are 67 percent greater and marijuana seizures are 8 percent greater for the first seven months of 1984 than in all of 1981.

In the first half of 1984, over 25 metric tons of cocaine were seized in the United States and Latin America, compared to approximately 3.7 metric tons in 1981.

	(Not mentioned: Imports of cocaine to U.S. reach 74-90 metric tons.)
Oct. 1984	Comprehensive Crime Control Act of 1984 passed by Congress authorizes pretrial detention, lengthens drug sentences to 20 years, and increases use of criminal forfeitures.
Dec. 1984	*Miami News* reports that $3.5 billion per year in cash is deposited in Florida banks. Most of it is believed to be drug money.
Dec. 1984	A Piper Seneca enters United States air space from the Bahamas without filing flight plan. It carries 1,000 lbs. of cocaine.
Feb. 7, 1985	Bank of Boston pleads guilty to felony charge of failing to report $1.22 billion in cash transactions with 9 foreign banks. $500,000 fine assessed.
Feb. 12, 1985	Metro-Dade Organized Crime Commander says South Florida cocaine traffic is worse than ever.
Mar. 1985	IRS reports that United States financial institutions launder about $80 billion per year in drug money.
Apr. 20, 1985	$1.3 million in small bills seized from Piper Navahoe at Fort Lauderdale Airport.
May 8, 1985	A local police officer in Everglades City, Florida stops a Winnebago Camper because it rides very low on its suspension. He discovers one ton of cocaine.
May 10, 1985	Department of Justice won 704 motions for pretrial detention (and lost 185) under CCC Act of 1984.
June 1985	Congress expands military role in War on Drugs.
July 17, 1985	Blue Lightning Task Force announced in Miami. Operation to include radar balloons and 60-knot interceptor boats tied into high-tech computerized command post. 1-800-BE-ALERT hotline established for citizen tips.
Aug. 21, 1985	Dept. of Treasury fines Crocker National Bank of San Francisco record fine of $2.25 million for failing to report $3.88 billion in cash transactions during 1980-84 period.
Sept. 27, 1985	Miami police open a drug house in Liberty City. They sell drugs and arrest 83 unwitting customers.

Dec. 31, 1985	United States Marshall's Service reports it has $313 million in seized cash and property in its custody.
Dec. 31, 1985	350,000 people die from effects of cigarette smoking.
1985	NORML estimates that marijuana is largest United States cash crop, worth about $14 billion per year. In one 3-day sweep, DEA agents sight over 3000 illegal plots of marijuana.
Jan. 1986	United States Magistrate Peter Nimkoff resigns in partial protest over governmental abuses of power in War on Drugs.
Feb. 1986	Florida Marine Patrol makes its largest cocaine seizure ever — 935 pounds.
Feb. 1986	President Reagan's budget message urges Congress to allow United States to spend an additional $181 million in the War on Drugs in fiscal year 1987.
Mar. 1986	President's Commission on Organized Crime calls for mandatory drug testing of all federal employees and workers hired by federal contractors; intensified military action also urged.
Apr. 18, 1986	Nova Law Center sponsors symposium, *The War on Drugs: In Search of a Breakthrough.*
Sep. 15, 1986	President Reagan issues Executive Order on a "Drug-Free Federal Workplace." Order requires executive agencies to develop a drug-free workplace, including testing for drug use, rehabilitation for drug users, and employment termination for repeat offenders.
Oct. 1986	Congress passes Anti-Drug Abuse Act of 1986. Provisions include a doubling of funds for the War on Drugs, mandatory minimum prison terms for many drug crimes, and the creation of new offenses (including money-laundering).

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The Law School and the Profession: A Need for Bridges

Judge Frank M. Coffin*

It is singularly appropriate that a judge address the twin subjects of the law school and the profession . . . for he is equally remote from both. And, though he might be expected to recuse himself because of lack of expertness in either field, such a defect has never yet prevented the bench from giving its opinion. Moreover, distance from and lack of intimate participation in either academia or the practice of law might at least contribute some objectivity and perspective. In any event I shall follow the example of Winston Churchill who began an address to the French people with perhaps more courage than prudence, saying, "*Prenez garde. Je vais parler francais.*"

I propose that we have a look at both the institution of the law school and the profession of the law, and their relationship to each other, past and present, with the aim of identifying what it ought to be in the future. It seems to me that we are in a time of challenge and flux when the law schools of the nation are seeking a clearer sense of mission and when the profession is in the throes of an unplanned and unpleasant transformation. The great question is whether the law school and the profession have anything to contribute to each other.

We begin with a brief retrospective view of the law school. In the mid-nineteenth century, it was a placid place where quiet inspiration was largely gained from reading and listening. Senator Hoar of Massachusetts describes, late in life, his experience at Harvard Law School at mid-century:

> The youth breathed a legal atmosphere from morning till night all the year round. He had the advantage of most admirable instruction, and the resources of a complete library. He listened to the lectures, he studied the text books, he was drilled in the recitations, he had practice in the moot courts and in the law clubs. He discussed points of law with his companions in the boarding-house and

* Judge, United States Court of Appeals for the First Circuit, 1965-present. LL.B., Harvard, 1947; A.B., Bates College, 1940. This article was originally presented as a speech on January 28, 1987, to the students of Nova Law Center.

> on his walks. He came to know thoroughly the great men who were his instructors, and to understand their mental processes, and the methods by which they had gained their success.[1]

Such a warm appraisal a half century after the fact was not shared by young Oliver Wendell Holmes, Jr., writing in the 1870 *American Law Review*:

> For a long time the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts. We say "almost a disgrace" because, undoubtedly, some of its courses of lectures have been good, and no law school of which this can be said is hopelessly bad. Still, a school which undertook to confer degrees without any preliminary examination whatever, was doing something every year to injure the profession throughout the country, and to discourage real students.[2]

Earlier in the year of this alarum, a man who had attended the Harvard Law School in Senator Hoar's time, and then had practiced law in New York for sixteen years, was made the first Dean of the school. Appropriately named for a discoverer, Christopher Columbus Langdell brought to legal education what Justice Blackmun has recently called "the only really brilliant idea legal education has had in 100 years."[3] This was, of course, the Socratic case method. It was based on the concept of law as a natural science and the phenomena or specimens it studied were appellate opinions. Each student would need his own book of selected opinions for study. But then he would

> still need help in learning to classify the cases, to distinguish like from unlike despite superficial similarity, to reject as useless opinions which were ill reasoned, based on bad logic, and hence were flawed specimens, unsuitable for generalization. Learning this art of analysis and discrimination requires first careful study of the material, then discussion with others, submission to questioning, justification of the student's judgement, or confession of error when error becomes apparent.[4]

This concept of law as a science, with a very specific body of

1. A. SUTHERLAND, THE LAW AT HARVARD 142 (1967).
2. *Id.* at 140.
3. Nat'l L.J., Sept. 22, 1986, at 4.
4. A. SUTHERLAND, *supra* note 1, at 176-77.

former Dean Dorothy Nelson points to a 1978 study of 1600 practicing lawyers who have seen no help from their law schools in drafting, in negotiation or in counseling clients.[10]

A third is that "thinking like a lawyer"— the target of Langdellianism — pays too little attention to the fact that, as an American Bar Foundation study observes, "the end of a court case is often only one step in a continuing conflict rather than a final settlement" and that clients often fear "that lawyers will translate a good working business relationship into a fight over a narrow legal point."[11]

Finally, former Yale Dean Harry Wellington has been concerned with what he has discerned among law professors as a "scorn" for the practicing lawyer's work, which he feels contributes to the "extensive and intense unhappiness of law students."[12]

Over the past twenty-five years there has been a considerable response to these criticisms — an infusion of clinical programs and of courses such as philosophy, history, and economics. And, most recently, courses in negotiation, alternative dispute resolution, and counselling. Indeed, the situation in legal education — if we really considered it a science, as Langdell did — has the earmarks of a scientific revolution as defined by Thomas Kuhn. In his book, *The Structure of Scientific Revolutions*, he defines such revolutions as "those non-cumulative developmental episodes in which an older paradigm is replaced in whole or in part by an incompatible new one."[13] They are, he continues, "inaugurated by a growing sense . . . that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way."[14]

Before we jump to any conclusions about legal education, let us take a look at the state of the profession. That profession, viewed as a universe, is divided into two spheres. We can call them Megalaw and Medilaw, big law and middle to little law. The first is the world of the high tech, fast track giant firms, serving corporate and institutional clients, 250 of the largest now averaging 194 lawyers, the largest now having over 800 lawyers, the top seven having over 500 each. One

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10. Nelson, *Justice — A Universal Responsibility*, 19 SUFFOLK U. L. REV. 815, 826 (1985).
11. F. ZEMANS & V. ROSENBLUM, *supra* note 9, at 204.
12. Nat'l L.J., Sept. 22, 1986, at 4.
13. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 92 (2d ed. 1970).
14. *Id.*

quarter of all these lawyers work in branch offices.[15] Some 50,000 lawyers! Growth of the largest, 16 percent a year. Starting salaries now well over $65,000. Fees over $525 an hour for some. Billable hours — 2000 and up; some boasting 4000 billables a year — a 50-week year of 80 billable hour weeks.[16] A world of specialization, complex litigation, rainmakers, hustling, computerization, the subcontracting out of recruiting and training, out-placement services for the discards, and the rise of the law office managerial class. In the other sphere, 21.3 percent of all lawyers are in solo practice; 22 percent work in a five to ten lawyer firm; and 70.2 percent work in firms of fewer than twenty lawyers.[17]

As for life in Megalawpolis, there are those who are thrilled with the excitement of being in on the big cases, the great takeovers, the stunning mergers. But listen to one witness, Ruth Hochberger, a publisher of newsletters for lawyers. She finds the reason for the $65,000-plus starting salaries is one stark fact: "The life of a large-firm associate is awful."[18] She documents with detail:

> The hours are oppressively long, sometimes around the clock for days on end. The work is often boring, and involves proofreading or basic legal research in solitude in the library, frequently with no indication of what the end product is or what use will be made of it. Training and supervision have, in many places, become close to nonexistent as firms get busier and busier, the tenure of associates gets shorter and shorter, and the number of bodies required to staff enormous corporate matters becomes so large that partners frequently do not know the names of all the associates to whom they are paying these exorbitant salaries.
>
> The positive reinforcement — either joy in a job well done or a deserved pat on the back — is routinely missing; substituted is an end-of-the-year bonus when the firm has a good year.
>
> And the final payoff — the coveted partnership — is so remote, sometimes nine or 10 years away, with so little chance of occurring (often entering classes of 50 first-year associates are whittled down to one or two partners) that it often seems about as

15. Nat'l L.J., Sept. 22, 1986, at S-2 to S-24.
16. Blodgett, *Time and Money: A Look at Today's Lawyer*, A.B.A. J., Sept. 1, 1986, at 47, 50.
17. Reidinger, *It's 46.5 Hours a Week in Law*, A.B.A. J. Sept. 1, 1986, at 44.
18. Hochberger, *Money Can't Buy Job Satisfaction*, Nat'l L.J., Sept. 1, 1986, at 13.

random as winning the state lottery.[19]

On the other hand, an American Bar Association study, published at the same time, records the typical practicing lawyer as enjoying his practice, as being active in civic activities, wishing only that there was more time to spend with spouse and children. A healthy 59.4 percent said they would choose a legal career again.[20] Yet here, too, all is not completely serene. The same ABA, in 1984, reported that only a third of the nation's lawyers under the age of thirty were "totally happy" in their work; even at age fifty less than half were "totally happy."[21] At the same time, Mary Ann Altman of the well known management consulting firm, Altman & Weil, Inc., filed this somber report of the profession as a whole:

> Lawyers today are leaving the practice for new careers outside the law as never before. A lifetime commitment to a group of partners is a thing of the past. Increasing numbers of lawyers are admitting that they find the practice of law neither interesting nor challenging.
>
> Others complain that the practice atmosphere has become tense, pressures have increased and the practice is no longer a caring human occupation.[22]

The reasons? The increasing dominance of computerized technology, the displacement of the private secretary, the disappearance of quality judgments in determining compensation, the boredom inherent in much specialization, the decreasing amount of long-term client-counselor relationships, an increasing lack of trust coupled with fierce competition within the profession, and increasing disrespect from outside the profession. But there is this difference: in Megalawpolis the die is cast, the trend to giantism irreversible; in Medilawpolis, the future may be more open to human experimentation, leadership, and humane resolution.

If this picture of the current state and direction of the practice of law is basically accurate, then it seems to me that there are serious implications for legal education. I am not talking of any education revolution in Kuhn's sense, for I visualize no excision of much of the

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19. *Id.*
20. Reidinger, *supra* note 17, at 47.
21. Smith, *A Profile of Lawyering Lifestyles*, A.B.A. J., Feb. 1984, at 50, 54.
22. Altman, *Fostering Firm Culture Can Stop Dehumanization of a Practice*, Nat'l L.J., Jan. 12, 1987, at 15.

Langdellian mode. I see no new paradigm which is incompatible with the old. As Professor Arthur Miller has urged, there is still a justification for striving to make the classroom experience "an intense experience," just as the courtroom is often intense.[23] Dean Redlich of N.Y.U. states the case in this way:

> The case method and Socratic dialogue may no longer make up the exclusive law school fare, but enough remains (particularly in the first year) to create an intellectual skepticism that sparks an inquiring mind to question underlying policies and values. Traditional classroom teaching has been criticized for thriving on the students' classroom mistakes, but the method also thrives on bad policy judgment, arbitrary actions of administrators, foolish legislative choices and the erroneous reasoning of judges. All of this provides a strong antidote to the inherent conservatism of the legal profession.[24]

No, I am not suggesting any substitution of techniques. There is room for the Socratic case method, as there is room for lectures, for independent reading, research, and writing, for work with computers and videotapes, for problem solving, for moot court, for clinical experience, for role playing. What seems to me to be indicated by our overview of the profession is the recognition by the law schools of the country that they and the profession are indissolubly linked. Since the law school has its reason for being in the education of lawyers, it has an obligation to do what it can to assure the survival of a noble and humane profession whose demands and rewards will continue to attract bright, hard-working, and socially concerned young men and women. The school also has an obligation to infuse into its three-year stewardship of its students whatever it can effectively teach of values, attitudes and disciplines that will be demanded by that profession.

This may suggest a mere restatement of the ancient dispute between academic teaching and clinical experience, between intellectualism and vocationalism. This is not my intent. It is a more fundamental suggestion that the law schools adopt Dean Gurney's advice to President Eliot and abandon any sub silentio policy, intended or not, of maintaining distance from the legal profession. It is not that I want the school and the profession to assimilate each other's characteristics, but rather that I see the need for a much more creatively symbiotic rela-

23. Interview, THE THIRD BRANCH, Nov. 1986, at 10.
24. Redlich, *Why Must Law Schools Blur Students' 'Vision?'*, Nat'l L.J., Aug. 18, 1986, at S-18.

tionship — for the survival of the profession as we know it and for the relevance of the law school as we wish it.

What is implied in such a relationship?

The first implication is that the practicing profession be more of a presence in the law schools. I do not mean that the faculties need do anything that does not come naturally; the superlative intellects, prodigious research and coruscating teaching abilities of the Langdellian faculty type are priceless resources. But there can occasionally be hirings of teachers whose major background has been practice rather than teaching and publication. And there can be special lectureships for lawyers on sabbatical — an increasingly frequent practice, as well as places for judges and lawyers-in-residence. There can also be awards for distinguished practitioners and speakers invited to campus.

As Dean Redlich has intimated, the role model function of teacher is perhaps something we have underestimated. To the extent that the role model available to students is confined to the razor-sharp analytical intellect, they miss the opportunity to experience other minds who have coped successfully in solving problems across the vast spectrum of human affairs.

I think, for example, of the role-model someone like Brandeis would be — a person who combines a first-rate mind with broad business, civic, and legal experience and a concept of his mission as a counsellor at law to serve as "lawyer to the situation," enhancing the long-run interests of all parties.

Another implication for legal education of its responsibility to the profession lies in the subject matter of the curriculum. I suggest that law schools can safely forget the demands of Megalawpolis. Perhaps whatever schools want to consider themselves in the top ten or twelve may, for fundraising reasons, want to conduct a course or two in mergers and acquisitions. But the large firms themselves are the primary source of education in what the large firms do.[25] Most law schools would do well to prepare their students for the real world they will enter and serve. That world is one where litigation is vastly overrated. Not that it is unimportant. It is both important and exhilarating to try a case before a judge, and especially before a jury. But trials are relatively few and far between. Ninety percent of federal court cases, for example, terminate without trial.[26] Much of what we call litigation is

25. F. ZEMANS & V. ROSENBLUM, *supra* note 9, at 203.

26. Tomkins, *Civil Dispute Processing* (Book Review), 69 JUDICATURE 372, 373 (1986).

writing out questions and answers. Far more central to the lawyer in Medilawpolis are counseling, negotiating, and settlement. And preventative law as opposed to reactive law. Yet these are the skills which studies have shown have seldom been the focus of any effort in law school. An American Bar Foundation study has noted:

> Neglected by law schools are the interpersonal skills so important to the client-oriented problem solving that is the task of the legal professional. The more analytical skills may constitute the ideal symbolic work of the legal profession, but very often they are not deemed to be as useful as interpersonal competencies in the actual practice of law.[27]

In short, to the grounding in Socratic dialectic, which prepares for an adversarial, competitive style, schools should consciously strive to add the imparting in small groups of the outlook and skills fostering collaboration and problem solving.

Still another implication lies in the field of inculcating a sophisticated sense of professional responsibility, a subject where, according to Judge Dorothy Nelson, "much of the instruction is mechanical."[28] Here is an area where thoughtful practitioners can make a profound difference in the sensitizing of young lawyers to the ethical dimension of their complex work.

In addition to encouraging more of a role model presence of the profession on campus, more attention to developing the "interpersonal competencies," and a more sensitized effort to inculcate a sophisticated sense of professional responsibility, the law school can do more to prepare its students for their career decisions. At the present the schools look on helplessly as the phalanxes of big firm recruiters descend and as students shuttle across the country for weeks of interviews. Before all this is deemed inevitable, schools should try to be in a position to give their students the best and most up-to-date information on all options. The presence on campus of some who know what the practice of law is in firms big, middle and small, in government, and in the public interest sector could measurably improve the quality of counselling — not only as the student prepares to choose his first job but also later on as the former student considers a change.

Finally, perhaps the most important contribution that the law

27. F. Zemans & V. Rosenblum, *supra* note 9, at 163.
28. Nelson, *supra* note 10, at 816.

school can make to the profession is to catalyze, lead, and coordinate efforts to look ahead to the future prospects and problems of the practice of law. I have said that, unlike Megalawpolis, Medilawpolis is still malleable. Directions can be changed, new forms can be molded. But forethought and planning are essential. The key questions are: How can solo practice survive? How can legal services be made more available to the poor and the middle class? What kinds of economies and cooperative groupings may be available for the person who wishes to practice alone or in a small group? What new forms of practice should be encouraged, such as clinics, prepaid insurance plans, institutional provision of legal services for church members, retirement home occupants, tenants, one-stop "package services" providing legal advice with other professional services? How can law schools assist? How can general practitioners have the services of experts? How can large firms best fulfill their pro bono obligation?

Bar associations and law schools in a number of states — Maine, California, Colorado, Connecticut, Minnesota, and at least seven others — have undertaken efforts, ranging from day-long conferences to professional surveys, workshops, interviews, and substantial reports, all aimed at planning for a future profession that will retain as much of its attractiveness as possible. In my own state of Maine, a Consortium on a Study of the Future of the Maine Legal Profession has been formed, in which the University of Maine Law School is a key participant.

A final role in which the law school may strengthen the profession is that of continuing education. Of course one area is education in legal specialties — an area where today so much time is perfunctorily spent in order to accumulate required credits. As a result, the term "continuing legal education" is held in bad odor by some. But wholly apart from traditional subjects, law schools could carve out a new area of education in the broad and liberal tradition of a humane profession — holding themselves out to help resolve for judges and lawyers alike tension and pressure by lifting their sights and broadening their horizons. Law schools could serve as honest brokers between the bench and bar for which they educate and the arts and sciences faculties of the universities with which they are affiliated.

All of this is leagues away from Langdell's and Ames's inarticulate premise that the profession and the school have nothing to do with each other. On bridging the gap in creative ways consistent with the independence and genius of each depends the possibility of becoming an old fashioned lawyer in a new fashioned world, to wit:

— in a world of increasing specialties, retaining something of the generalist;

— in a world stressing technical competence, retaining something of the broad view that once justified the law in being included among the humanistic professions;

— in an era of exaltation of adversarial combat and increasing delays and costs of litigation, finding ways of serving clients by seeing the common interests of all concerned, by being, as Brandeis was, lawyer to the situation, by creatively probing the possibilities of collaboration over combat, by making a specialty of preventive law rather than of the law of salvage, and in the process, having the time of one's life;

— in a legal community often marked by highly paid but subservient employees, maintaining independence and making the lawyer population one knows best a real fraternity;

— and, notwithstanding the escalating demands of the profession, making time for community and, not least, oneself as a broad-gauged, vital and integrated individual.

The Five-Year Residence Requirement for Naturalization: Its Operation and Employment-Related Exceptions and Ameliorations

Judge Juan M. Bracete*

I. Introduction

Congress, since the first naturalization statute,[1] has insisted that aliens pass through a trial period of residence in the United States before they are admitted to citizenship pursuant to article one, section eight, clause four, of the Constitution. Until 1929, the courts generally construed the residence requirement favorably to the alien, thus making any need for the amelioration or waiver of the required residence largely unnecessary. With the institution in 1929 of more stringent requirements as to the continuity of this residence, the need for exceptions and meliorations for reasons purely in the national interest became apparent. Presently, if an alien desiring naturalization has to be absent from the United States for reasons relating to his or his spouse's employment, the likelihood of his qualifying for a waiver or amelioration of the five-year residence requirement is present. This article analyzes the present state of the law in this area.[2]

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The views expressed in this article are those of the author and do not necessarily reflect those of the United States Department of Justice or any of its divisions, boards or offices.

1. The Act of March 26, 1790, 1 Stat. 103, was the first naturalization statute. This statute imposed a two-year residence requirement as a condition to naturalization. The Act of January 29, 1795, 1 Stat. 414, first imposed the five-year period as a condition for naturalization. Residence is only one of the requirements imposed by the statutes as a condition to acquire United States citizenship. A discussion of the other requirements is outside the scope of this article.

2. Citizenship confers upon the former alien the right to integrate himself fully into American society, allowing him to vote, hold public office, transmit the citizenship to his offspring, and travel abroad with the protection of our Government, as well as allow him to engage in certain types of employment reserved for citizens (notably employment with the United States Government). *See* Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978).

The practical and immediate benefit to the alien of citizenship is that upon becoming a citizen a person cannot be expelled from the United States or barred from entry. Furthermore, he can secure for his relatives benefits which were unavailable while he was simply an alien lawfully admitted for lawful permanent residence.[3]

The philosophy of the naturalization statutes has always been that naturalization is a bounty and that an alien does not have a right to naturalization unless he meets all the statutory requirements.[4] However, if the alien meets the requirements of the Act he is entitled to naturalization, since the naturalization court is not granting or withholding a favor.[5]

II. Residence Rules

The Act of March 2, 1929[6] set the first statutory rules of continuity of residence. Prior to this act, an alien needed, in effect, to show only lawful admission for residence and domicile for five years immediately prior to his petition for naturalization without much regard to his actual physical presence in the United States, as long as he was not deemed to have abandoned United States domicile.[7]

The rules first promulgated were: (1) an absence from the United States for more that one year would break continuity of residence, (2) an absence of more than six months but less than one year could break the continuity of residence unless satisfactorily explained, and (3), *sub silentio*, absences for a period of less than six months would not break the continuity of residence.

But matters were not for long satisfactory to Congress. The above mechanics could easily lead to circumvention of the intent of actual presence in the United States for a substantial amount of time as a condition for naturalization. This concern was finally addressed by the Immigration and Nationality Act of 1952 (hereinafter referred to as

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3. Sections 201 and 203(a) of the Immigration and Nationality Act of 1952 [hereinafter referred to as "the Act"], 8 U.S.C. §§ 1151 and 1153(a), allow citizens but not lawful permanent resident aliens to confer benefits on their siblings and parents.

4. United States v. Schwimmer, 279 U.S. 664 (1929).

5. Tutun v. United States, 270 U.S. 568 (1926).

6. 45 Stat. 1512.

7. The 1929 Act responded to situations such as the one exemplified by United States v. Dick, 291 F. 420 (1923), where the alien spent a minuscule amount of time in the United States but was found to be a "resident" for the required five-year period.

"The Act"), which amended the residence requirement language to provide that for at least one-half of the period for which residence is required the petitioner for naturalization must have been physically present in the United States.[8]

The residence required for naturalization must result from a lawful admission to permanent residence. Even though an alien may have been lawfully admitted for permanent residence, a subsequent entry which would be unlawful under the immigration laws may bar approval of the application.[9]

III. Exceptions

The statutory provisions discussed immediately hereafter waive or substitute the five-year residence requirement. The alien falling within the statutorily benefitted class can be naturalized in a term shorter than five years from lawful admission for permanent residence.

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8. The term United States is defined. Section 101(a)(38) presently states: "The term 'United States', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States. For the purpose of issuing certificates of citizenship to persons who are citizens of the United States, the term 'United States' as used in section 341 of this Act includes the Canal Zone."

According to section 506(c) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, the Northern Mariana Islands is a part of the United States and a State for purposes of immediate relative status determinations and judicial naturalization, effective upon the establishment of the Commonwealth of the Northern Mariana Islands. *See* 48 U.S.C. § 1681 note. The President declared the Commonwealth of the Northern Mariana Islands established as of Nov. 4, 1986. 51 Fed. Reg. 40,399 (1986). *See also* Application of Reyes, 140 F. Supp. 130 (Haw. 1956), for an application of this definition.

9. In Brymer v. United States, 83 F.2d 276 (9th Cir. 1936), an alien was lawfully admitted for permanent residence in 1892, and then unlawfully entered in 1907, since he had committed a crime which made him excludable. *See also In Re* Scriver, 9 F. Supp. 478 (W.D.N.Y. 1935). Entry is a defined term. See Section 101(a)(13) of the Act, 8 U.S.C. § 1101 (a)(13); Rosenberg v. Fleuti, 374 U.S. 449 (1963), and its progeny should also be consulted. The fact that deportation proceedings may not have been instituted is immaterial; section 318 of the Act, 8 U.S.C. § 1429, does not make the Attorney General's administrative determinations binding on the naturalization court. However, at least one circuit court has recently opined, albeit in a different context, that lawful permanent residence terminates only upon a final administrative decision stripping the alien of such status. *See* Rivera v. INS, 810 F.2d 540 (5th Cir. 1987). Also, the regulations in force permit an immigration judge to terminate deportation proceedings against an otherwise deportable alien so as to allow him to proceed to naturalization. 8 C.F.R. § 242(e) (1987).

Provisions which ease compliance of the five-year term of residence are discussed below.[10] For ease of analysis, these latter provisions are referred to herein as ameliorations.

A. *First Exception: Spouses of United States Citizens*

The exception for spouses of United States citizens is not employment-related. However, other exceptions and ameliorations of the five-year residence requirement to be discussed here depend on the existence of a marital union with a United States citizen. The case law as to recognition of the marital union for this exception is germane to the other provisions here discussed.[11] Furthermore, it is one of the most widely used exceptions. Therefore, a discussion of this provision is warranted.

The immigration statutes were at one time extremely sexist in this regard. The Cable Act of September 22, 1922, eliminated the automatic grant of citizenship to wives of United States citizens and required them to seek judicial naturalization; as originally drafted, only one year of residence was required.[12] The Act of May 24, 1934,[13] limited this measure of relief to spouses of citizens by providing for a three-year term of residence to qualify for naturalization.

The present statute[14] retains for spouses of citizens of the United

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10. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, signed by the President on November 6, 1986, contains what may be the first provision to make it more difficult for a group to comply with the residence requirement. Section 303(d)(5)(B) of this Act requires that persons granted lawful permanent resident status as seasonal agricultural workers must work as seasonal agricultural workers at least ninety days during each of the five years of residence to qualify for naturalization.

11. There are some limitations in the parallel interpretations of section 319(a) of the Act, 8 U.S.C. § 1430(a), and the other sections where marriage is one of the elements required to obtain the benefit. Obviously, the same reasons that require the departure from the United States of the citizen spouse which justify eligibility for the benefits of section 319(b) of the Act, 8 U.S.C. § 1430(b), may occasion the separation of the spouses. The benefits of section 319(d), 8 U.S.C. § 1430(d), are for widows; one cannot speak in terms of an existing marital union at the time of applying for naturalization.

12. 42 Stat. 1021. The automatic grant of United States citizenship to wives of male American citizens was provided by the Act of February 10, 1855, Sec. 1994 of the Revised Statutes, repealed by the Cable Act.

13. 48 Stat. 797.

14. Section 319(a) of the Act, 8 U.S.C. § 1430(a) reads:

> Any person whose spouse is a citizen of the United States may be naturalized upon compliance with all the requirements of this title except the pro-

States the residence requirement of three years set by the 1934 Act. The physical presence required in the United States is lowered to one year and six months. The petitioner for naturalization must live in "marital union" with the spouse and the spouse must be a United States citizen throughout the three-year period immediately preceding the petition.

Although the statutory language is fairly straightforward, there has still been a need for judicial construction. First, courts have had to reiterate that the benefits are intended for participants in lawful marriages.[15] Second, "marital union" has had to be defined. A long separation immediately prior to the filing of the petition for naturalization, where the spouses intended the separation to be permanent, will bar the obtaining of benefits under section 319(a) of the Act.[16] On the other hand, a separation short in duration and relating to family discord and incidents which occurred in the past and resulted in reconciliation will not bar the favorable operation of this section.[17]

At least one court has opined, "Surely, preservation of the family unit should be our touchstone in constructing the phrase 'in marital union.' And just as surely our inquiry should begin and end with a valid marriage, entered into in good faith, and still continuing and in existence as a legal status."[18] But it seems that the more favored view is that for the benefits of section 319(a) of the Act to accrue, a close, continuing marital relationship must be present throughout the three-year period immediately prior to the filing of the petition for naturalization.[19]

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visions of paragraph (1) of section 316(a) if such person immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years, and during the three years immediately preceding the date of filing his petition has been living with the citizen spouse, who has been a United States citizen during all of such period, and has been physically present in the United States for periods totaling at least half of that time and has resided within the State in which he filed his petition for at least six months.

15. In *In Re* Chong Jah Alix, 252 F. Supp. 313 (D. Haw. 1965), the court denied the petition for naturalization of the spouse of a United States citizen because the divorce obtained by the United States citizen to marry the petitioner was not recognized by his state of domicile at the time, thus making the present marriage void.
16. Petition of Bashan, 530 F. Supp. 115 (S.D.N.Y. 1982).
17. *In Re* Petition of Olan, 257 F. Supp. 884 (S.D. Cal. 1966).
18. *Id.* at 891.
19. Petition of Bashan, 530 F. Supp. at 115; *In Re* Kostas, 169 F. Supp. 77 (D.

B. *Second Exception: Spouse of United States Citizens Who Enter into Qualified Overseas Occupations*

Section 319(b) of the Act contains the most generous exception to the residence requirement available to any group of petitioners for naturalization.[20] This section in effect waives all periods of residence for spouses of United States citizens who take up employment abroad with (1) the Government of the United States, (2) an American institution of research, (3) American enterprises engaged in trade and commerce abroad, (4) international organizations of which the United States is a party, or (5) organizations, which must have an establishment in the United States, who direct them to go abroad as ministers of religion, priests or missionaries.

Under this section the only requirement of residence is lawful admission for permanent residence under the immigration laws and physical presence in the jurisdiction of the Naturalization Court at the time of admission to citizenship. The statute also contains a subjective residence test: intention to take up United States residence upon termination of the spouse's employment abroad.

The first issue to be adjudicated is the existence of a valid mar-

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Del. 1958).

20. Section 319(b) of the Act, 8 U.S.C. § 1430(b), reads:
(b) Any person, (1) whose spouse is (A) a citizen of the United States, (B) in the employment of the Government of the United States or of an American institution of research recognized as such by the Attorney General, or of an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof, or of a public international organization in which the United States participated by treaty or statute, or is authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States, or is engaged solely as a missionary by a religious denomination or by an inter-denominational mission organization having a bona fide organization within the United States, and (C) regularly stationed abroad in such employment, and (2) who is in the United States at the time of naturalization, and (3) who declares before the naturalization court in good faith an intention to take up residence within the United States immediately upon the termination of such employment abroad of the citizen spouse, may be naturalized upon compliance with all the requirements of the naturalization laws, except that no prior residence or specified period of physical presence within the United States or within the jurisdiction of the naturalization court or proof thereof shall be required.

riage, without which the section does not come into play.[21] In analyzing the marriage validity issue, the recognition of any prior divorce by the domiciliary jurisdiction will be analyzed as well as the formalities of the marriage celebration.[22]

Although military service was at one time questioned as qualifying employment for the application of the predecessor of Section 319(b) of the Act,[23] most reported cases analyzing the mechanics of this section have been decisions on the petitions of spouses of members of the Armed Forces.[24]

The statute has not been interpreted liberally as it concerns qualifying employment. "Commerce and Trade" does extend to callings not traditionally considered of a mercantile nature.[25]

An area of considerable interpretation has been the presumed need to reside abroad with the citizen spouse. The regulations[26] state that the petitioner must establish that he intends "upon naturalization to reside abroad with the United States citizen spouse." The only judicial interpretations in this area concern spouses of military personnel stationed in hazardous areas,[27] where the courts have read the statute as requiring living abroad where it is impossible to live with the spouse. But one court[28] has stated:

> In addition to the situation presented by the case sub judice, in which the alien spouse cannot join the citizen spouse by reason of

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21. *In Re* Chang Jah Alix, 252 F. Supp. 313 (D. Haw. 1965).

22. For a full discussion of the marriage validity issues see 2 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 7.18 (1987).

23. *See In Re* Sugarek, 77 F. Supp. 998 (N.D. Cal. 1947).

24. *See, e.g., In Re* Naturalization of K, 174 F. Supp. 343 (D. Md. 1959); *In Re* Petition of Sun Cha Tom, 294 F. Supp. 791 (D. Haw. 1968); *In Re* Simpson, 315 F. Supp. 584 (W.D. La. 1970); *In Re* Petition of Pou, 317 F. Supp. 177 (E.D. La. 1970); Petition of Gray, 369 F. Supp. 1049 (S.D. Miss. 1973).

25. In *In Re* Fang Lan Dankowsky, 478 F. Supp. 1203 (D. Guam 1979), the court refused to grant benefits under this section to the spouse of a teacher at the Taipei American School, an institution of obviously immense benefit to out country's presence in Taiwan and which liberally received funds from the Department of State; this refusal is rather short-sighted since, considering the programmed de-emphasizing of official ties to Taiwan, an institution providing such needed help to children of American citizens undoubtedly directly engaged in trade or commerce must by necessity be "engaged in whole or in part in the *development* of foreign trade and commerce of the United States" (emphasis added).

26. 8 C.F.R. § 319.2 (1987).

27. *See* cases cited *supra* note 24.

28. Petition of Gray, 369 F. Supp. at 1049.

restrictions imposed by the United States Government, this Court can envision analogous situations in which residence together is rendered difficult or undesirable because of the location of the citizen spouse's employment. Nevertheless, residence abroad by the alien spouse may be necessitated by economic conditions, or the desirability of having the alien spouse reside near the citizen spouse's place of employment and with relatives or friends. These too are "enforced absences" from the United States, the very situation which Congress sought to remedy by the enactment of 319(b).[29]

C. *Third Exception: Service in the Armed Forces*

Section 328(a) of the Act[30] provides that an alien who serves honorably in the armed forces continuously for at least three years and who files for naturalization while still in service or within six months thereafter may be naturalized without regard to residence.[31]

This section, in effect, may lower the period of required physical presence to zero; the qualifying service need be neither in the United States nor after acquisition of permanent resident status.[32] The regulations promulgated thereunder clearly establish that there must be a lawful admission for permanent residence before the petition for natu-

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29. *Id.* at 1051.

30. 8 U.S.C. § 1439(a) reads:

A person who has served honorably at any time in the Armed Forces of the United States for a period or periods aggregating three years, and who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period, or such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

31. Considerable litigation has arisen in connection with the earlier statutes. It is not profitable to discuss the issues raised because (1) the present statute does not give grounds to litigate the old issues and (2) we do not attempt to discuss prior statutory language except as it is still reflected in the present statute. For a thorough discussion on this topic see 3 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 17.5 (1987).

32. Typically it will be after; 10 U.S.C. §§ 3253 and 8253 prohibit enlistment of aliens in peacetime unless they are lawful permanent residents.

ralization is filed.[33] Form N-426 (Certification of Military or Naval Service) is utilized to comply with the proof of required qualifying honorable service in the Armed Forces demanded by Section 328(e) of the Act.[34]

Section 329[35] is an especially generous provision of the Act. It waives all residence and physical presence requirements for naturalization for aliens who have served honorably in the armed forces in an active duty status during periods of war or designated periods of military hostilities. Since naturalization may be granted before the service has been concluded, the alien may be denaturalized if he separates

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33. 8 C.F.R. § 328.1 (1987).
34. 8 U.S.C. § 1439(e).
35. 8 U.S.C. § 144, as applicable, reads:

> Any person who, while an alien or noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I [as defined in section 101(d)(2)(A)] or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950 and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which the Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section of (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active duty status, and whether separation from such service was under honorable conditions: Provided, however, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

The Act of December 29, 1981, 95 Stat. 1619, amended section 316(b) of the Act to grant these benefits to the spouses and dependents unmarried sons and daughters of the aliens eligible for benefits under this section.

from the service under less than honorable conditions.[36] The last period of military hostilities for purposes of this section was the Grenada campaign, which was designated as a period of hostilities for purposes of section 329 of the Act by Executive Order 12,582 of February 2, 1987.[37]

D. *Fourth Exception: Widows of United States Servicemen*

Section 319(d) of the Act[38] waives all period of residence for naturalization of widow(er)s of active duty servicemen. It requires that the petitioner for naturalization be living in marital union with the deceased United States citizen at the time of his demise and while he was serving honorably in the Armed Forces. The only residence requirement is lawful admission for permanent residence and physical presence in the jurisdiction of the Naturalization Court.

To be a surviving spouse, the marriage must be valid.[39] Living "in marital union" must be interpreted in light of the judicial decisions interpreting section 319(a) of the Act discussed above. Since Form N-426 (Certification of Military or Naval Service) is designed to secure military records of the petitioner himself, active duty status and honor-

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36. Section 329(c) of the Act, 8 U.S.C. § 1440(c), provides:

> Citizenship granted pursuant to this section may be revoked in accordance with section 340 of this title if at any time subsequent to naturalization the person is separated from the military, air, or naval forces under other than honorable conditions, and such ground for revocation shall be in addition to any other provided by law. The fact that the naturalized person was separated from the Service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation.

37. This executive order limits benefits to persons actually serving in direct support of the military operations in Grenada. The last general availability hostilities period was the Viet Nam episode which ended Oct. 15, 1978, by Executive Order No. 12081, 43 Fed. Reg. 42,237 (1978).

38. 8 U.S.C. § 1430(d) reads:

> Any person who is the surviving spouse of a United States citizen, whose citizen spouse dies during a period of honorable service in an active duty status in the Armed Forces of the United States and who was living in marital union with the citizen spouse at the time of his death, may be naturalized upon compliance with all the requirements of this title except that no prior residence or specified physical presence within the United States, or within the jurisdiction of the naturalization court shall be required.

39. *See In Re* Chang Jah Alix, 252 F. Supp. at 313.

able service would be established by documentation secured by the spouse directly from the Armed Forces.

E. *Fifth Exception: Extraordinary Contributors to the National Security or Intelligence Activities*

Persons who have assisted our national security interests have long been granted special consideration under our immigration laws.[40] However, it was not until December 4, 1985, that general legislation was enacted to accord persons who have contributed significantly to our national security or intelligence activities the right to be naturalized expeditiously. Section 316(g) of the Act[41] provides that, upon the concurrence of the Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration, an alien may be naturalized without regard to the residence and physical presence requirements if the alien has continuously resided in the United States for at least one year prior to the naturalization. The statutory language uses "residence" twice in a manner that creates an apparent contradiction. In the absence of authoritative interpretation of this section, the contradiction can be solved by interpreting the "residence and physical presence"

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40. Section 7 of the Act of June 20, 1949, 63 Stat. 208, as amended, codified at 50 U.S.C. § 403h, permits the Director of the Central Intelligence Agency, the Attorney General, and the Commissioner of Immigration and Naturalization to admit aliens for permanent residence without regard to their admissibility under the immigration laws whenever they deem the entry of such aliens to be in the interest of national security or essential to the furtherance of the national intelligence mission. The number of aliens and their relatives so admitted is limited to 100 per year.

41. 8 U.S.C. § 1426(g) in pertinent part reads:

> (1) Whenever the Director of Central Intelligence, the Attorney General and the Commissioner of Immigration determine that a petitioner otherwise ineligible for naturalization has made an extraordinary contribution to the national security of the United States or to the conduct of United States intelligence activities, the petitioner may be naturalized without regard to the residence and physical presence requirements of this section, or to the prohibitions of section 1424 of this title, and no residence within the jurisdiction of the court shall be required: Provided, That the petitioner has continuously resided in the United States for at least one year prior to naturalization: Provided, further, That the provisions of this subsection shall not apply to any alien described in subparagraphs (A) through (D) of section 1253(h)(2) of this title.
>
> (2) . . . .
>
> (3) The number of aliens naturalized pursuant to this subsection in any fiscal year shall not exceed five . . . .

waived to refer to the residence and physical presence required of other aliens after acquisition of lawful permanent residence status for naturalization; in contrast, the continuous residence of one year required may refer to the alien making the United States his domicile in fact for the one year immediately prior to his naturalization. Congress has limited this avenue of relief to only five aliens per year.

F. *Sixth Exception: Alien Children Adopted by United States Citizens*

In a radical departure from the established norm of requiring judicial naturalization of all individuals who are to become United States citizens after birth,[42] Congress passed legislation (signed by the President on November 14, 1986)[43] which contains a new provision[44] that provides for naturalization on the basis of a purely administrative petition. This procedure is available to alien children who are (1) adopted while under sixteen years of age by United States citizens, (2) lawfully admitted for permanent residence, (3) residing in the United States in the custody of the United States adoptive parents at the time of the filing of the application for citizenship, and (4) under eighteen years of age at the time their parents apply for citizenship on their behalf. This provision dispenses with any term of residence in the United States as a

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42. Collective naturalization, the procedure utilized by Congress to grant United States citizenship to entire classes of former aliens, generally upon acquisition of new territory by the United States, is outside the scope of this article.

43. The Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653.

44. This provision, to be codified as section 341(b) of the Act, reads:

(1) The adoptive citizen parent or parents of a child described in paragraph (2) may apply to the Attorney General for a certificate of citizenship for the child. Upon proof to the satisfaction of the Attorney General that the applicant and spouse, if married, are citizens of the United States, whether by birth or naturalization, and that the child is described in paragraph (2) the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship, but only if the child is at the time within the United States.

(2) A child described in this paragraph is a child born outside of the United States who-

(A) is under the age of 18 years,

(B) is adopted before the child reached the age of 16 years by a parent who is a citizen of the United States, either by birth or naturalization, and

(C) is residing in the United States in the custody of the adopting citizen parent, pursuant to a lawful admission for permanent residence.

condition for naturalization, requiring only presence in the United States at the time of administrative application for a certificate of United States citizenship, which constitutes *ipso facto* the application for naturalization.[45]

IV. Amelioration Provisions

The following provisions of our statutes make it easier to comply with the requirement of five years of continuous residence immediately prior to the filing of the petition for naturalization but do not lower the five-year requirement and are, therefore, for analytical ease discussed separately. Unlike the waiver provisions previously discussed, they do not allow the alien to apply for citizenship until after five years of lawful permanent resident status.

A. *First Amelioration: Aliens Proceeding Abroad on Qualified Employment and Their Families*

The second paragraph of Section 316(b) of the Act,[46] which is

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45. As previously utilized, an application for a certificate of citizenship was submitted only by persons who acquired United States citizenship by reason other than birth or naturalization in the United States. Typically, the certificate of United States citizenship was requested by a person born to parents at least one of whom could transmit United States citizenship to his or her offspring. The certificate of citizenship merely declared that the person had acquired United States citizenship at some time prior to the application for the certificate and the procedure was considered merely a convenience. Now a certificate of citizenship application will by itself constitute an application for citizenship by a person within the United States, which procedure has traditionally been termed naturalization. The fascinatingly complex area of acquisition of United States citizenship through the parents, an area of the law that has been constantly changing through legislation over the years, is outside the scope of this article.

46. 8 U.S.C. § 1427(b)(2) reads:

> [A]bsence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship (whether preceding or subsequent to the filing of the petition for naturalization) shall break the continuity of such residence except that in the case of a person who has been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of at least one year and who thereafter, is employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Attorney General, or is employed by an American firm or corporation en-

probably one of the longest sentences in the English language, provides that absences from the United States will not be deemed to interrupt continuous residence therein for naturalization purposes where the alien proceeds abroad to be employed with (1) the Government of the United States, (2) a recognized American institution of research,[47] (3) an American firm or Corporation or a 50% owned subsidiary thereof engaged in the development of foreign trade and commerce of the United States,[48] or (4) a public international organization of which the United States is a member.[49] A 1981 amendment extended the benefits to the spouse and the dependent unmarried sons and daughters of the employed alien.[50]

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gaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 percentum or whose stock is owned by an American firm or corporation, or is employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence, no period of absence from the United States shall break the continuity of residence if —

(1) prior to the beginning of such period of employment (whether such period begins before or after his departure from the United States), but prior to the expiration of one year of continuous absence from the United States, the person has established to the satisfaction of the Attorney General that his absence from the United States for such a period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries of such firm or corporation, or to be employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence; and

(2) such person proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose.

47. The Attorney General from time to time adds and deletes recognized institutions. Recognized institutions are listed under 8 C.F.R. § 316a.2. The listing is updated periodically and the filing of Form N-470 (Application to Preserve Residence for Naturalization Purposes) operates the process of listing.

See operations instructions 8 C.F.R. § 316a.1.

48. A self-employed individual does not qualify for benefits under this statute. *In Re* Natham, 114 F. Supp. 361 (S.D.N.Y. 1953).

49. The Attorney General list the organizations he deems to qualify under 8 C.F.R. §§ 316a.3 & 316a.4.

50. Act of December 29, 1981, 95 Stat. 1619.

The ameliorative provisions of this section of the Act first came into being in 1936[51] as an amendment to the 1929 Act[52] regulating continuity of residence required of government employees, employees of American firms, and employees of American institutions of research for purposes of qualifying for naturalization. The statute required approval of the absence by the Secretary of Labor prior to departure or employment except for persons already abroad at the time of passage of the Act.[53] The 1938 amendments to these provisions[54] tightened the requirements by making it a condition to benefit from the amelioration that the alien have resided in the United States for at least a year prior to the departure, a requirement which remains to this day.[55]

Presently, the eligible alien must file Form N-471 (Application to Preserve Residence for Naturalization Purposes) with the Service to secure the approval prior to either employment or one year of absence abroad.[56]

Failure to secure such approval will result in the absence interrupting residence, requiring the accumulation of the required residence anew after return to the United States.[57]

The statute as presently enacted waives for employees of the government of the United States granted benefits under section 316(b) the requirement of physical presence in the United States for at least one half of the required period of residence. The statute furthermore waives the prior one-year uninterrupted period of residence to beneficiaries of the waiver who are employed or under contract with the Central Intelligence Agency, allowing them to substitute any one-year period of physical presence in the United States.[58] *A fortiori*, the required physical presence is not waived for other beneficiaries of this section.

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51. Act of June 25, 1936, 49 Stat. 1925.
52. Act of March 2, 1929, 45 Stat. 1512.
53. *See* Schwartz v. United States, 121 F.2d 225 (9th Cir. 1941).
54. Act of June 29, 1938, 52 Stat. 1247.
55. In *In Re* Pinners Petition, 161 F. Supp. 337 (N.D. Cal. 1958), two absences, one of five days and one of ten days, were deemed sufficient to interrupt the one-year prior presence in the United States.
56. It is curious to note that 8 C.F.R. § 316 a.2 provides that the application in Form N-470 may be filed before or *after* commencement of the employment. *See In Re* Pinner's Petition, 161 F. Supp. at 337, for disapproval of this regulation. However, the regulation does have its logic.
57. *In Re* Pinners Petition, 161 F. Supp. at 337; Petition of Rothschild, 57 F. Supp. 814 (S.D.N.Y. 1944); Schwartz v. United States, 121 F.2d 225 (9th Cir. 1941).
58. Section 316(c) of the Act, 8 U.S.C. § 1427(c).

B. *Second Amelioration: Religious Travelling Abroad*

Section 317 of the Act[59] provides that ministers of religion and missionaries, brothers, nuns or sisters sent abroad by their organization having an establishment in the United States may be naturalized regardless of their physical presence in the United States provided that (1) they have been admitted for permanent residence before that time and (2) they have been continuously physically present in the United States for at least a year at any time after acquiring status of a permanent resident. This provision does not cover the spouses or offspring of the ministers and missionaries.[60]

There are no published regulations interpreting this section of the naturalization statute other than the regulation providing for filing of form N-470 to secure the Attorney General's approval of the absence.[61]

C. *Third Amelioration: Service in the Armed Forces of the United States*

Sections 328(c) and (d)[62] provide that an alien not entitled to nat-

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59. 8 U.S.C. § 1428 reads:

> Any person who is authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States as a missionary, brother, nun, or sister, who (1) has been lawfully admitted to the United States for permanent residence, (2) has at any time thereafter and before filing a petition for naturalization been physically present and residing within the United States for an uninterrupted period of at least one year, and (3) has heretofore been or may hereafter be absent temporarily from the United States in connection with or for the purpose of performing the ministerial or priestly functions of such religious denomination, or serving as a missionary, brother, nun, or sister, shall be considered as being physically present and residing in the United States for the purpose of naturalization within the meaning of Section 316(a), notwithstanding any such absence from the United States, if he shall in all other respects comply with the requirements of the naturalization law. Such person shall prove to the satisfaction of the Attorney General and the naturalization court that his absence from the United States has been solely for the purpose of performing the ministerial or priestly functions of such religious denomination, or of serving as a missionary, brother, nun, or sister.

60. This oversight should have been corrected, as it was for the spouses and offspring of employees of the Government, American commercial and research organizations, and international organizations. See Pub. L. No. 97-116, 95 Stat. 1619.

61. 8 C.F.R. § 316 a.21(b) (1987). Form N-470 may be filed at any time.

62. 8 U.S.C. § 1439(c) and (d) reads as follows:

uralization under the residence exception provisions of 328(a) discussed previously may utilize the service in the armed forces for more than three years, whether continuous or not, as periods of residence within the United States regardless of the place where the alien served. Consequently, even though the alien needs to wait five years after admission for lawful permanent residence to petition for naturalization, any absence from the United States while a member of the armed forces, however long, will not bar naturalization. Service in the armed forces is established by means of Form N-426 filed concurrently with the petition for naturalization.

D. *Fourth Amelioration: Service in Certain American-Owned Vessels*

The realities of the sea trade have been explicitly recognized by the United States naturalization statutes since the nineteenth century. In 1918, Congress adopted the rule, subsequently modified, of denying to seamen employed in vessels not of American registry the amelioration provisions then existing.[63]

In the case such petitioner's service was not continuous, the petitioner's residence in the United States, good moral character, attachment to the principals of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such petition between the periods of petitioner's service in the Armed Forces, shall be alleged in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon. Such allegations and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization.

The petitioner shall comply with the requirements of section 316(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States.

63. In McDonald v. United States, 279 U.S. 12 (1929), the Supreme Court interpreted the Act of May 9, 1918, as denying the seaman ameliorative provisions to service in all vessels not of American registry. This particular case would have been decided differently today since the present statute makes controlling (1) the home port and (2) ownership of the vessel. Seamen have traditionally received, and to this day receive, disparate treatment under our immigration laws. *See, e.g.*, sections 244(f) and 245(c) of the Act, 8 U.S.C. § § 1254(f) and 1255(c), where benefits available to other aliens are not available to crewmen.

The present statute, section 330(a)(1) of the Act,[64] provides that service by seamen shall be deemed residence in the United States for purposes of naturalization if the service is aboard a vessel (1) owned be American interests and operated by the Government of the United States of an agency thereof, or (2) with a home port in the United States and registered in the United States or, if registered abroad, owned by a citizen or a corporation in the United States after admission for permanent residence.

No action need be taken by the seaman to avail himself of these provisions other than submission at the time of petitioning for naturalization the evidence of service required by the statute.[65]

E. *Fifth Amelioration: Employment in Certain Nonprofit Communications Media*

Section 319(c) of the Act,[66] adopted in 1967, applies to aliens em-

64. 8 U.S.C. § 1441(a)(1) reads:
Any periods of time during all of which a person who was previously lawfully admitted for permanent residence has served honorably or with good conduct, in any capacity other than as a member of the Armed Forces of the United States, (A) on board a vessel operated by the United States, or an agency thereof, the full legal and equitable title to which is in the United States; or (B) on board a vessel whose home port is in the United States, and (i) which is registered under the laws of the United States, or (ii) the full legal and equitable title to which is in a citizen of the United States, or a corporation organized under the laws of and of the several States of the United States, shall be deemed residence and physical presence within the United States within the meaning of section 316(a) of this title, if such service occurred within five years immediately preceding the date such person shall file a petition for naturalization. Service on vessels described in clause (A) of this subsection shall be proved by duly authenticated copies of the records of the executive department or agency having custody of records of such service. Service on vessels described in clause (b) of this subsection may be proved by certificates from the masters of such vessels.

65. Form N-400B is the form required by the regulations, in conjunction with the appropriate employer certifications to obtain the benefits of this section. 8 C.F.R § 330.1. It is interesting to note that the regulations recognize that the statute confers service in purely private endeavors as evidence of good moral character, attachment to the principles of the Constitution, and favorable disposition to the good order and happiness of the United States, other requirements for naturalization which are not discussed in this article.

66. 8 U.S.C. § 1430(c) reads:
(c) Any person who (1) is employed by a bona fide United States incorpo-

ployed for at least five years after admission for permanent residence by nonprofit organizations incorporated in the United States principally engaged in the dissemination abroad through the communications media of information which significantly promotes United States interests, as so determined by the Attorney General; the section provides that such persons may be naturalized while employed by the organization or within six months after termination of the employment. The only requirement as to physical presence is presence in the United States at the time citizenship is conferred.

Presently, only two organizations have been designated as United States incorporated nonprofit organizations principally engaged in conducting abroad through communications media the dissemination of information which significantly promotes United States interests abroad within the purview of Section 319(c) of the Act.[67]

V. Summary and Conclusion

Our naturalization laws have, since the First Congress, provided for a period of residence in the United States preparatory to admission for citizenship. The recognition by Congress of special situations creating hardship to aliens desiring to fully integrate into our society by acquiring citizenship, the advantages of having family members share the same citizenship, and the need to reward service in the armed forces or the need to allay the fears of aliens who would not otherwise serve overseas to the detriment of our national interest, has resulted in the creation of a number of exceptions to and ameliorations of the gen-

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rated nonprofit organization which is principally engaged in conducting abroad through communications media the dissemination of information which significantly promotes United States interests abroad and which is recognized as such by the Attorney General, and (2) has been so employed continuously for a period of not less than five years after a lawful admission for permanent residence, and (3) who files his petition for naturalization while so employed or within six months following the termination thereof, and (4) who is in the United States at the time of naturalization, and (5) who declares before the naturalization court in good faith an intention to take up residence within the United States immediately upon termination of such employment, may be naturalized upon compliance with all the requirements of this Title except that no prior residence or specified period of physical presence within the United States or any State or within the jurisdiction of the court, or proof thereof shall be required.

67. 8 C.F.R. § 319.5 (1987) presently names Free Europe, Inc. and Radio Liberty Committee, Inc.

eral residence requirement for naturalization. The present provisions to effect these policy choices are neither simple nor balanced among each other; they are the accretion of almost 200 years of legislation responding to perceived needs and abuses at different times. They nevertheless result in an almost complete compendium of responses to virtually every possible situation in which a valid motive to proceed abroad by a person desiring integration to our community could exist.

"A Task of No Common Magnitude": The Founding of the American Law Institute

William P. LaPiana*

In February 1923 Justice Oliver Wendell Holmes wrote to Harold Laski:

> Some of the virtuous under the call of E[lihu] Root and William Draper Lewis meet here [in Washington] next week to talk of restatement of the law (I believe). . . . I will try to [look in on them] but I will take no hand and won't believe till they produce the goods. You can't evoke genius by announcing a *corpus juris*.[1]

Fortunately for the American Law Institute few leading lawyers shared Justice Holmes' skepticism. Over three hundred lawyers, judges, and law teachers did meet in Washington on February 23, 1923, and enthusiastically created the Institute which did indeed concern itself primarily with the collection, arrangement, and restatement of the most important principles of American case law. That meeting and the resulting institution were the outgrowth of forces which had been working for legal reform throughout the preceding two decades. This essay will trace those forces and try to show how their interplay culminated in the meeting of February 23, 1923.

I

According to Max Rheinstein, three basic problems have dominated the thinking of American jurists: adaptation of the common law to the circumstances of the New World; endowing with specific content the broad prescriptions of the federal Constitution and the adaptation of those prescriptions to changing social conditions; and the preservation of the unity of the common law in the face of the multiplicity of

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1. HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935 at 482 (H. Howe ed. 1953).

jurisdictions.[2] To these William Twining has added two more: "modernization of the law in the wake of the industrial and technological revolution that swept the United States in the period after 1870," and "simplification of the sources of law, as the legal profession and the courts became more and more swamped by the prodigious output of legislation, regulations and reported cases."[3]

A concern with these problems, however, does not necessarily lead to an active interest in legal reform. In its everyday workings the Anglo-American legal system undergoes constant change. Each decision of the appellate court is a potential modification of the law, however slight.[4] Over time these gradual changes can lead to important changes in legal rules. Especially in the eyes of those for whom conservatism is a virtue, one of the glories of the common law system is its ability to accommodate change without the need for sudden and wholesale innovation.

The concept of legal reform, on the other hand, evokes a much more rapid process, an imposition of a scheme thought out in advance on the organic development of the common law. Not surprisingly, in the Anglo-American system reform often involves legislation which is the antithesis of court-made law. The great medieval statutes—*Quia emptores*, the Statute of Uses, the Assize of Novel Disseisin—were all rather radical modifications of the customary law.[5] In the ante-bellum United States legislative reform of common-law pleading and the adoption of collections of revised statutes in many of the states represent the same sort of legal reform pressed into service to accomplish the American ends described by Rheinstein and Twining.[6]

As Twining points out, however, the conditions of material life in the United States changed rapidly and drastically after 1870 and brought new challenges to the law as well, of course, as to other areas

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2. Rheinstein, *Obituary of Karl Llewellyn*, 27 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 601-05 (1962).

3. W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

4. For discussions of representative examples of legal change see McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 41 J. OF AM. HIS. 970 (1975); Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVE IN AMERICAN HISTORY 329 (1971).

5. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 30-31, 320-22, 359-60, 585-90 (5th ed. 1956).

6. C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 166-81, 185-95 (1981).

of society.[7] Not surprisingly, these changes helped to bring out new structures which were transformed by technological and industrial change. They also, however, transformed the way in which actors on the American legal scene thought about legal reform.

The influence of industrial and technological change was indirect. First, certain aspects of law appeared to be out of step with the reality of the new world of industry in which more and more Americans labored. Second, changes in social structure accompanying changes in material life challenged the self-image of the legal profession in ways which helped to shape the sort of legal reform the profession sponsored in an attempt to respond to the perceived dichotomy between social reality and law.

The changes in American life brought about by the innovations Twining mentioned did not, of course, go unnoticed by those who lived through them. The facts of daily life had indeed changed and many self-conscious attempts were made to bring American society and government into line with the changed material conditions of life. While the history of these attempts at change cannot be neatly summarized in a phrase, it is convenient to refer to the Progressive era and the Progressive movement, and to describe this as the "age of reform." And it is equally convenient to accept as a starting point the assertion that the legal system and the legal profession were to a great degree out of step with the progressive elements of society because they appeared to be obstacles to the most broadly accepted goal of Progressivism, social justice.

Part of the quest for social justice in the Progressive era involved improving the lot of laboring men and women. Much of this melioristic desire found expression in state statutes limiting the hours of work, improving working conditions, requiring payment of wages in currency rather than in script, and in the creation of workmen's compensation schemes. Such laws did involve redistributing some of the wealth of society, although they stopped far short of creating a socialistic system. They nonetheless met severe opposition and had no more dedicated opponents than some of the judges of the appellate courts who invalidated many of these laws in the name of freedom of contract.

The growth of the doctrine of freedom of contract and its incorporation through the fourteenth amendment into the corpus of liberties which is the possession of every American is itself a history of legal

7. TWINING, *supra* note 3.

change. The story culminates in the United States Supreme Court's decision in *Lochner v. New York*.[8] The case involved a New York statute which ordered that "No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day . . . ."[9] Writing for a bare five member majority, Justice Peckham held that

> It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being me, sui juris), in a private business, not dangerous in any degree to morals or in any real and substantive degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.[10]

Against this rather mechanical use of doctrine Oliver Wendell Holmes hurled one of his most memorable aphorisms: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[11] In Holmes's view the case was "decided upon an economic theory which a large part of the country does not entertain."[12]

The *Lochner* case was only one of many clashes between court and legislature. Throughout the period statutes designed to further generally Progressive reform — measures ranging from the income tax to the Sherman Anti-Trust Act to various sorts of labor legislation — were resolutely opposed by at least some members of the bar and by the judges of the appellate courts.[13] Whatever the reason for this diver-

8. 198 U.S. 45 (1905).
9. *Id.* at 46 n.1.
10. *Id.* at 64.
11. *Id.* at 75; for a discussion of Holmes's brief dissent, see M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 103-06 (rev. ed. 1957).
12. *Lochner*, 198 U.S. at 75.
13. A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 at 19-38, 221-37 (rev. ed. 1969); for a thorough examination

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gence between the two institutional sources of law in the American version of the common-law system, its existence posed special problems for the bar, which is the self-appointed guardian of American legal culture and of the principle of justice.

The American bar seems to have taken to heart Alexis de Tocqueville's encomiums.[14] In the late nineteenth and early twentieth centuries it was an opinion shared by few others. For many dedicated to reform in the name of social justice the repeated failure of specific reforms in the courts was to be blamed on the corporation lawyer, the demon pressing the claims of wealth on the courts to the detriment of the worker. Even those friendly to the profession saw cause for concern in the apparent increasing subjugation of the practitioner to the corporate wealth which was his client. This was viewed as being detrimental to the profession's traditional independence born of mastery of the intricacies of the science of the law. "To an imagination of any scope," said Holmes in an 1897 speech which must have made some lawyers uncomfortable, "the most far-reaching form of power is not money, it is the command of ideas."[15]

If these developments within the profession of the law were not disquieting enough, changes in society as a whole exacerbated the problem. The Progressive era was a time in which the concept and role of the professional acquired new importance.[16] As social structure changed and America became more and more a national society, mastery over a politically neutral body of scientific knowledge became an important way to make one's place in society respectable and secure.[17] As practitioners of one of the oldest professions lawyers should have fitted easily into the scheme, but the political atmosphere made their

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of many of the important Supreme Court cases of the period see J. SEMONCHE, CHARTERING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY 1890-1920 (1978).

14. "The special information that lawyers derive from their studies ensures them a separate rank in society, and they constitute a sort of privileged body in the scale of intellect." I A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 283-90 (Bradley ed. 1945).

15. Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 201 (1920); *see also* R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 156-63 (1955).

16. *See generally* R. WIEBE, THE SEARCH FOR ORDER 1877-1920 at 113-21 (1967); B. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA 80-120 (1976); P. STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 140-42 (1982).

17. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U.L.J. 351, 357-58 (1969).

claims to scientific neutrality appear hypocritical. To complicate matters more, the new profession of law teaching had arisen, claiming a more perfect grasp of the science of the law.[18] As "keepers of the professional conscience" they only drew more attention to the practitioners' dilemma.[19]

Out of this tangle of conflict and confusion came proposals for reform, for change swifter and more directed than the slow development of judge-made law. This essay will trace the proposals presented by the legal profession itself (both practitioners and teachers), principally as expressed through the American Bar Association and the Association of American Law Schools.[20] Each of the four major plans for change — codification and classification, procedural modernization, reorganization of the courts, and a new jurisprudence — drew on the history of thought about American law. The patterns of advocacy and of opposition show how the strands of historical experience were rewoven into a new pattern in the face of the rapid changes of the late nineteenth and early twentieth centuries. The story of this give and take, culminating in the founding of the American Law Institute, illustrates the strongest influence on the process of reconsideration — the desire to solidify the place of the legal expert in a changing society.

II

Of the four basic approaches to legal reform evident in the Progressive era, the most venerable sought salvation in the codification of the common law. The goal of codification is to reduce the mass of law contained in the decisions to a relatively few simple, clear propositions which could be assembled into a code and enacted into law. The legislature rather than the courts establishes the ground rules.

The battle over codification is one of the most familiar episodes in American legal history and also one of the least thoroughly understood. Its roots go back into the late eighteenth century and are firmly anchored in the bedrock of hostility to lawyers. Hostility to the profession was linked to hostility to all things English, including, of course,

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18. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, 5 PERSPECTIVES IN AMERICAN HISTORY 555 (1971).

19. HOFSTADTER, *supra* note 15.

20. On the usefulness of studying the ABA, and by implication the AALS, in an attempt to answer the kinds of questions that are posed in this essay, see Auerbach, *supra* note 18, at 564 n.42.

the common law.[21]

The theme of opposition to English ways was prominent in the more extreme rhetorical manifestations of support for codification, especially William Sampson's 1824 address to the New-York Historical Society and Robert Rantoul, Jr.'s "Oration at Scituate" of 1836.[22] Both men heaped well-deserved scorn on the supposed history of the common law which portrayed it as the legatee of pure Saxon ideas of liberty. Both used irony to great and no doubt irritating effect. And both firmly believed that the only law fit for America was written law, embodied in a code adopted by the legislature. For Sampson, however, the production of such a code was the province of learned lawyers. Rantoul placed his faith in the elected representatives of the people and belittled the supposedly disinterested pursuit of legal truth by a profession which was merely one more selfish interest opposed to the public good.

These differences between the two men were surely due at least in part to the changing pattern of American politics. Sampson wrote just before the era of Jacksonian democracy; Rantoul was a prominent Democratic politician in Whig-dominated Massachusetts. They shared, however, a certain scorn for things English; Sampson also exhibited a reverence for the French legal experience, especially the Code Napoleon.[23]

Not all support for codification, however, came from outside the mainstream of the profession. In 1837, Joseph Story, the greatest legal scientist of the day, proposed in a report to the Massachusetts legislature a limited sort of codification encompassing not the entire common law but rather the criminal law and the law of evidence. In addition, Story suggested that in the field of substantive civil law there would be a codification of

> those principles, and details . . . which are of daily use and familiar application to the common business of life, and the present state of property and personal rights and contracts, and which are now so far ascertained and established, as to admit of a scientific form and arrangement, and are capable of being announced in distinct and

21. For a general treatment see M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 at 32-58 (1976).

22. Samson's and Rantoul's speeches are both most easily consulted in P. MILLER, THE LEGAL MIND IN AMERICA, FROM INDEPENDENCE TO CIVIL WAR 119-34, 220-28 (1962).

23. BLOOMFIELD, *supra* note 21, at 59-60.

determinate propositions.[24]

In spite of the stature of its author, Story's report did not mark a new stage in an ongoing national debate. Both before and after the issuance of the 1837 report, codification of statute law in several states and a growing number of treatises on various areas of law (some of the most important of which were written by Story himself) seemed to defuse the drive for codification of the common law.[25] An exception, however, was the situation in New York, where the year 1848 saw the most spectacular example of codification up to that time. In that year the New York legislature adopted a code of procedure that radically changed the law governing the mechanics of carrying on law suits in the state and thereby swept away a vast amount of common law learning. The Field Code, named after its principal author, became the most important symbol of codification in America.[26]

It is an understatement to call David Dudley Field (1805-1894) the chief proponent of the procedural code which came to bear his name. Starting in the 1830s he was a persistent advocate for legal change. Nor did he rest with the passage of the code of procedure. Until his death he remained perhaps the most prominent advocate in the American legal profession of codification of both procedural and substantive law, domestic and international. He was also one of the most prominent practitioners in the City of New York, famous, or notorious, depending on the observer's point of view, for representing some of the most flamboyant characters of the age, including Jay Gould and Boss Tweed. He was nothing if not controversial and persistent.[27]

His opponents, led by James C. Carter, were deeply fearful of clumsy legislative interference with the orderly development of the common law. Judges were superior law makers who could be depended on to mold the law according to the needs of the time; a code would

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24. Story, *Codification of the Common Law*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 715 (W. Story ed., rept ed. N.Y. 1972) (1st ed. Boston 1852); J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 92-98 (1971).

25. C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 158-81 (1981).

26. Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 32, 34-35 (A. Reppy ed. 1949).

27. For a brief exposition of Field's role see Pound, *David Dudley Field: An Appraisal*, in *id.* at 3-16.

freeze it into sterility.[28] Underneath their disagreements, however, Field and Carter shared certain assumptions: "They both valued flexibility in the law; liked a businesslike rationality; distrusted the role of non-experts, of laymen, in the making of law."[29] Unlike the antebellum disputes over codification, however, the debates between Field and Carter and their respective supporters found an audience made up almost exclusively of legal professionals.

In light of the emphasis both sides gave to expertise, it is not surprising that the problem of codification came before the American Bar Association. Founded in 1878 in Saratoga Springs by a few dozen wealthy lawyers, the ABA spent most of its first few years providing an added dimension to the summer vacations of its members. It was, however, representative of the concerns of a segment of the elite of the profession, which was deeply concerned with promoting "safe, conservative reform" in the face of the demands for innovation and change which reflected the changing conditions of material life in late nineteenth century America.[30] After an address on the subject in 1884 by Judge John F. Dillon, the Association decided that one of the defects of the legal system which could be safely and conservatively reformed by lawyers was delay and uncertainty in judicial administration. In 1885 and 1886 the Association had before it lengthy reports on the problem. Both reports were authored by committees in which David Dudley Field and Dillon were the moving forces.[31] Not surprisingly, both documents called for codification as a solution. After much debate[32] the ABA did approve by a vote of fifty-eight to forty-one a resolution which, in terms reminiscent of Story, called for the reduction of the law "so far as its substantive principles are settled, to the form of a statute," but the sound and fury of debate seem to have exhausted the interest of the Association in the subject.[33]

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28. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 403-04 (2d ed. 1985).

29. *Id.* at 405.

30. *Id.* at 650-51; Matzko, *The Best Men of the Bar: The Founding of the American Bar Association*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 75-76, 89 (G. Gewalt ed. 1984).

31. Special Committee on Delay and Uncertainty in Judicial Administration, *Report*, 8 REPORTS OF THE A.B.A. 323, 323-449 (1885); Special Committee on Delay and Uncertainty in Judicial Administration, 9 REPORTS OF THE A.B.A. 325, 325-502 (1886).

32. 8 REPORTS OF THE A.B.A. 46-62, 67-83 (1885); 9 REPORTS OF THE A.B.A. 11-74 (1886).

33. 9 REPORTS OF THE A.B.A. 74 (1886); *see also* Yntema, *The American Law*

A facet of the codification movement lived on in the Association, however, and indeed in the larger arena of legal reform. One of the assumptions underlying the theory of codification is the idea "that legal system is best, and works best, and does the most for society, which most conforms to the idea of legal rationality — legal order which is most clear, orderly, systematic (in its formal parts), which has the most structural beauty, which most appeals to the modern, well-educated jurist."[34] The mere rearrangement of the law on the printed page in accord with an appropriate scheme of classification would effect great good by elucidating the basic principles of the law, whether or not those principles are put into statutory form.

The American Bar Association first took up the problem of classification in 1888 in response to a letter on the subject from Henry T. Terry, who called for an arrangement of American law based on "ultimate principles."[35] The committee formed in reponse to this appeal made elaborate reports in 1891 and 1902 but was discontinued after 1907.[36] In 1917 another committee concerned with classification was formed, perhaps in response to Elihu Root's comments on the necessity of a classification of American law made in his presidential address to the ABA in 1916.[37] This committee was continued until 1924, when its aims were judged to be sufficiently provided for by the new American Law Institute.[38]

Classification was also taken up at the state level, New York being an example. There the chairman of the Board of Statutory Consolidation, Adolph J. Rodenbeck, expected great things from a classification of the law into a gigantic outline whose headings would be formulated

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Institute, 12 CAN. B. REV. 319, 327 n.26 (1934).

34. FRIEDMAN, *supra* note 28, at 407.

35. 12 REPORTS OF THE A.B.A. 327, 327-38 (1889). Terry was a lawyer and scholar of sorts who spent most of the 1910's teaching at the Imperial University in Tokyo. As late as 1924 he was corresponding with Roscoe Pound on the problem of classification and proposed an elaborate system which Pound found much too dependent on Austin. Letter from Roscoe Pound to William Draper Lewis, June 24, 1924, Paige Box 32, Roscoe Pound Papers, Harvard Law School Library, Cambridge, Massachusetts [hereinafter Pound MSS].

36. Committee on Classification of the Law, *Report*, 14 REPORTS OF THE A.B.A. 379, 397-408 (1891); Committee on Clarification of the Law, 25 REPORTS OF THE A.B.A. 425, 425-75 (1902); Yntema, *supra* note 33, at 327 n.26.

37. Root, *Public Service by the Bar*, 41 REPORTS OF THE A.B.A. 355, 365-66 (1916).

38. Committee on Clarification and Re-statement of the Law, 49 REPORTS OF THE A.B.A. 39-40 (1924).

according to the principles of logic enunciated by Archbishop Richard Whately, nineteenth-century English cleric and author of a widely-read treatise first published in 1823.[39] The thrust of all these efforts was well summarized by the ABA committee in 1920: "The elements here referred to, involve carrying to the lawyers a comprehension and understanding of fundamental *legal principles* and by *classification* showing that these principles form a thread or clue through and to the mass of decisions."[40]

Clearly, the idea of classification had a much fuller play than the idea of codification, in part because it did not evoke the overheated emotions that the Field-Carter controversy lent to all discussions of the latter. It also had a more distinguished and less controversial lineage. It was the vigorous contemporary representative of a notion of legal science which completely dominated American legal thought before the Civil War when the very idea of science reflected the overwhelming prestige accorded the thought of Francis Bacon.

Allegiance to "Baconianism" was a mark of scientific orthodoxy in antebellum America. While the orthodox did not all adhere to a single version of the creed, in general Baconianism meant empiricism, the avoidance of hypotheses, a belief that careful observation of the material world and proper classification of the facts observed would allow the induction of the principles underlying the processes of nature. This would reveal, ultimately, the very mind of God.[41]

This model of science could easily encompass the common law. What are individual cases but the data to be observed? What is to be drawn from an observation of all cases but legal principles the ordering of which will lead to rational understanding of the legal universe? It was the primary tool of lawyers like Story; these lawyers, Perry Miller chronicled, attempted to construct and maintain the temple of law in the face of opposition based on the popular and democratic strains in American thought.[42]

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39. *See* A. RODENBECK, THE CLASSIFICATION AND RESTATEMENT OF THE LAW 8-11 (1919).

40. Special Committee on Classification and Restatement of the Law, *Report*, 6 A.B.A. J. 420, 424 (1920).

41. G. DANIELS, AMERICAN SCIENCE IN THE AGE OF JACKSON 65 (1968); T. BOZEMAN, PROTESTANTISM IN AN AGE OF SCIENCE: THE BACONIAN IDEA AND ANTEBELLUM RELIGIOUS THOUGHT 23-30 (1977).

42. P. MILLER, LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 99-265 (1965). For typical examples of the invocation of Bacon by antebellum legal thinkers see 2 J. WILSON, THE WORKS OF THE HONORABLE JAMES WILSON,

The idea of legal science survived the Civil War and helped to inform the thought of, among others, Christopher Columbus Langdell who as the first dean of Harvard Law School made all things new in American legal education. His definition of legal science, found in the preface to his first casebook, the 1871 *A Selection of Cases on the Law of Contracts*, illustrates both the premises of the classifiers and what they hoped to accomplish:

> Law, considered as a science, consists of certain principles or doctrines. . . . Moreover the number of fundamental doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable

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L.L.D. 43-44 (1804); D. MAYES, AN ADDRESS DELIVERED BEFORE THE TRUSTEES AND FACULTY OF TRANSYLVANIA UNIVERSITY AT THE OPENING OF THE SESSION OF THE LAW DEPARTMENT ON THE 7TH NOV. 1831 at 16 (1831); AN INTRODUCTORY LECTURE DELIVERED TO THE LAW CLASS OF TRANSYLVANIA UNIVERSITY ON THE 5 OF NOVEMBER 1832 at 7, 17 (1832); J. GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS xiii (F. Heard ed. 4th ed. 1887) (1st ed. 1832); Kent, *The Rise and Progress of Commercial Law in English Jurisprudence*, in INAGURAL ADDRESSES, DELIVERED BY THE PROFESSORS OF LAW IN THE UNIVERSITY OF THE CITY OF NEW-YORK, AT THE OPENING OF THE LAW SCHOOL OF THE INSTITUTION 49 (1838); *Notes of Professor Greenleaf's Introductory Lecture, At the Present Term*, 1 THE L. REP. 218 (1838) (a reprint of the "Notes" in the Harvard Law School Library Treasure Room bears in Greenleaf's hand the inscription "with the respects of S. Greenleaf" and in another hand the notation "Gift of Prest. Quincy." Greenleaf no doubt considered the "Notes" to be at least an accurate summary of his views.); F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 80-81 (rpt. 1970) (1st ed. 1839); Ingrham, *An Address Delivered before the Law Academy of Philadelphia, at the Opening of the Session of 1828-1829*, 12 HAZARD'S REGISTER OF PA. 323, 326 (1833); Hopkinson, *An Address Delivered before the Law Academy of Philadelphia at the Opening of the Session of 1826-1827*, 12 HAZARD'S REGISTER OF PA. 289, 290 (1833); Sergeant, *A Lecture Delivered before the Law Academy of Philadelphia, on Tuesday Evening, November 28, 1843*, 3 PA. L.J. 93, 97; Rawle, *A Discourse on the Nature and Study of Law*, 14 HAZARD'S REGISTER OF PA. 181, 182 (1834); J. WILLARD, ADDRESS TO THE MEMBERS OF THE BAR OF WORCESTER COUNTY, MASSACHUSETTS, OCTOBER 2, 1829 at 113 (1830); Story, *Developments of Science and Mechanic Art* [1829], in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 479 (W. Story ed., rpt. 1972) (1st ed. 1852); Story, *Characteristics of the Age* [1826], in *id.* at 350-51; for further praise of Bacon see *Progress of Jurisprudence* [1821], in *id.* at 207.

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from their number.[43]

Although the law schools would eventually move beyond this taxonomic ideal, as incarnated in the classifiers it would play an important role in the founding of the American Law Institute.[44]

Whatever the differences among them, the promoters of codification and classification met the challenge of the late nineteenth and early twentieth centuries with proposals going to the basic cause of all problems. Once properly codified or at least classified, the law would never again be out of step with society. Other proponents of reform had far more modest goals. While they often spoke the language of clarification of the law, simplification of the practitioner's task, and the abolition of anachronisms, they turned their attention not to the substantive law but to procedure, the adjective law which governs the mechanics of an action before the court. These mechanics can be summarized by a timetable which indicates when papers are to be filed and a list of rules which dictate what must be in the papers if the desired relief is to be obtained. Problems begin when the rules become complex and rigid. The smallest mistakes can then result in the dismissal of an action or in a decision which may be contrary to clear principles of justice. Complex rules can also provide rich raw material from which lawyers who are so inclined can fashion delay and obfuscation.[45]

Not surprisingly, therefore, when dissatisfaction with the legal system includes complaints about the law's delay, the defeat of justice by technicality, and the mystification of the law, relief is often sought through procedural reform. The Progressive era was just such a period, although surely not the first. Field's code of civil procedure was meant to answer such complaints. Its principal feature was the abolition of the distinction between law and equity and the creation of a single form of action through which an aggrieved private party could obtain whatever

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43. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii (1871).

44. For discussions of the concept of law as science in the period under consideration, see Yntema, *supra* note 33, at 320-22; TWINING, *supra* note 3, at 12; S. Yeazell, The Ideology of Legal Method 1880-1925, at 9-13 (unpublished seminar paper, Harvard Law School, 1974).

45. On the complexity of procedure and pleading under the unreformed common law see FRIEDMAN, *supra* note 28, at 126-34; J. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE 93-96 (1967); W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 at 72-77 (1975).

sort of relief was appropriate, be it the money damages of the common law courts or the more flexible remedies of the equity tradition. This was a revolutionary change: It meant the end of all special pleading, forms of actions and writs, and the closing of the chasm between equity and law—the destruction at one blow of "the paraphernalia of this most recondite, most precious, most lawyerly area of law."[46] The Field Code was not a success in New York, perhaps because of its revolutionary nature.[47] Nonetheless, the Code had some success in the newer states of the West and even in England.[48] It was not the only force for procedural reform, however. In the 1880's and 1890's Chief Justice Charles Doe of New Hampshire was able to radically simplify the civil procedure of his state, although his success was prefaced by twenty years of struggle. What the Field Code established by statute, and more, Doe did by judicial decision. Indeed, he was credited with saving New Hampshire from the problems of code practice.[49]

In short, the reform of procedure is supposed to promote efficiency and economy in the courts through the alteration of the most craft oriented segment of the lawyer's work. Procedural reform is thus excellent professional reform. It is politically neutral, having no object except the common good. It emphasizes the technical and scientific, the most abstruse portion of the lawyer's work, something which is his alone. "The fact is that technical law reform, whether or not it fills any general social needs, fills an important need of the *profession*; and in this lies its magic."[50] In a time of crisis of professional identity, like the Progressive era, a turn to procedural reform should be expected. Such an expectation is not disappointed. The movement to reform civil procedure was one of the most widely supported legal reforms of the period.[51]

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46. FRIEDMAN, *supra* note 28, at 392.

47. Friedman maintains, however, that "[t]he real vice of the code probably lay in its weak empirical base." *Id.* at 394.

48. *Id.* at 394-97; C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 29-31 (2nd ed. 1947); R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 52-57 (1952).

49. REID, *supra* note 45, at 93-108

50. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U.L.J. 351, 357 (1969).

51. This statement rests on an examination of the *Green Bag*, *Case and Comment*, *Bench and Bar*, and the *Central Bar Journal* for the period 1906-1920. These periodicals were not university law reviews but commercial publications. Presumably they had to publish more material of current interest than a law review did and they all

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The third strain of legal reform evident during the Progressive era was also concerned with efficiency and economy but turned its attention to the courts, which were governed by the procedural rules as well as to the rules themselves. The most prominent advocate of the reorganization of the courts was the American Judicature Society, founded in 1913. Concentrating on efficient and expert administration, especially as applied to urban areas, the AJS fits the traditional conception of Progressive reform very nicely.

The Judicature Society spent its first seven years drafting model court administration statutes both for states and metropolitan areas. While the Society's materials provided alternative systems to suit local needs, the favored model for a state-wide system featured a unified General Court of Judicature, an elected chief justice who appointed the judges of the lower divisions of the unified court, and elected county judges. The model municipal court also featured an elected chief justice who appointed his associates who sat in functionally distinct divisions — appellate, chancery, domestic relations, civil jury, and civil non-jury — in whose peculiarities they should become expert. In both cases the chief justice was to be responsible for the organization and efficiency of both the judicial and administrative sides of the court and answerable for his performance at the polls.[52]

The American Judicature Society itself claimed that its plans were simply "the short ballot and the commission form of government applied to the judiciary and to the administration of justice by the courts."[53] The Judicature Society was thus in tune with the main line of Progressive urban reform. One of its most prominent members, Albert Kales, advocated the short ballot and the commission not only on the urban but also on the state level.[54] The Society's secretary, Robert

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devoted considerable space to procedural reform. Examination of the classified bibliography in *Case and Comment* from 1910 to 1917 shows sixty-one articles on procedural reform appearing in various legal publications. An idea of the geographical dispersion of the movement can also be obtained from an examination of the letters in the Pound MSS, *supra* note 35. One of the leaders of the movement, Pound received requests for help from reformers in Illinois, Washington, Missouri, Texas, the District of Columbia, Ohio, and California.

52. *First Draft of a State-Wide Judicature Act*, AMERICAN JUDICATURE SOCIETY BULLETIN VII *passim* (1914); *First Draft of an Act to Establish a Model Court for a Metropolitan District*, AMERICAN JUDICATURE SOCIETY BULLETIN IV *passim* (1914).

53. *Id.* at 4.

54. A. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 170 (1914).

Harley, expected to "sail to glory with the short ballot and the commission-manager form of government" and illustrated the need for the reforms advocated by the group with a revealing metaphor: "[One could] as well conceive of a department store being successfully run without a manager as to conceive of the manifold duties involved in administering justice in the modern city accomplished by the mere voluntary acts of unorganized judges."[55]

Such an examination of administration, of "proper procedures and continuous enforcement rather than . . . simple self-fulling rules,"[56] is characteristic of the Progressive era. On the other hand, the reformers of procedure and of classification approached reform in a way more characteristic of the nineteenth century. They expected great results from fairly simple changes.[57] Thomas Shelton, chairman of the ABA's Committee on Uniform Judicial Procedure, believed a grant by Congress to the Supreme Court of the power to write the procedural rules for the law side of the federal courts would create "a new era of scientific judicial relations" in which lay criticism would be answered by "*instant relief*" for procedural inequities, a complete reorganization of the courts would be effected, and "an equitable division of power and duty between the legislative and judicial departments of government" would result.[58] Rodenbeck saw great benefits from the classification of the law since "the very lack of scientific interest and study of the law in the profession . . . has caused the law to be looked upon and treated by many, not as a science but as a livelihood."[59] By putting one bill through Congress and reducing the law to an outline, Shelton and Rodenbeck would have aided the professionalization of the bar, cleared the way for scientific development of the law, and restored the proper relationship between legislature and court.

The reformers associated with the AJS also exhibited some of the weaknesses of Progressive reform. The most prominent was their great faith in norms established by psychological testing. John H. Wigmore,

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55. Harley, *Court Organization for a Metropolitan District*, 9 AM. POL. SCI. REV. 518 (1915); *see also* Harley, *Business Management for the Courts*, 5 VA. L. REV. 1, 21 (1917).

56. R. WIEBE, THE SEARCH FOR ORDER, 1877-1920 at 154 (1967).

57. *Id.* at 62 and generally at 11-75; E. GOLDMAN, RENDEZVOUS WITH DESTINY: A HISTORY OF MODERN AMERICAN REFORM 9-23 (rev. ed. 1955); HOFSTADTER, *supra* note 15, at 131-48.

58. Committee on Uniform Judicial Procedure, *Report*, 6 A.B.A. J. 507, 513-16 (1920).

59. RODENBECK, *supra* note 39, at 8.

dean of the Law School at Northwestern University and a leader of the Society, returned from his service in the Judge Advocate General's Corps after the First World War and announced that the time had come to institute psychiatric examinations for all criminal defendants.[60] Apparently the poor results from psychological screening of draftees did not diminish his faith. Robert Harley wished to see a "psychopathic laboratory" attached to every criminal record,[61] where those who could not cope with "the fierce competition of metropolitan life" would be identified and sent to rural colonies rather than prisons. Such people were not criminal "but simply unable because of brain lesions to live up to the multitudinous regulations of metropolitan society." Harley did not believe in limiting a good thing: "We will go further, even, by testing the minds of the witnesses and jurors in civil as well as criminal cases."[62]

The men associated with the AJS were certainly representative of certain aspects of Progressivism. In addition, the four most prominent — Harley, Kales, Wigmore, and Nathan William MacChesney — were all law teachers. Their embrace of reform-oriented attitudes and newer ways of thinking set them apart from the practitioners agitating for procedural reform and classification through bar associations.[63] These differences would eventually move from the intellectual sphere to the field of political conflict.

The final mode of legal reform actively pursued in early twentieth century America was designed to provide a jurisprudential foundation for the other types of reform. Sociological jurisprudence was to provide a sound theory of law and of judicial decision-making which would prevent the sorts of opinions which had focused so much hostility on the courts.

Roscoe Pound was the prophet of sociological jurisprudence in America. His work, as he freely admitted, rested heavily on Continental, especially German, scholarship, and the extent of his own originality is still an open question.[64] Whatever his sources, however,

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60. Wigmore, *Some Lessons for Civilian Justice to be Learned from Military Justice*, 10 J. CRIM. L. & CRIMINOLOGY 170, 175 (1919).

61. Harley, *Court Organization*, *supra* note 55, at 516; Harley, *Present Tendencies in Judicial Reform*, 9 AM. POL. SCI. REV. 538 (1916). Such a commitment to norms was not always a component of progressive reform; *see* J. ADDAMS, DEMOCRACY AND SOCIAL ETHICS 13-70 (A.F. Scott ed. 1964).

62. Harley, *Court Organization*, *supra* note 55, at 516.

63. Auerbach, *supra* note 18, at 554-58.

64. Among the sources for sociological jurisprudence Pound listed: VACCARO,

> by 1910 . . . he had formulated a systematic critique of American law. The central theme of his criticism was that the deductive method and nineteenth century legal theory had created a closed system of legal rules, one that enshrined ephemeral anachronisms as fundamental principles in conscious disregard of the society that law served.[65]

The old jurisprudence was mechanical, the new would be sociological.

Pound recognized that with the new century had come a new conception of justice — social justice as opposed to the older legal justice. Society had decided to pit "the organized brains of the community against the aggressive individual brain" in order to prevent exploitation and oppression.[66] This desire was reflected in legislation which put social interests above individual interests. Unfortunately, not only was legislation itself scorned by the common law tradition, but the anti-individualist notion embodied in the legislation ran contrary to the intellectual outlook which dominated the courts.[67]

To counteract the obstacles to the new legislation, sociological jurists insisted on six main points:

1) "Study of the actual social effects of legal institutions and legal doctrines,"
2) "sociological study in connection with legal study in preparation for legislation,"
3) "study of the means of making legal rules effective,"
4) "a sociological legal history" designed "to show us how the

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Les Bases Sociologiques du Droit et de L'Etat (1898); Vanni, Lezioni di Filosofia del Diritto (1902, 1908); Stammler, Wirthschaft und Recht (1906); Ehrlich, Soziologie und Jurisprudenz (1906); Grasserie, Les Principes Sociologiques du Droit Civil (1906); Gumplowicz, Allgemeines Statsrecht (1877, 1907); Demogue, Les Notions Fondamentales du Droit Privé (1911); Duguit, Le Droit Social, le Droit Individuel et la Transformation de L'Etat (1908, 1911); Rolin, Prolegomenes a la Science du Droit (1911). All are cited in Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 Harv. L. Rev. 591, 612 (1911); *see also* R. Pound, Law and Morals 150-53 (1924) (bibliography).

65. D. Wigdor, Roscoe Pound: Philosopher of Law 161 (1974).

66. Pound, *Social Justice and Legal Justice*, 75 Central L.J. 459 (1912).

67. *See* Pound, *Courts and Legislation*, 7 Am. Pol. Sci. Rev. 361-83 (1913); Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383, 383-407 (1908). Much of what Pound wrote was repetitive. The notes to these paragraphs indicate only some of the sources which support the statement made. For a full list of Pound's writings on jurisprudence in this period, all of which have entered into the synthesis presented here, see F. Setaro, A Bibliography of the Writings of Roscoe Pound (1942).

law of the past grew out of social, economic, and psychological conditions, how it accorded with or accomodated itself to them, and how far we can proceed upon that law as a basis, or in disregard of it, with well-grounded expectations of producing the results desired,"

5) "the importance of reasonable and just solutions of individual causes,"
6) all with the hope of making "effort more effective in achieving the purposes of law."[68]

In short, the sociological jurist criticizes legal systems, doctrines, and institutions "with respect to their relation to social conditions and social progress."[69]

Once the sociological view of jurisprudence came to dominate legal thinking, all that would be well for the cause of the current problem was to be found in the intellectual realm and had nothing to do with politics or economics. Judges made antisocial decisions because they had antiquated ideas about law and society. They were still living in a world in which the sole purpose of law was to free the human will and abolish the invidious distinctions based on status.

> Much in American judicial decisions with respect to master and servant, liberty of contract, and right to pursue a lawful calling, which it has been the fashion of late to refer to class bias of judges or to purely economic influences, is in reality merely the logical development of traditional principles of the common law by men who if they had not been so taught, read every day in their scientific books of the progress from status to contract and the development of law through securing and giving effect to the human will.[70]

The bench and the bar needed reeducation, and the business of legal education belonged to the law school and its faculty. Just as faulty law teaching was responsible for the antiquated ideas still controlling the courts,[71] so reformed teaching would train "the rising gen-

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68. Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 3), 25 HARV. L. REV. 489, 513-16 (1912).
69. *Id.*
70. Pound, *Political and Economic Interpretations of Jurisprudence*, 9 PROC. OF THE AM. POL. SCI. ASS'N 100 (1912); *see also* Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454-87 (1909); Pound, *Taught Law*, 37 REPORTS OF THE A.B.A. 977 (1912).
71. Pound, *Social Problems and the Courts*, 18 AM. J. SOC. 339 (1912).

eration of lawyers in a social, political and legal philosophy abreast of our times."[72] It was the mission of that new profession to raise up a new generation of practitioners trained in a law appropriate to the modern world. Pound did not underrate the importance of the task:

> It is . . . the duty of American teachers of law to investigate the sociological foundations, not of law alone, but of the common law and of the special topics in which they give instruction, and while teaching the actual law by which courts decide, to give to their teaching the color which will fit new generations of lawyers to lead the people as they should, instead of giving up their legitimate hegemony in legislation and politics to engineers and naturalists and economists.[73]

These four suggestions for reform put forward by public-spirited members of the profession can be linked one with the other according to several different criteria. Classification and sociological jurisprudence were concerned with legal science, although one rested on old and the other on new notions of what that was. Procedural reform and the reform of court organization, on the other hand, were concerned with the day-to-day operation of the courts, yet one was the darling of academics in touch with relatively advanced social and political thought while the other was the pet of practitioners who may have been far more conservative. Several actors in the events leading to the founding of the ALI operated across the entire field, advocating the same reforms for different reasons. In the end, the American Law Institute became the institutional embodiment of legal reform because it best served the needs of the legal professionals involved in a time of change. What those needs were and how the ALI met them is the subject of the final part of this essay.

III

The period of most intense interaction of the four major strands of legal reform is bounded by two important events: Roscoe Pound's speech at the American Bar Association convention of 1906 on "The Causes of Popular Dissatisfaction with the Administration of Justice"

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72. Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 352 (1905).

73. Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 613 (1907).

and the founding of the American Law Institute in 1923. The configurations of reform notions in the two years were quite different. In the intervening years one strain — the classificatory — came to dominate the others under the relentless pressure for the complete professionalization of the practice of law.

In 1906 Roscoe Pound was dean of the law school at the University of Nebraska. The recipient from Nebraska of a Ph.D. in botany, he had studied law for only one year at Harvard before returning to Lincoln to practice law. By 1906, he had achieved great prominence in his native state, having served on the commission appointed to hear cases backed up on the docket of the state supreme court. He was at St. Paul in August 1906 at the invitation of the president of the ABA, who had heard him speak at the annual meeting of the Nebraska State Bar Association in 1905.[74]

Pound diagnosed the causes of popular dissatisfaction with the administration of justice.[75] He noted that American political institutions de-emphasized bureaucratic control in favor of local government, that all law inherently tended toward uniformity, and that it was an age of transition from extreme individualism to a more collective outlook. These causes, however, "will take care of themselves." "But too much of the current dissatisfaction," Pound continued, "has a just origin in our judicial organization and procedure."[76] The principal result of the failings of judicial organization and procedure is "a deep-seated desire to keep out of court, right or wrong, on the part of every sensible businessman in the community."[77]

Pound's far from radical speech infuriated some members of the ABA. A resolution to reprint the speech and distribute it to the members of the Association and to a joint committee of Congress then considering a judiciary bill was met by vigorous attacks on Pound's propositions. In the end the subject matter of the speech was referred to the Committee on Judicial Administration and Remedial Procedure.[78] The following year that committee reported that Pound had not been "iconoclastic" or "antagonistic" and urged the creation of a special committee to "Suggest Remedies and Formulate Proposed Laws to

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74. D. WIGDOR, *supra* note 65, at 1-123.

75. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REPORTS OF THE A.B.A. 395, 395-417 (1906).

76. *Id.*

77. *Id.* at 408-09.

78. 21 REPORTS OF THE A.B.A. 11, 12, 55-65 (1906).

Prevent Delay and Unnecessary Cost in Litigation." The committee's recommendation was adopted and the ABA officially bent its efforts toward procedural reform.[79]

During the entire period under consideration here the Special Committee focused its attention solely on procedure in the federal courts, leaving the state field to state bar associations. The Special Committee was able to secure the passage of bills requiring a showing of probable cause before the granting by the United States Supreme Court of a writ of habeas corpus, working a limited procedural unification of law and equity and simplifying the process for amending pleadings, broadening the scope of review by the United States Supreme Court, and requiring that new trials be refused if the errors complained of in the court below did not effect the substantial rights of the parties; it also provided advice to the committee of the Supreme Court which wrote the new equity rules of 1912.[80]

The Special Committee also published lengthy reports in 1909 and 1910 on comprehensive procedural reform. These reports, which were the work of Pound, advocated the creation of a system of procedure by rules of court rather than through statutory enactment. Actual implementation of this notion on the federal level was left to another committee, headed by Thomas Shelton, which worked for congressional passage of a bill allowing the Supreme Court to make such rules for the law side of the federal courts. Although Shelton met nothing but frustration — Senator Thomas Walsh of Montana kept the bill bottled up in the Judiciary Committee seemingly forever — after his death his reform was finally adopted and resulted in the Federal Rules of Civil Procedure.[81]

As pursued by the ABA, procedural reform would fulfill important professional aims. By removing rule-making from the legislatures it would reinforce lawyers' claims to professional status: to the experts belonged the making of rules for the practice of expertise.[82] Improving

79. Committee on Judicial Administration and Remedial Procedure, *Report*, 31 REPORTS OF THE A.B.A. 52, 505-12 (1907).

80. Wheeler, *Memorandum*, 45 REPORTS OF THE A.B.A. 62-63 (1920).

81. Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, *Report*, 34 REPORTS OF THE A.B.A. 578, 578-609 (1909), and 35 REPORTS OF THE A.B.A. 614, 614-50 (1910); Committee on Uniform Judicial Procedure, *Report*, 6 A.B.A. J. 509 (1920).

82. It is significant that under the most widely supported plan for procedural reform the judges would be making the rules. For a discussion of the image of the judge as the expression of the highest professional aspirations, see Botein, *What 'We*

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the mechanism for managing business in the courts would, Pound frankly said in 1906, help preserve the profession's near monopoly of the means of resolving commercial disputes. In spite of the allure of the goal, the ABA's efforts for procedural reform made only slow progress, principally because nothing could be done without the cooperation of Congress. The classification movement, however, drew its impulse from and was directed by the legal profession itself. The great enthusiasm engendered was damped by the First World War before any practical results could be seen, but it revived after the great conflict was over and played an important part in the founding of the ALI.

The ABA first took up classification in response to Henry T. Terry's letter of 1888. The committee then formed ceased to exist after 1907, just as procedural reform received the Association's sanction. The lengthy 1902 report of the Committee on the Classification of the Law expressed rather typical sentiments: "The great fundamental principles upon which the fabric of our law rests, constitutes [sic] a system, and it is the reverse of science to treat the expressed rules as the whole, or as the most important part of that system."[83] This brief statement clearly shows the Baconian heritage of classification. The "expressed rules," the holdings of cases, are merely illustrative of the principles which lie behind and which really are the law.

The classificatory ideal did not disappear, however, with the demise of the ABA committee. In 1910 one issue of the *Green Bag*, a magazine for lawyers, was entirely devoted to the question of the creation of an American corpus juris, a gigantic classification and statement of the principles of American law. The centerpiece of the presentation was a long "Memorandum in re Corpus Juris" prepared by practitioners Lucien Hugh Alexander and James De Witt Andrews and by a distinguished teacher, George Kirchwey of Columbia.[84] The heart of the proposal was the creation of a group of law teachers who would write a complete statement of American law according to a scientific scheme of classification and then submit their work to an advisory board of practitioners, judges, and other teachers. In this way all American law could be "completely exhibited as the product of the best

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Shall Meet Afterwards in Heaven': Judgeship as a Symbol for Modern American Lawyers, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 46-59 (G. Geison ed. 1983).

83. Committee on the Classification of the Law, *Report*, 25 REPORTS OF THE A.B.A. 425, 425-75 (1902).

84. *Memorandum in re Corpus Juris*, 22 GREEN BAG 59 (1910).

thought in the profession."[85]

Both the method chosen to prepare the corpus juris and the claim that it would be the highest accomplishment of the profession would reappear in the discussions surrounding the founding of the ALI thirteen years later. In the meantime, however, the 1910 agitation seems to have come to nothing. In 1916 the idea was revived within the ABA once more, probably in response to Elihu Root's presidential address of that year, "Public Service by the Bar."[86]

Root's speech urged the profession to take an active part in society to insure that the people of the United States benefitted from the best possible administration of justice. The true spirit of the profession required such service. "Commercialization" of the bar, the attitude that lawyering is merely "a career which affords a living without manual labor," must be opposed through strict control over admission to the bar and the requirement that admission be governed by the standards of the best law schools. Preserving standards is only part of the solution, however. Even the most honorable members of the profession need help in understanding the rapidly changing American law. Judges and lawyers engaged in the administration of justice needed a new American Corpus Juris Civilis which would "carry to the great mass of them, present and future, a comprehensive and discriminating understanding of the legal principles which form the thread of Ariadne for guidance through the labyrinth of decisions."[87] Yet again the understanding of principles was the key to knowing law. Discrete cases were at best imperfect guides.

In 1917 the ABA created a Special Committee on the Classification and Restatement of the Law. This Special Committee set its collective mind to producing the corpus juris; one of its leaders was the same James DeWitt Andrews of the 1910 project. Not much was accomplished during the War, but the committee came to life again in 1919 and from then until 1922 Andrews tried to convince the Association that a corpus juris could be created through the dormant American Academy of Jurisprudence. Founded in 1914 by a group of luminaries including William Howard Taft, Elihu Root, George Wickersham, Frederick Coudert, Roscoe Pound, and Samuel Willis-

85. *Id.* (emphasis in original removed).

86. Root, *Public Service By the Bar*, 41 REPORTS OF THE A.B.A. 355, 365 (1916).

87. *Id.*

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ton,[88] the Academy had the familiar aim of inquiring

> into all important principles of law which at the present time are in a confused, conflicting, and uncertain stage by reason of conflicting judicial decisions, to the end that the sound principles of right and justice may be discovered and such logical reasons therefore given as will preclude as far as possible future uncertainty and discussion and in this manner unify and clarify the law.[89]

The coming of the War ended the group's activities and Andrews' attempt to revive it was frustrated by the coming of the ALI.

The mid-decade revival of the classification idea was not limited to the elite practitioners represented in the ABA. In 1914 the elite law teachers of the Association of American Law Schools heard two speeches, one by Joseph Beale of Harvard on "The Necessity For a Study of Legal System"[90] and the other by Wesley N. Hohfeld of Yale on "A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?"[91] Beale made yet another contribution to the rhetoric of principles, system, and science:

> What, then, is the common law which is scientifically studied in the country? It is surely a philosophical system, a body of scientific principle which has been adopted in each of the common law jurisdictions in this country, as the basis of its law. . . . But the general scientific law remains unchanged in spite of these errors [misstatements and misconceptions of the courts]; the same throughout all common law jurisdictions. This is the science which we teach, and this is the science which requires systematic statement in order that progress and reform may be possible.[92]

Hohfeld's paper was a detailed outline of such a systematic study. These two speeches, together with the appointment the following year

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88. 44 REPORTS OF THE A.B.A. 92 (1922).

89. Letter from James DeWitt Andrews to William Howard Taft, New York City, Paige Box 26, Pound MSS, *supra* note 35.

90. Beale, *The Necessity for a Study of Legal System*, PROC. ASS'N AM. L. SCHOOLS 348 (1914).

91. Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*, 14 PROC. ASS'N AM. L. SCHOOLS 76-139 (1914).

92. Beale, *supra* note 90.

of a committee to investigate the establishment of a center for jurisprudence, were selected by the Director of the ALI as the starting point for his brief official history of the Institute.[93] This beginning was aborted by the War, but when activity began again in 1920 the denouement came rapidly.

The parallel movement of the ABA and the ALI towards the goal of classification of the law might seem surprising in the light of the hostility between the two organizations and the broader differences between the two aspects of the profession which they represented. The meeting of the AALS which heard the speeches of Hohfeld and Beale was the first to meet separately from the annual meeting of the ABA. The split was occasioned, according to the law teachers, by the older organization's slighting of both them and of legal education, symbolized by the proximate cause of the break, the moving of the date of the ABA's meeting from August to October, a time particularly unpropitious for academics.[94]

But the differences went deeper than a disagreement over a convenient time to meet. The men involved had different views on the proper response to the questions raised by the changing circumstances of American life. Beale, for example, was a thorough advocate of sociological jurisprudence. He told his colleagues:

> The vocation of our own age, then, is to restudy our law with a view to its readjustment and reform. . . . We must examine the law objectively to learn its social purpose and to see how far that purpose is being accomplished. Such a study is the object of the new sociological jurisprudence.[95]

Root, on the other hand, not only trusted in the gradual development of the law to solve the current problems, but he even praised the *bete noir* of the sociological jurist — freedom of contract — as the instrument of the destruction of a society based on status. He further cautioned: "We should not forget that every increase of governmental power to control the conduct of life is to some extent a surrender of individual freedom and a step backwards towards that social condition in which men's lives are determined by status rather than by their own free will."[96] He was

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93. Lewis, *History of the American Law Institute and the First Restatement of the Law: 'How We Did It'*, in I RESTATEMENT IN THE COURTS 1-2 (1945).
94. Auerbach, *supra* note 18, at 567.
95. Beale, *supra* note 90, at 39.
96. Root, *supra* note 86, at 372.

a believer in a theory of law which Pound had labelled an anachronism.[97] Nor did all teachers hold the same views. Harlan Stone, then dean of the law school at Columbia, could attack the concept of social justice as a basis for judicial decision and label sociological jurisprudence more a theory of legislation than of the judicial process and still lament the profusion of judicial opinions and call for systematization.[98]

On the whole, however, law teachers were far more inclined to speak the rhetoric of Progressivism than were the practitioners who concerned themselves with the issues of legal reform.[99] Through their advocacy of quintessential Progressive reform of the court system the law teachers of the American Judicature Society would, in fact, come into sharp conflict with certain elements of the organized bar.

The AJS was not the original proponent of reform of the organization of the courts. Pound's 1906 speech had emphasized reorganization of the courts as well as procedural reform, and one of the reports he prepared for the Special Committee to Suggest Remedies contained a detailed plan for the reform of state court organization centering on the unification of the courts. Pound acknowledged, however, that since implementation of such a plan would require action in each state, its submission to the ABA was really a propaganda device.[100] It was the American Judicature Society which took up the cause as Pound had outlined it.

The AJS, however, added one small innovation. The appointed judges of the unified state court were to go before the electorate three, nine, and eighteen years after appointment to allow the people to decide whether they should be retained in office. Should a judge survive all three tests he would continue in office until death, retirement, or impeachment. This system was designed as a safe substitute for judicial recall and as a form of popular selection of judges which would cause the least damage to the quality of the bench.[101]

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97. Pound, *Political and Economic Interpretations of Jurisprudence*, 9 PROC. AM. POL. SCI. ASS'N 94-105 (1912).

98. H. STONE, LAW AND ITS ADMINISTRATION 40-49, 212-14 (1924); Stone, *The Lawyer and His Neighbors*, 4 CORNELL L.Q. 185 (1919).

99. Auerbach, *supra* note 18, at 555-56.

100. Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, *Report*, 34 REPORTS OF THE A.B.A. 595 (1909).

101. *First Draft of a State-Wide Judicature Act*, AMERICAN JUDICATURE SOCIETY BULLETIN VII at 3-14 (1914); KALES, *supra* note 54, at 225-51; Kales, *Methods of Selecting and Retiring Judges*, AMERICAN JUDICATURE SOCIETY BULLETIN VI at 29-

The arrangement resembled the judicial recall closely enough, however, to call down the wrath of Rome Green Brown, chairman of the ABA's special committee to oppose the judicial recall.[102] Theodore Roosevelt's inclusion in the New Nationalism of some sort of judicial recall as a means to remedy decisions such as *Lochner v. New York*[103] drove the upper reaches of the American bar to distraction in a way no political issue was to do again until another Roosevelt attempted to pack the United States Supreme Court.[104] Brown's committee was but one manifestation of that exasperation which stemmed from a view of American government and society which was probably widespread at the elite levels of the bar. The most important feature of American government in this view was the check of popular whims and passing fancies exercised by the courts. It was also apparent that the fickle populace was always attacking the security of property, making the courts its greatest defender. Thus judicial recall was anathema. It would destroy the only security the nation, or better, the propertied groups, had against popular usurpation of authority.[105]

Brown was able to wring a compromise out of the AJS which preserved the elections but placed them at the end of fixed terms rather than at points in a life tenure, thus saving them from the stigma of being recall elections.[106] The fatuousness of this resolution belies the

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52 (1914).

102. Brown was a wealthy and conservative Minneapolis lawyer dedicated to the fight "against judicial recall and other revolutionary and anti-constitutional doctrines of socialism." In 1919 he resigned from the ABA because 1) the Executive Committee refused to reimburse some of the expenses incurred in his crusade against socialism, and 2) the ABA's 1919 annual meeting rejected a resolution passed by Brown's committee "condemning the revolutionary movement signified by the Red Flag of Socialism and urging a campaign of education in support of the government which is signified by our Flag of the Stars and Stripes . . . ." Letter from Rome G. Brown to George T. Page, President of the ABA, Minneapolis, September 4, 1919, copy in Paige Box 26, Pound MSS, *supra* note 35; Botein, *supra* note 82, at 54-64.

103. 198 U.S. 45 (1905).

104. G. MOWRY, THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT 215-18 (1947).

105. These generalizations are based on an examination of the political attitudes of Adolph J. Rodenbeck, Everett P. Wheeler, Thomas W. Shelton, and Henry A. Foster, all prominent reformers of procedure.

The attitude described agrees with Arnold M. Paul's description of "neo-federalism." *See* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 at 159-60, 233-35 (rev. ed. 1969).

106. *Revised State-Wide Judicature Act*, AMERICAN JUDICATURE SOCIETY BULLETIN VII-A at 170, 186 (1917).

importance of the conflict. The injection of politics into what should have been reform based on scientific ideas of efficient organization was fatal. As Pound put it, "the real difficulty is that Kales, who drew the plan, is an unusual Bull Moose and several of his associates are more or less on the fringe of the Bull Moose herd."[107]

Once its suggestions were seen as partisan, the projects of the AJS could not command the support of other academics like Pound, let alone of the profession at large. But Pound himself was the principal exponent of sociological jurisprudence, a way of looking at law that not only seems to have been the peculiar province of academics but also at least implied a view of the issues of social justice different from that of the practitioners, like Root, who supported freedom of contract. Whatever the political tendency of Pound's rhetoric, however, the practice of sociological jurisprudence made it easy to gather all right thinking lawyers into the fold. In the end, sociological jurisprudence lacked not only political content but in fact had little content of any kind. Pound's grand idea had little life off the printed page.

Given the importance attached to legal education in Pound's work and his position as dean of Harvard Law School from 1916, he might have been expected to welcome expansion of the curriculum in a sociological direction. Pound's practice of legal education at Harvard, however, was remarkably narrow. He found abhorent Wigmore's plan to add a fourth year of legal study in which courses emphasizing the practical working of the law would be taught. Pound summed up his view in a letter to Harlan Stone: "It has been the glory of the better law schools in the country that they have stood resolutely for thorough work — for doing a few of the things best [worth] doing as well as they could, rather than for paper programmes attempting to cover everything."[108] Nor did he have any sympathy for clinical training or legal aid work, although presumably it would have brought the student into contact with some of the social forces which made a sociological juris-

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107. Roscoe Pound to Rome G. Brown, Cambridge, March 23, 1915, Ms. Box 2, Early Period Addenda, Pound MSS, *supra* note 35. Pound was a director of the AJS but did not keep in close touch with its activities since they were centered in Chicago. He did not see the controversial Bulletin VI before it was published. Roscoe Pound to Rome G. Brown, Cambridge, March 23, 1915, Ms. Box 2, Early Period Addenda, Pound MSS, *supra* note 35. Botein, *supra* note 82, at 60-62, has an interesting discussion of the attitudes of some leaders of the ABA who opposed the judicial recall in the name of judicial reform designed to separate courts from electoral politics.

108. Roscoe Pound to Harlan F. Stone, Cambridge, July 13, 1917, Paige Box 8, Pound MSS, *supra* note 35.

prudence necessary.[109] He was even opposed to separate courses in jurisprudence.[110] Both would have distracted the student from professional training.

In truth, Pound's views do not seem to have advanced beyond those of his predecessor, James Barr Ames, who was prepared in 1902 to lend Joseph Beale to the University of Chicago to be the first dean of its new law school until he discovered that President William Rainey Harper of Chicago intended to put on the faculty Ernst Freund, a professor of political science and specialist in administrative law. Ames wrote Harper that Beale would not go unless the new school was to be "a School with a curriculum of pure law, with a Faculty made up exclusively of professors, who are lawyers," and Beale himself said he would refuse the position unless the school were to teach only "strictly legal subjects" with a "faculty consisting only of lawyers."[111]

The one attempt to put sociological jurisprudence into practice was not made by Pound. Louis Brandeis was in full sympathy with Pound's ideas.[112] The famous "Brandeis brief" in *Muller v. Oregon*[113] — a few pages of legal argument and hundreds of pages of hard data on the adverse effects on women of long working hours — was truly sociological jurisprudence in action and led the United States Supreme Court to uphold the Oregon ten-hour law.[114] Brandeis went on to more successful defenses of social legislation, primarily at the state level.[115] As Mel-

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109. Legal Aid, Roscoe Pound to Harlan F. Stone, Cambridge, February 26, 1916, Ms. Box 3, Early Period Addenda, Pound MSS, *supra* note 35.

110. Roscoe Pound to James Parker Hall, dean of the University of Chicago Law School, Cambridge, November 27, 1916, Paige Box 8, Pound MSS, *supra* note 35.

111. Quoted in Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSPECTIVES IN AMERICAN HISTORY 438 n.56 (1971). On Pound's lack of innovation in legal education see WIGDOR, *supra* note 65, at 223-24; on the narrowness of Langdell's method see TWINING, *supra* note 3, at 13-14.

112. "As one of Brandeis's law secretaries [James M. Landis] has suggested, Brandeis was living proof of the kind of jurist Pound was seeking . . . ." S. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS 92 (1956); Brandeis's statement of his views is in Brandeis, *The Living Law*, 10 ILL. L. REV. 461-71 (1916).

113. 208 U.S. 412 (1908).

114. *See* A. MASON, BRANDEIS: A FREE MAN'S LIFE 248-51 (1946); M. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM 39-42 (1971); P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 114-31 (1984); the brief was published by the National Consumers' League, *Women in Industry*.

115. A. MASON, *supra* note 114, at 251-53.

vin Urofsky notes, however, "in practice, aside from Brandeis, few lawyers had had great success with data-laden briefs."[116] Perhaps the most spectacular disappointment was *Adkins v. Children's Hospital*,[117] in which the United States Supreme Court, unmoved by a massive Brandeis brief prepared by Felix Frankfurter, invalidated a statute setting a minimum wage for women in the District of Columbia in the name of "liberty of contract."[118]

Surprisingly enough, when Pound was involved in defending the Child Labor Act of 1916 before the federal district court for the Western District of North Carolina he made no use of the Brandeis technique, but argued solely in traditional terms about the nature and extent of the federal commerce power.[119] When Pound was asked to prepare a report on classification of the law for the new American Law Institute in 1923 he produced "little more than . . . a potted history of various theories of classification, only to reject most of them in favor of acceptance of the traditional categories of the common law. . . . [I]t might well have been written by someone who had never heard of sociological jurisprudence."[120]

What sociological jurisprudence came to mean, then, was not a body of doctrine but an attitude or even a rhetoric which emphasized the well-known ability of the common law to accomodate itself to the times and which emphasized even more strongly the importance of thorough training for the forming of good lawyers. As befits such a blandly acceptable notion, the rhetoric of sociological jurisprudence appeared more and more frequently. It can be seen in the works of prominent New York practitioners like Henry W. Taft and Frederick Rene Coudert.[121] It even penetrated the discourse of Harlan Stone. "The en-

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116. M. Urofsky, *supra* note 114, at 145.

117. 261 U.S. 525 (1923).

118. *See* F. Frankfurter, Brief for Appellant: District of Columbia Minimum Wage Case (1923); P. Murphy, The Constitution in Crisis Times, 1918-1969 at 56 (1972); F. Frankfurter & H. Phillips, Felix Frankfurter Reminisces 103-04 (1960).

119. D. Wigdor, *supra* note 65, at 195-98; S. Wood, Constitutional Politics in the Progressive Era: Child Labor and the Law 101-05 (1968).

120. Twining, *supra* note 3, at 24; *see also* Pound, *Preliminary Report on Classification of the Law*, 2 Proc. Am. L. Inst. 318-25 (1924); Pound, *Classification of Law*, 37 Harv. L. Rev. 381-425 (1924).

121. H. Taft, Law Reform: Papers and Addresses by a Practicing Lawyer 3 (1926); F. Coudert, Certainty and Justice: Studies of Conflict Between Precedent and Progress in the Development 36-37 (1913).

tire history of our law" he wrote in 1919, only five years after he had rejected the concept of social justice, "has been one of change and adaptation to meet new conditions, social and economic, and to conform to a more enlightened ethical perception."[122] Stone doubted, however, that sociological jurisprudence had "any methodology, any formulae, or any principles which can be taught or expounded so as to make it a guide whether to the student of law or to the judge" in the face of the unordered, unscientific chaos of the American common law.[123]

These words of Stone are revealing. Belief in the need to classify transcended differences, and the teachers, at least those in the schools of the AALS, had a unique contribution to make to that endeavor. They were the masters and advocates of the case method of teaching. Whatever Christopher Columbus Langdell thought he was doing when he started to teach at Harvard using opinions of the appellate courts as the only classroom material, and whatever his successors eventually made of his system, some believers in classification took the Dean at his word when he spoke of the relatively few fundamental doctrines of the law. Root stated the close relationship between the impulse to classify and the case method quite clearly in his 1916 address to the ABA:

> The living principle of the case system of instruction in our law schools is that the student is required by a truly scientific method of induction to extract the principle from the decision and to continually state and restate for himself a system of law evolved from its history. . . . With a Bar subjected generally to that process of instruction, the more general systematic study of jurisprudence would follow naturally and inevitably, and the influence of that study would be universal; and from that condition would evolve naturally the systematic restatement of our law, by men equal to that great work.[124]

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122. Stone, *The Lawyer and His Neighbors*, 4 CORNELL L.Q. 185, 188 (1919); *see also* Stone, *The Significance of a Restatement of the Law*, 10 PROC. ACAD. POL. SCI. IN CITY OF N.Y. 6 (1923) (*Law and Justice*). On Stone's favorable attitude to sociological jurisprudence see Stevens, *supra* note 111, at 427 n.28; A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 114-20 (1968). Mason asserts that Stone's *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319-37 (1923), indicates his full conversion to sociological jurisprudence from his critical position evidenced in LAW AND ITS ADMINISTRATION, *supra* note 98.

123. Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319, 327-28 (1923).

124. Root, *supra* note 86, at 366.

Acceptance of the case method became a shibboleth dividing the professional law teacher from the practitioner or judge whose part-time teaching had been the backbone of what formal legal education there had been in the United States; nevertheless, the case method's intellectual premises were not necessarily opposed to those of "old fashioned" members of the profession. In fact, early opposition to the case method was based on the belief that it obscured principles and turned students into mere "case lawyers."[125] As the new legal scholarship became more common with the growth of the full time professoriate and of the law reviews in which they published, it no doubt became obvious to at least some practitioners who cared about such things that the analysis of cases involved the extractions of the very principles which were at the heart of the conventional theory of law.

A project of classification could thus unite the elite practitioners and the elite law teachers, the two most vocal and most prominent parts of the profession, by emphasizing a shared view of what the law was really all about.

America's entry into the First World War put an end to agitation for legal reform on the part of the AALS and the ABA. Once the crisis was over and the nation returned to "normalcy," classification reemerged as almost the sole focus for reform. In part, classification triumphed through a lack of competition. The one active form of sociological jurisprudence received a severe set back in the *Adkins*[126] case, and freedom of contract had a renaissance while the concept of sociological jurisprudence itself was revealed more and more to be empty rhetoric.[127] The AJS continued to peddle its model statutes, but more quietly. The procedural reformers in the ABA began to lose some of their energy as the leadership, especially Everett P. Wheeler, who had been chairman of the Special Committee from the beginning, grew old.

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125. For representative discussions see J. BISHOP, COMMON LAW AND CODIFICATION, OR THE COMMON LAW AS A SYSTEM OF REASONING (1888); Schouler, *Cases Without Treatises*, 23 AM. L. REV. 1 (1889); Dwight, *Columbia College Law School, New York*, 1 GREEN BAG 141-60 (1889); S. DICKSON, THE METHODS OF LEGAL EDUCATION, AN ADDRESS TO THE LAW SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA 25 (1891); Penfield, *Text Books vs. Leading Cases*, 25 AM. L. REV. 234-38 (1891); Phelps, Keener, Tiedeman, & Gray, *Methods of Legal Education*, 1 YALE L.J. 139 (1892); Wurts, *Systems in Legal Education*, 17 YALE L.J. 86-97 (1907); R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1950S TO THE 1980S at 57-60 (1983).

126. 261 U.S. at 525.

127. P. MURPHY, *supra* note 118, at 63.

The committee formed in response to Pound's 1906 speech became the Committee on Jurisprudence and Law Reform and turned away from grand procedural designs to small reforms of the substantive law. Symbolic of the change, Pound himself was omitted from the committee in 1920, to his annoyance.[128] The bill granting the Supreme Court rule making powers was still bottled up in the Senate Judiciary Committee and its great supporter, Thomas Shelton, would spend the rest of his life in a futile effort to dislodge it.[129]

The one type of reform to reemerge with vigor was classification. The ABA committee came to life again in 1919, under James DeWitt Andrews' leadership. By 1920 he was trying to revive the American Academy of Jurisprudence as a vehicle for the creation of a restatement of the law according to a scientific scheme of classification, and that same year persuaded the ABA to pass a resolution ordering his committee and the Executive Committee of the Association to cooperate with any group working towards a restatement and classification of the law.[130]

Andrews almost got his way. The Executive Committee looked with favor on his project, and at the annual meeting in 1922 he presented a plan to finance the operation through a publishing company whose initial capital would be supplied by individual subscriptions of $800 to whatever series of books would be produced. The Executive

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128. Roscoe Pound to J.F. Loughborough, Cambridge, December 23, 1920, Paige Box 32, Pound MSS, *supra* note 35.

129. *Successful Annual Meeting Crowns Year of Real Accomplishments*, 18 A.B.A. J. 705, 760 (1932); *Association's Fifty-Sixth Annual Meeting is Marked by Notable Features*, 19 A.B.A. J. 553, 603 (1933).

After Shelton's death the Association discontinued his committee (1933). Ironically enough, before the decade was out the goal was reached and the Federal Rules of Civil Procedure were enacted, having been written by a committee appointed by the Supreme Court under the Rules Enabling Act of 1934. 48 Stat. 1064 (1934). Although Congress ordered that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant," their simplification of practice and procedure has almost surely affected the doing of substantive justice in the federal courts. By changing the test for the maintenance of a lawsuit from the statement of a cause of action, usually defined by the traditional common law categories which in turn can be interpreted very narrowly, to the statement of a claim on which relief can be granted, the rules have probably encouraged the righting of many more wrongs than could have been handled under the old system. For a striking and humorous example of this process see Dioguardi v. During, 139 F.2d 774 (2d Cir. 1944).

The links between progressive era procedural reform and the writing of the FRCP have yet to be traced.

130. 45 Reports of the A.B.A. 82-87 (1920).

Committee, however, reversed itself and recommended defeat of this idea, presumably, as Andrews himself charged, because it looked with greater favor on the recent activities of the AALS.[131]

The law teachers had returned to the problem of classification and restatement in 1920 and appointed a Committee on Juristic Center to investigate the creation of a permanent body dedicated to the improvement of the law. The Committee reported with enthusiasm in 1921 and the Association resolved "to invite the appointment of similar committees representing the courts, the bar associations, the professional and other scientific bodies engaged in the study of the substantive and adjective law and its administration, for the purpose of jointly creating a permanent organization for the improvement of the law."[132] Three months later, in March 1922, a member of the AALS committee, William Draper Lewis, dean of the law school at the University of Pennsylvania, approached Elihu Root, "the leader of the American Bar," for his support. It was forthcoming and on March 22, 1922, the AALS committee and some distinguished practitioners met under Root's chairmanship in New York City and formed the Committee on the Establishment of a Permanent Organization for the Improvement of the Law. This group produced a lengthy diagnosis of the failings of American law and called the great meeting of February 23, 1923, which failed to impress Mr. Justice Holmes but which accepted the report and created the American Law Institute.[133]

The report of the Committee on the Establishment of a Permanent Organization focused on the uncertainty and complexity of American law. No one could be blamed for this situation. The bench and bar were the prisoners of a system which demanded the resolution of individual cases and thus worked against any ordered development of the law. Nevertheless, the defects constantly undermine respect for the law and "disrespect for law is the corner-stone of revolution."[134] It would not be impossible, however, to stave off the apocalypse:

> The community possesses a force tending toward the certainty of the law as well as its adaptation to the needs of life in proportion as our judges and lawyers have that grasp of legal principles which

131. 47 REPORTS OF THE A.B.A. 84-96, 391-93 (1922).

132. HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE 19TH ANNUAL MEETING 116 (1921).

133. Lewis, *supra* note 93, at 2-3; 2 P. JESSUP, ELIHU ROOT 470-71 (1938).

134. Committee on the Establishment of a Permanent Organization for the Improvement of the Law, *Report*, 1 PROC. AM. L. INST. 6-7, 68 (1923).

> enable them to see the real issues presented by the facts of a case, and the skill to apply consistently the proper principles to its solution.[135]

All that was needed was "constructive scientific work."[136]

Although other strains of legal reform had become moribund by 1920, the scientific classifying strain which triumphed in the ALI did not succeed because of a total lack of competition. Alternatives were expressed by persons who were at the very least not anathema to the elite represented in the ABA and the AALS. The 1920 meeting of the AALS which appointed the Committee on Juristic Center heard the then president of the Association, Eugene A. Gilmore of the University of Wisconsin, give an address in which he suggested three methods of improving legal education and thus the law itself.[137] One was the creation of "a national seminar or institute of law" with a membership of practitioners, judges, and teachers who would concern themselves with wide-ranging problems. This suggestion was related to the ALI but the other two certainly were not. One concerned a closer involvement of law schools in legislative law making and the other advocated a closer relationship between law schools and colleges and a smoothing of the transition between the two by bringing the social sciences into the legal curriculum and some law into the college.[138]

Neither of these suggestions had any real success, although there was a legislative drafting bureau associated with Columbia University in 1920.[139] The Association's committee on curriculum retained a narrow view of legal education. Wigmore had to present his views on widening the curriculum and lengthening the course of the study as a minority report.[140]

Another suggestion was made in 1921 by Benjamin Cardozo in his article "A Ministry of Justice."[141] Cardozo proposed to gather judges,

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135. *Id.* at 74.

136. *Id.* at 35, 37.

137. Gilmore, *Annual Address*, in HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, PROCEEDINGS OF THE SUMMER MEETING, AND OF THE EIGHTEENTH ANNUAL MEETING 150-51, 154-56 (1920) [hereinafter HANDBOOK].

138. *Id.*

139. Harlan F. Stone to Roscoe Pound, New York City, December 13, 1920, Ms. Box 33, folder 15, Pound MSS, *supra* note 35.

140. HANDBOOK, *supra* note 137.

141. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921). Pound talked of a ministry of justice in 1917 before the Conference of Bar Associ-

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professors, and practitioners who would mediate between the legislature and the courts, pointing out which legal problems could be solved by statutory enactments and which should be left to the courts. Cardozo himself, however, found the suggested law institute an even better idea. He told the 1921 meeting of the AALS:

> Well, this Academy, if we found it, will be able to cooperate with the Ministries of Justice and may even render them superfluous. It will supply the judges the ideals and the standards to which they will increasingly repair to shape the law and change it within the limits of judicial power.[142]

These failed alternatives have one thing in common — they did not support professionalism as strongly as did the American Law Institute. Both the legislative drafting bureau and the ministry of justice had a political function, and involvement in politics was the antithesis of professionalism. Professionals were the masters of a neutral body of scientific knowledge, but politicians were not. Broadening the law school curriculum diluted those very claims to mastery of a useful body of knowledge. It would also call into doubt lawyers' self-sufficiency and autonomy, thus working a particular hardship on teachers who become the masters of a difficult or incomplete discipline. The position of the legal academic was of great importance because his existence testified to the scientific worth of the discipline. Its proper study required an academic class. The importance of the academic as opposed to the mundane can be seen in the treatment received at the 1921 ABA convention by the ALI's most direct competitor, Andrews' revived American Academy of Jurisprudence. It was strongly attacked in floor debate because its commercial nature made it hopelessly unscientific and unscholarly.[143]

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ation Delegates. Pound, *Anachronisms in Law*, 3 J. AM. JUDICATURE L. SOC. 142 (1920). Having been informed by Felix Frankfurter of Cardozo's interest in the subject, Pound corresponded with the judge and made some bibliographic suggestions. Letters from Roscoe Pound to Benjamin Cardozo, April 27, 1921, and May 25, 1921, both from Cambridge and both in Paige Box 32, Pound MSS, *supra* note 35.

142. AALS HANDBOOK AND PROCEEDINGS 119 (1921).

143. *Remarks of G. Wickersham*, 47 REPORTS OF THE A.B.A. 90-91 (1921); *see also* Letter from Roscoe Pound to James DeWitt Andrews, Cambridge, May 6, 1921, Paige Box 32, Pound MSS, *supra* note 35.

Pound was suspicious of the Committee on Classification and Restatement of the Law, writing to Harlan Stone that he had accepted a place on it only because of his fear of "enthusiasts" and to enable himself "to sit on the lid." Pound to Stone, Cam-

The founding rites of the ALI were permeated by the rhetoric of professionalism. In the first place, the Report of the Committee to Establish a Permanent Organization insisted that the proposed organization "should not promote or obstruct political, social or economic changes" but should remain on the high plane of science, leaving for the legislatures such questions as tax and fiscal policy, government administrative policy, and "novel social legislation" like old age pensions or methods for composing differences between capital and labor.[144] Another familiar note was sounded when the Committee blamed "not a little of the existing uncertainty in the law" on low educational requirements for admission to the bar and on the politicization of judicial office.[145] Finally, the report could not emphasize too strongly the legal profession's "obligation to the American people to promote the certainty and simplicity of the law, and its adaptation to the needs of life," analogizing it to the "duty of the doctors of medicine to organize to increase medical knowledge."[146]

The ultimate glorification of the legal profession was saved for the report's speculations on the future of the proposed restatement. An early draft of the report expressed the hope that if the restatements were done well enough then state legislatures would adopt the principles they contained as a "guide and aid to the Courts" having authority equal to that of the decisions of the highest court of the state.[147] This hope was reduced to a speculation in the final draft. It was not of current importance. "The important thing now is so to plan the work that the restatement from its inception shall be recognized as a work of great public importance for the execution of which the American legal profession as represented by its leaders on the bench, in practice, and in the schools, is responsible."[148] The goal has clearly become the exaltation of the profession and the preservation of that leadership which

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bridge, November 24, 1919, Ms. Box 4, folder 9, Early Period Addenda, Pound MSS, *supra* note 35. *See also* Letter from Henry M. Bates, dean of the University of Michigan Law School, to Roscoe Pound, Ann Arbor, December 3, 1920, Paige Box 11, Pound MSS, *supra* note 35.

144. 1 PROC. AM. L. INST. 4-5, 15-16 (1923).

145. *Id.* at 74.

146. *Id.* at 29, 64-65.

147. The drafts of the Committee's report are gathered in a volume entitled American Law Institute, *Preliminary Reports, Etc.*, in the Harvard Law School Library.

148. Committee on the Establishment of a Permanent Organization for the Improvement of the Law, *Draft Report*, 1 PROC. AM. L. INST. 24 (Part 1) (1922).

Pound praised in his 1906 speech. As Elihu Root told the founding meeting, their action "points the pathway where we will be acknowledged the natural leaders of the democracy in its struggles towards better life, towards permanency of institutions."[149]

The concern with professionalization was not new, of course. Throughout the period examined the question of the role of the expert — the place of the self-proclaimed exponent of neutral science — had been in question. Never before, however, had it been so prominent. The successful establishment of the ALI in 1923 suggests a crisis of professionalism even more acute than that of the preceding two decades. Pound for one judged the situation in terms recalling Holmes's comments in "The Path of the Law."[150] To a southern correspondent he complained that "mammon has a fearful hold upon the bar north of Mason and Dixon's Line."[151] He also complained to Harlan Stone that no one seemed willing to stand up to A. Mitchell Palmer and denounce his illegal acts as Attorney General. "There was a time when the bar would have taken this matter up vigorously as of course. Has the profession become so immersed in client-caretaking as to have forgotten its duty to the law?"[152]

Granted that the Palmer Raids and the general suppression of civil liberties were new elements, but they did not seem to rouse any great number of lawyers.[153] A more immediate threat to professionalism was evident. The bar was being flooded by undesirables trained at third-rate law schools, many of which were no better than cramming schools for the bar exams and did nothing to instill their students with the spirit of the profession.[154]

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149. *Remarks by E. Root*, PROC. AM. L. INST. 55 (Part 2) (1922).

150. Holmes, *supra* note 15, at 201.

151. Pound to Charles A. Woods, Cambridge, December 23, 1920, Paige Box 32, Pound MSS, *supra* note 35.

152. Pound to Harlan Stone, Cambridge, February 5, 1921, Paige Box 32, Pound MSS, *supra* note 35; *see also* WIGDOR, *supra* note 65, at 236-37.

Pound was one of the signers of a report to the American people on the illegal practices of the Department of Justice. *See* FRANKFURTER & PHILLIPS, *supra* note 118, at 173-74.

153. On the exuberant "patriotism" of the bar during and after the First World War, see Auerbach, *supra* note 18, at 580-84.

154. *Id.* at 586-601. Much of what follows is based on Auerbach's article, although the reader will note some differences in emphasis.

An interesting example of deference toward the law school can be seen in the letters of Learned Hand to some of the members of the Harvard Law School faculty — *e.g.*, "To a judge of the first instance who spends most of his time in settling questions

While lawyerly fears of undesirables, principally immigrants and Jews, seems to be a staple of the American profession, after the First World War they became more pronounced.[155] The ABA appointed a committee on legal education chaired by Elihu Root to investigate the problem, while Alfred Z. Reed undertook a similar study for the Carnegie Foundation. Reed's report basically advocated the formalization of the actual situation. There were two American bars which practiced two very different kinds of law, and the divisions were along economic and class lines. Reed was therefore willing to have the night, or part-time schools train the lower bar, leaving the training of the upper bar and the improvement of the law to the full-time schools of high standard.[156]

The Root committee totally rejected the idea of a divided bar but accepted the part-time school provided it offered a course of as many working hours as there were in the standard three-year full-time program. It demanded, however, two years of collegiate education before

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of fact, it [metaphysics and the larger questions involved in law] all seems pretty remote, but we look to you in the school to reform us out of our traditionalism." Letter from Learned Hand to Zechariah Chafee, Jr., New York, March 30, 1921, Ms. Box 15, folder 26, Learned Hand Papers, Harvard Law School Library, Cambridge, Massachusetts; *see also* Letter from Hand to Chafee, October 28, 1920, December 3, 1920, March 26, 1924, all from New York City and all in Ms. Box 15, folder 26 of the Hand Papers, also Hand to Joseph Beale, New York City, March 27, 1922, Ms. Box 13, folder 13, Hand Papers, and Hand to Thomas Reed Powell, New York City, April 23, 1922, Ms. Box 35, folder 8, Hand Papers. I would like to thank Professor Gerald Gunther for his kind permission to examine the Hand Papers.

For those who believed in the scholarly law school the statistics relating to legal education must have been frightening. Of the six largest law schools during the 1919-1920 school years, only one, Harvard, enrolling 883 students, required any college work for admission. Of the other five (Georgetown, New York University, George Washington, Fordham, Suffolk), enrolling 4,061 students (16.58% of all law students), only two had full-time programs and all five had part-time afternoon or night programs in the same year 42.9% of the law students in the United States were enrolled in full-time schools, and only 13.9% of the total were enrolled in schools requiring at least two years of college work for admission. A. Reed, Training for the Public Profession of the Law 452 (1921); A. Reed, Present-Day Law Schools in the United States 531, 532-35 (1928).

155. For an early example (1874) see IV A. Nevins and M. Thomas, The Diary of George Templeton Strong 544 (1952): "This [requiring a college diploma or an examination including Latin for admission in Columbia Law School] will keep out the little scrubs (German Jew boys mostly) whom the School now promotes from grocery counters in Avenue B to be 'gentlemen of the bar.'"

156. A. Reed, Training for the Public Profession of the Law 403-420 (1921); Auerbach, *supra* note 18, at 588-91.

entering law school. It was the latter requirement that was seen by opponents of the new guidelines as limiting access to the bar along economic lines.[157] The AALS followed the Root committee's lead, rejected the divided bar and agreed to accept part-time schools as members while raising its entrance requirements over a number of years to two years of college. The departure from settled policy regarding part-time schools as members so infuriated Pound that he wrote to Harlan Stone, suggesting that "Columbia and Harvard, and a few other institutions which have consistently stood for what ought to be in legal education . . . pull out of this Association and let it run as an Association of second-rate institutions."[158] Pound's fulminations came to nothing, however, and the net result was that the ABA and the AALS each gave a little and patched up their differences as they slammed the door through which came those who could never be properly professional lawyers.

The agreement between the ABA and the AALS on standards for legal education and admission to the bar did not alter state laws governing admission in the slightest, but the significance of the agreement should not be underrated. For once the upper levels of the profession, at least, both practitioners and teachers, were speaking with one voice on the subject of what made a good professional. At the same time they both testified to the scientific nature of the law and their own great sense of responsibility to the nation — and thus reaffirmed their right to lead — through the American Law Institute. The legal profession could at least face American society with a secure knowledge of its own worth.[159]

Security, however, can be a fleeting thing. The treaty between the practitioners and the teachers did not work perfect reconciliation. The resulting alliance carried within itself, as so many compromises do, the seeds of its own destruction. Some law teachers, of course, like Pound, were unhappy with any compromise of what they saw as high and necessary standards, no matter how strongly required by the practicalities of the situation. On the whole, however, the exclusionary intent of the new rules for the legal education seem to have been widely sup-

157. Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association, *Report*, 46 REPORTS OF THE A.B.A. 667-88 (1921); Auerbach, *supra* note 18, at 593-98.

158. Roscoe Pound to Harlan F. Stone, Cambridge, January 2, 1923, Ms. Box 33, folder 15, Pound MSS, *supra* note 35.

159. Auerbach, *supra* note 18, at 599-601; Yeazell, *supra* note 44, at 43-45.

ported.[160] It was the centerpiece of it all, the American Law Institute, which was the weakest element.

The ALI at first glance was indeed the highest manifestation of the idea of professionalism. Here were judges, teachers and practitioners drawn together in a self-perpetuating body charged with deciding by vote the true principles of the science of law. These principles would then be sent into the world to triumph by their own worth without being subjected to the corruption of the political process as practiced by state legislatures. Indeed, the Institute had triumphed over competing programs of reform at least in part because it did the most to remove the legal professional from the defilement of partisan politics and place it squarely with the experts. Yet the very basis for the entire undertaking was an idea of law unchanged from the early nineteenth century, an idea which underlay, so it seems, the thinking of both practitioner and teacher. The Institute was a twentieth century bottle holding distinctly nineteenth century wine.

Almost at the very moment the ALI was being born Pound's intellectual heirs were beginning to mount a real challenge to the view of law which lay behind it. Legal realists had no place for ultimate principles revealed through the mere evidence of cases. No matter what divided the teachers and practitioners who helped to found the ALI, their intellectual histories were far more alike than different. What was coming in legal education was different and would help to guarantee that the profession of law would continue to question itself as the century unfolded.

160. Auerbach, *supra* note 18, at 591-600.

An Argument Against Judicial Immunity for Employment Decisions

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A state supreme court justice allegedly makes improper advances toward a female court employee. When the justice is rebuffed, he pres-

sures a court clerk to fire the woman.[1]

The woman, even if she could prove that she was wronged, might have no damages remedy in the courts. This unfortunate circumstance may occur if the United States Supreme Court affirms a recent court of appeals decision.[2]

The role of the judge is to decide cases on the basis of the facts and the law. For this reason, judges have traditionally been held immune from being sued[3] for actions related to their official duties. Were it otherwise, judges might in deciding cases be influenced by the possibility of future litigation against the judge him- or herself.

The Supreme Court has given strong support to the doctrine of absolute judicial immunity. The Court stated in 1980 that "[j]udicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without being mulcted for damages . . . ."[4]

The scope of judicial immunity has been much debated in recent years.[5] One of the most perplexing issues involving judicial immunity will soon be addressed by the Supreme Court: Are judges immune from suits based on their employment decisions?[6] As the notion that employment decisions should not be made on the basis of certain illegitimate factors—such as race, sex, and national origin—has become widely accepted, judges have increasingly become the subject of law suits by former employees claiming that their discharges were for unlawful reasons. Some courts have held that judicial immunity extends to

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1. *See Misconduct Charged on Vermont High Court*, N.Y. Times, Jan. 29, 1987, at 1, col. 2.

2. Forrester v. White, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987).

3. Judges are not only immune from liability; they are also immune from having to go to trial. Mitchell v. Forsyth, 472 U.S. 511 (1985).

4. Dennis v. Sparks, 449 U.S. 24, 31 (1980).

5. *See, e.g.*, Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980); Rosenberg, *Whatever Happened to Absolute Judicial Immunity?*, 21 HOUS. L. REV. 875 (1984); Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879; Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 FORDHAM L. REV. 1503 (1985).

6. It appears that the only scholarly discussions of the issue are a few brief references in Note, *supra* note 5, at 1509-11. It should be noted, though, that the opinions in *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987), authored by Judges Jesse E. Eschbach and Richard Posner, would be serious and important contributions to the debate, even if they appeared in a law review instead of the *Federal Reporter*.

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employment decisions, while others have held that judges may be sued.

The conflict on this issue is demonstrated by two decisions issued five days apart in June 1986 by the United States Court of Appeals for the Seventh Circuit. In the first case, *Forrester v. White*,[7] a panel of the court held that an Indiana juvenile court judge could not be sued for alleged sex discrimination in dismissing a probation officer. A different panel of the court then ruled in *McMillan v. Svetanoff*[8] that a court reporter claiming that her dismissal was based on her race and political affiliation could sue the judge who fired her. The *McMillan* court tried to reconcile its opinion with the earlier decision,[9] but in fact the two opinions represent vastly different points of view. The Supreme Court denied certiorari in *McMillan*,[10] but has agreed to hear *Forrester*.[11]

This paper contains a survey of Supreme Court decisions on judicial immunity. This is followed by an examination of the ways in which lower courts have interpreted judicial immunity, both generally and in the context of cases alleging employment discrimination by judges. Arguments for and against immunity for employment decisions will be discussed. In conclusion, an argument will be made that the historical origins and policy bases for judicial immunity are not implicated in employment decisions; further, such immunity would be unfair and would lower respect for the judiciary. Finally, granting judicial immunity for employment decisions would be such a difficult task, with decisions made largely on a case-by-case basis, that judges would be faced with as much uncertainty as if there were a blanket denial of immunity for employment decisions.

I. A History of Judicial Immunity

The Supreme Court has based its support of judicial immunity on precedent in the common law. The Court in 1871 said that judicial immunity "has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the

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7. 792 F.2d 647 (7th Cir. 1986) (issued June 5). The plaintiff's petition for a rehearing *en banc* was denied on September 11, 1986. Conversation with Clerk's Office, January 6, 1987. Certiorari was granted on Feb. 23, 1987. 107 S. Ct. 1282. The case will likely be argued in late 1987.

8. 793 F.2d 149 (7th Cir.) (issued June 10), *cert. denied*, 107 S. Ct. 574 (1986).

9. *Id.* at 152. *See also infra* note 107 and accompanying text.

10. 107 S. Ct. 574 (1986).

11. 107 S. Ct. 1282 (1987).

courts of this country."[12] Recent scholarship has argued that in fact the case for immunity on historical grounds is "inconclusive and unpersuasive."[13] Whichever is correct, judicial immunity has been well-established in the United States for over a century.

The Supreme Court first discussed judicial immunity in the 1868 case of *Randall v. Brigham*.[14] An attorney sued the judge who prohibited him from practicing law. The judge was held to be immune, as judges "are not liable to civil actions for their jurisdictional acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly."[15] Three years later the Court partially receded from this holding, and said that intent was irrelevant; there would be immunity even if the judge acted with malice.[16]

The Supreme Court next dealt with judicial immunity in 1879 in *Ex Parte Virginia*.[17] The case was a criminal action against a judge who had excluded blacks from juries.[18] The judge, serving time in prison, filed a habeus petition to gain his release. The Court rejected his claim of judicial immunity, holding that the judge in selecting jurors was engaged in a ministerial (rather than a judicial) act.[19]

The next important Supreme Court case on judicial immunity was *Pierson v. Ray*[20] in 1967. The Court held that 42 U.S.C. § 1983, part of the Civil Rights Act of 1871, did not abolish common law judicial immunity.

The Court's most important immunity decision was in the 1978

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12. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).
13. Feinman and Cohen, *supra* note 5, at 204. *Contra* Block, *supra* note 5.
14. 74 U.S. (7 Wall.) 523 (1868).
15. *Id.* at 536.
16. *Bradley*, 80 U.S. (13 Wall.) at 347. The case involved the trial of John H. Suratt for the murder of Abraham Lincoln. The attorney for Suratt allegedly insulted the judge, who then removed the attorney's name from the list of attorneys permitted to practice in the court. The Supreme Court held that the judge could not be sued for damages.
17. 100 U.S. 339 (1879).
18. While this was a criminal case, it remains relevant to a consideration of immunity from civil suits. *See infra* note 168.
19. *Id.* at 348. Another Supreme Court case on judicial immunity, of lesser importance, is Alzua v. Johnson, 231 U.S. 106 (1913) (immunity for judge alleged to have altered decision reached by other judges, prepared a decision with false statements, and mislead other judges into believing facts in opinion were correct).
20. 386 U.S. 547 (1967).

case of *Stump v. Sparkman*.[21] The defendant was a judge who approved a mother's request that her daughter be sterilized. Several years later the daughter sued the judge. In a five-to-three decision, the Court held that the judge was immune from suit. The majority opinion by Justice White established a two-part test for determining whether a judge is immune. A judge will be immune from suit for damages unless he or she acted in the "clear absence of all jurisdiction"[22] (referring to subject matter jurisdiction); the second requirement is that the act complained of have been "judicial" in nature.[23] The jurisdictional question is often answered by reference to statute.[24] What constitutes a judicial act is more difficult to determine.

The Court provided a standard for judicial acts:

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.[25]

The decision has been much criticized. First, it is not always clear what the Court was saying. For example, the standard for judicial acts quoted above is important, but is stated in an awkward, convoluted manner. Second, the decision left many questions unanswered. "[T]he brief legacy of *Sparkman* has been disarray and dissatisfaction."[26]

At issue in *Supreme Court v. Consumers Union*[27] was a suit against state supreme court justices for disciplinary rules covering the conduct of attorneys. The United States Supreme Court held that the state supreme court justices were acting in a legislative function, and hence were not entitled to absolute judicial immunity.[28] In *Dennis v. Sparks*[29] the Court held that there was immunity for a judge who allegedly issued an injunction as a result of a conspiracy between the

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21. 435 U.S. 349 (1978).
22. *Id.* at 357.
23. *Id.*
24. *Id.* at 358.
25. *Id.* at 362.
26. Block, *supra* note 5, at 920. *See also* Feinman & Cohen, *supra* note 5, at 202-03 ("commentators unanimously have condemned the decision").
27. 446 U.S. 719 (1980).
28. *Id.* at 731, 737.
29. 449 U.S. 24 (1980).

judge and some of the defendants. Most recently, the Court in the 1984 case of *Pulliam v. Allen*[30] ruled that judicial immunity is a protection only against damages; there is no judicial immunity against injunctive relief.[31] The Court also held that a claim against a judge for injunctive relief can give rise to an award of attorney's fees under 42 U.S.C. § 1983.[32]

Based on Supreme Court precedent, the law of judicial immunity can be summarized as follows: Judges are immune from suit for damages as long as they are acting within their subject matter jurisdiction and are engaged in judicial acts. If the acts are clearly beyond their jurisdiction, *or* if they are nonjudicial, there is no immunity.[33] It is irrelevant whether the judge acted with malice. The immunity does not extend to injunctive or declaratory relief. Attorney's fees may be assessed against a judge. The crucial undecided question, in the context of immunity for employment decisions, is the definition of a "judicial act."

II. The Difficulty of Defining a "Judicial Act"

A scholar has written of the experience of the British courts at the end of the nineteenth century: "Various definitions of a judicial act were developed; often, when a definition appeared patently unsuitable in a particular context, the courts would discard it and adopt another definition, also supposedly universal in its application."[34] American courts have met with no greater success.

The Supreme Court's standard for judicial acts, stated in *Sparkman*[35] and quoted above,[36] has not been of much help. The term "judicial act" is by no means self-evident, the Seventh Circuit has said.[37] The test is stated so that little is held to be nonjudicial. According to one commentator, "Only in the most obvious cases . . . will these factors present no problems."[38]

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30. 466 U.S. 522 (1984).
31. *Id.* at 541. The Court noted, though, that such relief will probably not often be awarded.
32. *Id.* at 544. The attorney's fees in the case were assessed against the judge.
33. Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir. 1980).
34. Block, *supra* note 5, at 891.
35. 435 U.S. at 362.
36. *See supra* text accompanying note 25.
37. *Forrester*, 792 F.2d at 653.
38. Note, *supra* note 5, at 1507. *Cf.* Feinman & Cohen, *supra* note 5, at 285

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Sometimes courts have found parts of the *Stump* test to be irrelevant or "inapplicable."[39] Often lower courts have developed their own tests to judge whether acts are judicial.

The Fifth, Ninth, and Eleventh Circuits have stated four factors to be considered in determining whether a judge's conduct constitutes a judicial act:

> (1) the precise act complained of . . . is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.[40]

This test has been of limited use. The Supreme Court in *Stump* provided a test, which proved to be inadequate; as a result, several of the courts of appeal have "explained" the *Stump* test in the test quoted just above; but this test has also proved to be inadequate. Some courts have just about given up, admitting that in this area of the law cases are decided without any clear standards.

The Fifth Circuit has been most forthright in its admission that there are no real standards for determining what constitutes a judicial act. In 1985 the court stated that while the four-part test will often work, "it is not the only test, and each of its factors are not to be given equal weight in all cases."[41] "[T]here are situations in which immunity must be afforded even though one or more of the . . . factors fails to obtain."[42] In each case the factors should be "construed . . . generously to the holder of the immunity and in the light of the policies underlying judicial immunity."[43]

("A rule that a judge will be immune for any 'judicial act' is practically indisputable on its face, and a court predisposed to immunity will need little justification to find without reference to policy that anything short of a physical assault is a judicial act.").

39. *Lopez*, 620 F.2d at 1235.

40. Dykes v. Hosemann, 776 F.2d 942, 946 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 569 (1986). The test has also been used in Holloway v. Walker, 765 F.2d 517, 524, *reh'g en banc denied*, 773 F.2d 1236 (5th Cir.), *cert. denied*, 106 S. Ct. 605 (1985); Adams v. McIlhany, 764 F.2d 294, 297, *reh'g en banc denied*, 770 F.2d 164 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 883 (1986); Harper v. Merckle, 638 F.2d 848 (5th Cir. Unit B 1981); Ashelman v. Pope, 793 F.2d 1072, 1075-76 (9th Cir. 1986) (en banc); Harris v. Deveaux, 780 F.2d 911, 914 (11th Cir. 1986).

41. *Holloway*, 765 F.2d at 524.

42. *Adams*, 764 F.2d at 297.

43. *Id.*

It is of course important that tests be flexible and able to adapt to new circumstances. This four-part test, however, is so flexible and so without standards that it is not a test in any real sense. The Fifth Circuit requires that the four factors be applied to the facts of the case. If the result is a finding of no immunity, the factors are reweighed so that the result is a finding of immunity. If one factor overwhelmingly suggests that there should be no immunity, then perhaps that factor should be disregarded. In short, this is less of a test than it is an obstacle for plaintiffs, and the obstacle seems almost insurmountable.[44]

A redefinition of "judicial acts" is beyond the scope of this Note.[45] This description of the courts' writings on the definition of judicial acts is included to place in perspective the problems that the courts have in deciding on immunity for employment decisions. "Universal"[46] rules may not be a realistic goal in this area.

III. The Lower Courts on Judicial Immunity for Employment Decisions

The courts have been unable to arrive at a consensus on the issue of judicial immunity for employment decisions. "The federal courts disagree on the scope of the immunity defense for decisions regarding judicial personnel."[47]

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44. *Cf.* McMillan v. Svetanoff, 793 F.2d 149, 154 (7th Cir.) ("The consensus of these cases is that judicial immunity should not be extended lightly . . . . "), *cert. denied*, 107 S. Ct. 574 (1986). For a discussion of burdens and immunity, see *infra* notes 87 to 89 and accompanying text.

45. *Cf.* Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 FORDHAM L. REV. 1503 (1985).

46. *See supra* text accompanying note 34.

47. *Forrester*, 792 F.2d at 653-54. Five days later, another panel of the Seventh Circuit wrote that "[m]ost court decisions interpreting judicial acts in the context of judges' hiring and firing decisions have not extended judicial immunity protection." *McMillan*, 793 F.2d at 151. While both statements may be correct, they certainly view the decisions from different perspectives. This is perhaps just another example of the lack of consensus.

Another example of this can be seen in Cronovich v. Dunn, 573 F. Supp. 1330 and 573 F. Supp. 1340 (E.D. Mich. 1983). In the first opinion the judge stated that the defendant/judge was not entitled to immunity. Twenty days later the judge released a second opinion. "I have found on further review of the cases that there is some confusion over the scope of the immunity granted judges in making personnel appointments. The cases are not as crystal clear as I initially thought." 573 F. Supp. at 1342.

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A. *Disagreement in the Lower Courts*

Sixteen federal district courts, six federal courts of appeal, and one state supreme court have been confronted with the issue of judicial immunity for employment decisions. No consensus has been reached.

Six courts have either dodged the issue of immunity or not mentioned it at all. The plaintiffs in these cases were a juvenile detention officer,[48] a class of government employees,[49] adult probation officers,[50] a juvenile probation officer,[51] an assistant director of criminal probation,[52] and a law assistant.[53]

Nine courts have *granted* immunity. The plaintiffs in those cases were a judge alleging discriminatory assignments,[54] attorneys alleging discrimination in assignment to criminal cases,[55] an employee of a probation department,[56] a magistrate denied reappointment,[57] an assistant

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48. Mason v. County of Delaware, 331 F. Supp. 1010, 1017 (E.D. Pa. 1971) (earliest case) (suit dismissed for lack of jurisdiction and failure to state a claim; "it is not clear whether [judicial] immunity would extend to the administrative duties of hiring and firing").

49. Nowlin v. Pruitt, 8 Emp. Prac. Dec. (CCH) ¶ 9554 (N.D. Ind. 1974) (second earliest case) ("plaintiffs should carefully delineate a path around such a well established concept [as judicial immunity]").

50. Shore v. Howard, 414 F. Supp. 379, 386 n.3 (N.D. Texas 1976) ("the availability of judicial immunity for suits in damages for hiring or dismissing employees would require a careful weighing of the circumstances under which each suit might arise. The Court does not reach this question in the present action . . . .").

51. Atcherson v. Siebenmann, 605 F.2d 1058, 1064 & n.8 (8th Cir. 1979) (judge held to be entitled to qualified immunity, so issue of absolute immunity not reached), *reversing* 458 F. Supp. 526 (S.D. Iowa 1978). *Cf.* Ohse v. Hughes, No. 85-3074 (7th Cir. Apr. 1, 1987) (available May 14, 1987 on Westlaw) ("the *Atcherson* court ducked the question").

52. Pruitt v. Kimbrough, 536 F. Supp. 764 (N.D. Ind. 1982) (issue not discussed), *aff'd mem.*, 705 F.2d 462 (7th Cir. 1983). *See infra* note 58.

53. Mareno v. Re, 568 F. Supp. 17, 22 n.1 (S.D.N.Y.) ("Having rejected plaintiff's claim on the merits, I need not reach defendant's alternative contention, that the action is barred by the doctrine of judicial immunity."), *aff'd mem.*, 742 F.2d 1430 (1983), *cert. denied*, 465 U.S. 1008 (1984).

54. Wright v. Patrolmen's Benevolent Ass'n, 9 Emp. Prac. Dec. (CCH) ¶ 10,240 (S.D.N.Y. 1975).

55. Thompson v. District of Columbia, 22 Emp. Prac. Dec. (CCH) ¶ 30,840 (D.D.C. 1980).

56. Blackwell v. Cook, 570 F. Supp. 474 (N.D. Ind. 1983).

57. Lewis v. Blackburn, 555 F. Supp. 713 (W.D.N.C. 1983). This decision was affirmed, 734 F.2d 1000 (4th Cir. 1984), in an opinion in which the court said that "monetary damages are barred by Judge Snepp's judicial immunity." *Id.* at 1008. That

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director of criminal probation,[58] two probation officers,[59] a personal secretary to a judge,[60] and a court services officer.[60.1]

Eight courts have *denied* immunity. The plaintiffs in these actions were a probation officer,[61] a director of a program on aging,[62] a staff attorney,[63] a friend of the court,[64] a hearing officer in a juvenile division,[65] a group of employees (probation officers, assistant superintendent, and teacher) at a juvenile center,[66] a court reporter,[67] and a personal and confidential secretary to a judge.[67.1]

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panel decision was then reversed on other grounds by the court *en banc*. 759 F.2d 1171 (4th Cir. 1985). Certiorari was denied. 106 S. Ct. 228 (1985).

58. Pruitt v. Kimbrough, 665 F.2d 1049 (7th Cir. 1981) (unpublished order, quoted in Cronovich v. Dunn, 573 F. Supp. 1340, 1343 (E.D. Mich. 1983)). This order by the court of appeals was followed the next year by an opinion of the district court in which the issue of immunity was not discussed; the district court, though, seemed to suggest that the issue was unresolved. Pruitt v. Kimbrough, 536 F. Supp. 764, 767 (N.D. Ind. 1982).

59. Forrester v. White, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); Bryant v. O'Connor, No. 85-4348 (D. Kan. Dec. 2, 1986) (described in Mason v. Twenty-Sixth Judicial District, No. 86-2103-S (D. Kan. Apr. 8, 1987) (available June 6, 1987 on Lexis, Genfed library, Newer file)).

60. Mead v. McKittrick, 727 P.2d 517 (Mont. 1986).

60.1. Mason v. Twenty-Sixth Judicial District, No. 86-2103-S (D. Kan. Apr. 8, 1987) (available June 6, 1987 on Lexis, Genfed library, Newer file).

61. Atcherson v. Siebenmann, 458 F. Supp. 526 (S.D. Iowa 1978), *rev'd on other grounds*, 605 F.2d 1058 (8th Cir. 1979).

62. Clark v. Campbell, 514 F. Supp. 1300 (W.D. Ark. 1981).

63. Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

64. Cronovich v. Dunn, 573 F. Supp. 1330 (E.D. Mich. 1983). Twenty days later the court retreated a bit, and noted that the issue of immunity may be the subject of an interlocutory appeal. 573 F. Supp. 1340, 1343.

65. Goodwin v. Circuit Court, 729 F.2d 541, 549 (8th Cir. 1984) ("The decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision."), *cert. denied*, 105 S. Ct. 112 (1984) and 105 S. Ct. 1194 (1985). Interestingly, Judge Posner, dissenting in *Forrester*, 792 F.2d at 663, wrote that "a judge's absolute immunity from damage liability for employment discrimination . . . was not argued in Goodwin v. Circuit Court of St. Louis County."

66. Laskowski v. Mears, 600 F. Supp. 1568 (N.D. Ind. 1985). This is the most recent of a number of cases from the Northern District of Indiana on judicial immunity for employment decisions. Earlier cases include: *Nowlin*, 8 Emp. Prac. Dec. (CCH) at ¶ 9554; *Pruitt*, 536 F. Supp. at 764; and *Blackwell*, 570 F. Supp. at 474.

67. McMillan v. Svetanoff, 793 F.2d 149 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986).

67.1 Guercio v. Brody, 814 F.2d 1115 (6th Cir. 1987).

Three other decision are difficult to categorize. In Abbott v. Thetford, 534 F.2d

Courts have rarely discussed the immunity issue in depth; rather, they have usually made conclusory statements on whether or not there is immunity.[68] However, a few recent cases granting immunity have developed a policy basis for such immunity.[69] This argument will be considered in Part IV of this Note. First, though, there will be a discussion of the reasons for the lack of consensus: the irrelevance of *Stump v. Sparkman* and analytical flaws of the lower courts.

B. *The Irrelevance of* Stump

Perhaps the most basic reason for the lack of consensus is that the paradigm for judicial immunity cases is irrelevant to the issue of immunity for judicial employment decisions. The *Stump* test has two parts: the judge will be protected by immunity as long as 1) he or she was not acting clearly in excess of jurisdiction, and 2) the acts were judicial.[70]

This test does not adequately deal with cases involving immunity

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1101 (5th Cir. 1976) (en banc, adopting dissenting opinion from panel, 529 F.2d 695 (5th Cir. 1976)), a probation officer was fired for filing a lawsuit on behalf of some children. The probation officer sued the judge for violation of his first amendment rights, but the Fifth Circuit rejected the claim. The court noted the close relationship between probation officers and judges, but seemed to decide the case on constitutional grounds. 529 F.2d at 705-06. One of the concurring judges preferred to decide the case on immunity grounds. 534 F.2d at 1103 (Clark, J., specially concurring). In Sherwood v. Farrar, 9 Emp. Prac. Dec. (CCH) ¶ 10,202 (W.D. Mich. 1975), a clerk-typist sued a judge and the court administrator. The judge did not have to go to trial, as he did not order the plaintiff's dismissal. The court held, though, that the *court administrator* "acted under color of law in discharging the plaintiff. Such an administrative act is not performed in the course of or incident to the actual decision of cases, and is thus not the subject of judicial immunity." *Id.* at page 7906.

In Ohse v. Hughes, No. 85-3074 (7th Cir. Apr. 1, 1987) (available May 14, 1987 on Westlaw), a probation officer was suspended by his supervisor, who wanted to fire the employee. Three judges were chosen to hold a hearing on the probation officer's continued employment. The hearing resulted in the employee's termination. The fired employee sued, but the three judges were protected by judicial immunity, since they were found to have been engaged in judicial acts. "Ohse's hearing had all the elements of a judicial proceeding—counsel was present, witnesses were cross-examined and documentary evidence was received. Importantly, the judges had no personal or professional interaction with Ohse other than when Ohse initiated the interaction through his own letters addressed to them and, of course, through the hearing."

68. *See, e.g., Wright*, 9 Emp. Prac. Dec. (CCH) at ¶ 10,240 (granting immunity), and *Goodwin*, 729 F.2d at 549 (denying immunity).

69. *Blackwell*, 570 F. Supp. at 474; *Pruitt*, 665 F.2d at 1049 (unpublished order quoted in *Cronovich*, 573 F. Supp. at 1343); and *Forrester*, 792 F.2d at 647.

70. *Stump*, 435 U.S. 349, 357-64 (1978).

for employment decisions. The first prong of the test—involving subject matter jurisdiction—seems irrelevant. Some courts simply ignore it.[71] The Seventh Circuit has stated that "in this case a jurisdiction analysis is inappropriate because the discharge decision does not implicate the power of the court—only the authority of the judge to make such an employment decision."[72] Interestingly, five days earlier another panel of the Seventh Circuit tried to squeeze an employment case into the jurisdictional prong of the *Stump* test. The court admitted that the plaintiff's claim "did not arise directly out of litigation before the court, so the question of subject-matter jurisdiction makes little sense."[73] The court went on to apply the test anyway. "In the context of the dismissal of a staff member," the court said, "it is our opinion that the threshold question is this: was the judge *authorized* to discharge the plaintiff?"[74] Not surprisingly, the court found that the judge had the authority.

The court was engaging in a useless charade. It is hard to imagine a scenario in which a judge will have dismissed an employee he or she was without authority to fire. Courts should be forthright and admit, as did the other panel of the Seventh Circuit, that the jurisdiction prong of the *Stump* test is not implicated in the employment cases.

The second prong of the *Stump* test concerns whether the acts were judicial in nature. The general problems with determining which acts are "judicial" have already been discussed.[75] This has been the crucial issue in the employment decisions cases, and a difficult one. Some of the analytical weakness courts have brought to this issue will now be examined. Then, in the next section of this Note, there will be an examination of the policy issues implicated in judicial immunity for employment decisions. Since precedent does not supply a clear answer to the question,[76] the arguments for and against granting immunity will

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71. *E.g.*, *Blackwell*, 570 F. Supp. at 474.

72. *McMillan*, 793 F.2d at 151.

73. *Forrester*, 792 F.2d at 655.

74. *Id.* at 656 (emphasis added). *Accord* Mason v. Twenty-Sixth Judicial District, No. 86-2103-S (D. Kan. Apr. 8, 1987) (available June 6, 1987 on Lexis, Genfed library, Newer file).

75. *See supra* text accompanying notes 34 to 46.

76. Of course, an argument can be made that *Stump* is in fact relevant and controlling on the issue of judicial immunity for employment decisions. According to this argument, *Stump* defines the outer reaches of judicial immunity; since employment decisions are clearly not within the scope of *Stump* immunity, then there can be no immunity.

This argument, while logically strong, may not be well received by the Supreme

then be considered.[77]

C. *Analytical Weaknesses of the Lower Courts in Employment Cases*

In considering whether absolute judicial immunity should be granted for employment decisions, courts have made several errors. They have at times misused state law and have failed to agree whether immunities should be construed narrowly or broadly (and who should carry the burden).

Under the subject-matter jurisdiction inquiry of the *Stump* test, courts sometimes refer to state law to determine whether a judge was acting in the "clear absence of all jurisdiction."[78] This is entirely appropriate, since a state judge's jurisdiction is governed by state law. In fact, the Supreme Court in *Stump* consulted a state statute.[79] Some courts, though, have accepted as controlling a state statute's characterization of an act as either judicial or nonjudicial. For example, the Fifth Circuit Court of Appeals held that in Texas the setting of bond and supervision of court reporters are judicial functions.[80] The cited author-

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Court. First, the Court in reviewing the question is likely to do more than simply consult precedent; instead, it will likely consider the policy bases underlying judicial immunity. Second, the Court has never *explicitly* addressed the question of immunity for employment decisions. The Court has often decided issues that appear—by implication—to have been decided in earlier cases.

77. *See Stump*, 435 U.S. at 368 (Stewart, J., dissenting) ("It seems to me . . . that the concept of what is a judicial act must take its content from a consideration of the factors that support immunity from liability for the performance of such an act."); Block, *supra* note 5, at 915 ("Stewart's dissent in *Sparkman* is noteworthy for suggesting, for the first time, that the limits of judicial immunity should be defined by the policies giving rise to the doctrine."); Butz v. Economou, 438 U.S. 478, 506 (1978) ("federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."); *Forrester*, 792 F.2d at 650 ("In deciding whether the district court correctly ruled in Judge White's favor, we must first consider the general principles behind the immunity defense."); Adams v. McIlhany, 764 F.2d 294, 297 (test for judicial act "should be construed . . . in the light of the policies underlying judicial immunity."), *reh'g en banc denied*, 770 F.2d 164 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 883 (1986).

78. *Stump*, 435 U.S. at 357.

79. *Id.* at 358.

80. Slavin v. Curry, 574 F.2d 1256, 1263-64 (suit by litigant, rather than employee), *modified and reh'g denied*, 583 F.2d 779 (5th Cir. 1978).

ity was a Texas statute.[81] Similarly, a federal district court found that a judge was not entitled to immunity because his acts were not judicial. "The defendant in discharging the plaintiff was exercising administrative functions which have been statutorily defined as 'executive powers.' "[82]

These cases are undoubtedly mistaken. A statute cannot make into a judicial act conduct which is nonjudicial in nature. For example, several courts have stated that the punching of a litigant by a judge is clearly a nonjudicial act for which a judge is not entitled to immunity.[83] Were a state legislature to pass a law stating that striking a litigant was "judicial," this should not be determinative. In determining whether an act is judicial, courts should use a federal standard.[84]

This does not mean, though, that courts should not consult state statutes; rather, courts should not accept state *characterizations* of acts as being either judicial or nonjudicial. Some courts have properly used state law. A federal district court stated that to determine whether an act is judicial, "it is necessary to review the [employee's] duties and responsibilities contained" in the state statute.[85] The state law was used to determine what the employee did; the court then properly concluded on its own whether the act was judicial.[86]

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81. TEX. REV. CIV. STAT. ANN. art. 2321 (Vernon Supp. 1978).

82. Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981). The court also noted that judges were required by statute to be bonded before performing those duties described as "executive." *Id.* at 1303. The court said that this showed that the acts must have been nonjudicial; if they were judicial, there would be immunity, and hence the bonding requirement would have been "meaningless." *Id.* One does not need to obtain a bond if one is immune.

83. *E.g.*, Ammons v. Baldwin, 705 F.2d 1445, 1448 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974).

84. Lynch v. Johnson, 420 F.2d 818, 820-21 (6th Cir. 1970).

85. Blackwell v. Cook, 570 F. Supp. 474, 477 (N.D. Ind. 1983).

86. *Id.* at 478 ("The nature of these statutory duties placed on the [employee] indicates that the officer occupies a confidential relationship with the judge"). *Cf. Forrester*, 792 F.2d at 657:

> State law often provides an answer. . . . [I]t may determine, for example, who is in fact a "judge." However, while state law may conclusively determine when a judge is *not* entitled to immunity, . . . it does not always determine when a judge *is* entitled to immunity, because a state may assign a task to a judge for reasons unrelated to safeguarding principled and independent decision-making.

(emphasis in original). *Cf.* Clark v. Tarrant County, 798 F.2d 736, 747 ("While the status of an employee is a question of federal law in determining a Title VII claim, state law is relevant in describing the duties and supervision of the employees."), *reh'g*

Courts have failed to agree on whether judicial immunity should be narrowly or broadly construed, and on which party should carry the burden (this disagreement has not been limited to employment cases). The Supreme Court has clearly stated that "the burden is on the official claiming immunity to demonstrate his entitlement."[87] Despite this, many courts have said that the scope of judicial immunity is to be broadly construed.[88] The Fifth Circuit has said that in judging whether an act is judicial, the four factors "should be construed in each case generously to the holder of the immunity . . . ."[89] It may not be logically impossible to hold that the burden is on the person trying to establish the immunity and that the immunity itself will be "broadly construed"; these two positions are, though, at war with each other. One suggests a preference for denying immunity, while the other suggests a preference for granting it. The lower courts should follow the suggestions of the Supreme Court; the Court has said that the burden is on the judge, so judicial immunity should be narrowly construed.

IV. The Attempt to Expand Judicial Immunity to Employment Decisions

A. *The Policy Bases of Judicial Immunity*

There are many unanswered questions in the area of judicial immunity. One thing is clear, however: the policy considerations that gave rise to absolute judicial immunity are not implicated in employment decisions by judges. Stated differently, when judges formulated the doctrine of judicial immunity, and when the doctrine has been examined in recent years by the Supreme Court, there was no expectation that there would be immunity for employment decisions. As Judge Richard Posner has written, "[i]f there is a case for absolute immunity from civil liability for judges' employment decisions, it is a completely

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en banc denied, 802 F.2d 455 (5th Cir. 1986).

87. Dennis v. Sparks, 449 U.S. 24, 29 (1980) (judicial immunity). *Accord* Butz v. Economou, 438 U.S. 478, 506 (1978) (executive immunity) ("federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."); Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) (judicial immunity) ("One claiming immunity has the burden of demonstrating entitlement to it.").

88. *Ashelman*, 793 F.2d at 1078.

89. *Adams*, 764 F.2d at 297.

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different case from the traditional one."[90]

Judicial immunity has traditionally existed so that judges could not be sued by dissatisfied litigants. Justice White wrote for the Supreme Court in 1980:

> Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption.[91]

The Court earlier stated that the "cluster of immunities protecting the various . . . participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location."[92] The Ninth Circuit has written of "the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of controversies between adversaries."[93]

Courts recently deciding judicial employment decision cases have recognized that traditional judicial immunity would not protect employment decisions. In a recent case in which immunity was denied to a judge alleged to have fired a court reporter because of her race and political affiliation, the Seventh Circuit stated that "[p]roviding judicial immunity in employment actions alleging civil rights violations will not further the objective of the doctrine. The judge will not be more inhibited in rendering decisions because he may be called to task for firing a court reporter."[94] Another panel of the Seventh Circuit, in *granting*

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90. *Forrester*, 792 F.2d at 661 (dissenting).

91. Dennis v. Sparks, 449 U.S. 24, 31 (1980).

92. Butz v. Economou, 438 U.S. 478, 512 (1978). *Cf.* Stump v. Sparkman, 435 U.S. 349, 363 n.12 (1978) (discussion of "case" as being a normal attribute of a judicial proceeding).

93. Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982). *See also* Shore v. Howard, 414 F. Supp. 379, 385 (N.D. Texas 1976) ("The application of the doctrine of judicial immunity is restricted to its single objective of protecting judicial freedom in the process of deciding civil and criminal cases.").

94. McMillan v. Svetanoff, 793 F.2d 149, 155 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986). The court continued: "Because allowing judges to hire and fire court reporters with impunity will not further the objectives of the judicial immunity doctrine—principled decisionmaking—we decline to extend it to a judge's decision to terminate a court reporter." *Id. See also* Guercio v. Brody, 814 F.2d 1115, 1119 (6th Cir. 1987) ("The basic problem" with extending immunity to employment decisions "is that

immunity, admitted that "the rationale of decisions involving disgruntled litigants is not necessarily applicable to those involving former judicial employees."[95] The court noted that the federal courts have not been able to agree on judicial immunity for employment decisions. "This uncertainty in the case law is understandable, because decisions regarding court personnel depart from the paradigm of *Bradley* and its progeny."[96]

Since advocates of judicial immunity can gain no support from the traditional policy bases of judicial immunity, they have had to develop their own argument for the extension of the doctrine.[97] The case for immunity will be described in the following section. After this the argument's weaknesses will be examined.

B. *The Argument for Judicial Immunity for Employment Decisions*

In *Forrester v. White*[98] the Seventh Circuit Court of Appeals granted absolute immunity to a judge for his actions in firing a woman who worked first as an adult probation officer, then as a juvenile probation officer, and finally as the Project Supervisor of a Juvenile Court Intake and Referral Services Project.[99] This was the first decision in which a court explicitly stated a policy basis for granting judges immunity for their employment decisions.[100]

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it would not serve a central underlying purpose of judicial immunity: promoting fearless and independent decision-making by the judiciary.").

95. *Forrester*, 792 F.2d at 653.

96. *Id.* at 654 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871)).

97. Courts increasingly refer to policy considerations when deciding judicial immunity cases. *See supra* note 77.

98. 792 F.2d 647 (7th Cir.), *cert. granted*, 107 S. Ct. 1282 (1987). Judge Jesse E. Eschbach wrote the majority opinion, with which Judge William H. Timbers concurred. Judge Richard Posner dissented.

99. *Id.* at 648-50.

100. Two earlier courts mentioned themes which were later adopted by the *Forrester* court. In Pruitt v. Kimbrough, 665 F.2d 1049 (7th Cir. 1981) (unpublished order quoted in Cronovich v. Dunn, 573 F. Supp. 1340, 1343 (E.D. Mich. 1983)), immunity was granted to a judge. The court said that "[w]e find that the relationship, and the judges' acts of appointing, supervising, and discharging probation officers are intimately related to the judicial process . . . ." Later, a federal district court in Blackwell v. Cook, 570 F. Supp. 474, 479 (N.D. Ind. 1983), *aff'd*, 734 F.2d 1000 (1984), *rev'd en banc on other grounds*, 759 F.2d 1171 (4th Cir. 1985), wrote that "the critical point here is the relationship between probation officer and the judge." "The nature of these

The *Forrester* court wrote that judges must be immune from suits for damages based on many employment decisions because the suits could affect the way judges perform their duties. The court noted that judges must now depend to a considerable extent upon the help of staff[101]— secretaries, clerks, probation officers, bailiffs, staff attorneys, magistrates, friends of the court, juvenile services officers, court reporters. According to the court, "suits brought by former court personnel may have a powerful, albeit indirect, effect on the rights of litigants."[102] The court explained what might happen if judges could be sued for employment decisions:

> The evil to be avoided is the following: A judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge's decision-making will decline.[103]

The court stated that not all employees would be barred from suing. Whether an employee could sue would depend upon that employee's relationship with the judge's judicial duties. "[T]he critical inquiry is whether the person affected by the judge's acts stands in such a relationship to the judicial system as would make immunity appropriate in light of the concerns expressed above."[104] The plaintiff in *Forrester* was barred from suit because the functions that she performed "were inextricably tied to discretionary decisions that have consistently been considered judicial acts."[105] This, according to the court, was the "fundamental factor to consider in deciding whether the defendant was acting in a judicial capacity when he demoted and terminated the plaintiff."[106]

Under the rule of *Forrester*, then, a judge is immune from suit for employment decisions when the employee's relationship is sufficiently related to the judicial acts of the judge. A probation officer might very well be unable to sue; a janitor, on the other hand, would probably face

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statutory duties placed on the probation officer indicates that the officer occupies a confidential relationship with the judge." *Id.* at 478.

101. *Forrester*, 792 F.2d at 654.
102. *Id.*
103. *Id.* at 658.
104. *Id.* at 656.
105. *Id.* at 657.
106. *Id.*

no such obstacle.[107]

C. *Weaknesses of the Argument for Judicial Immunity for Employment Decisions*

The *Forrester* court's argument for absolute judicial immunity has several weaknesses. Each will now be discussed.

1. *Comparisons with the Immunities of Other Branches of Government*

The *Forrester* court considered the immunity accorded to personnel decisions by officials in the other branches of government. Personnel decisions by the President, the court noted, are accorded absolute im-

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107. *See Blackwell*, 570 F. Supp. at 479 ("While the judge and the janitor might *personally* enjoy a close friendship dating back to childhood, that personal relationship would be distinguishable from their occupational relationship.") (emphasis in original).

It is this point that the *McMillan* court—a panel of the Seventh Circuit which, five days after *Forrester* was decided, denied immunity to a judge sued by a court reporter—used to distinguish *Forrester*. The *McMillan* court stated that "*Forrester* goes beyond Blackwell [v. Cook, 570 F. Supp. 713 (W.D.N.C. 1983)] by emphasizing the effect of firing on the judge's ability to render decisions. Because court reporters are not similarly situated such analysis is not dispositive of this case." *McMillan*, 793 F.2d at 152.

While this distinction is valid, the language in *McMillan* makes clear that the *McMillan* and *Forrester* courts view the issue of judicial immunity for employment decisions from vastly different perspectives. For example, the *McMillan* court wrote that "[s]hielding judges from personal liability in their hiring and firing decisions *cannot* outweigh the need to protect the constitutional rights of public employees." *Id.* at 155 (emphasis added). The court continued:

> Certainly the court reporter assists the judge in his or her official capacity, but so does everyone else employed within the judge's chambers—the secretary, bailiff, law clerk, court reporter, probation officer, clerk of the court, janitor—they all assist in the smooth operation of the judicial process. That, however, does not entitle a judge to absolute immunity in all employment-related decisions. *Providing judicial immunity in employment actions alleging civil rights violations will not further the objective of the doctrine.*

Id. (emphasis added).

The Sixth Circuit has stated that "[w]e follow generally the reasoning of the Seventh Circuit's recent decision in McMillan v. Svetanoff . . . ." Guercio v. Brody, 814 F.2d 1115, 1116 (6th Cir. 1987). The Sixth Circuit made no mention of the *McMillan* court's attempt to distinguish *Forrester*.

munity.[108] The law on legislative employment decisions is less clear. In 1979 the Supreme Court bypassed an opportunity to settle the issue.[109] Since then the First Circuit has ruled that the Speaker of the Puerto Rico House of Representatives could not be sued for an employment decision,[110] and the Court of Appeals for the District of Columbia held that an Official Reporter of the United States House of Representatives could not sue for employment discrimination.[111] The D.C. Circuit stated that there would be immunity when an employee's duties were "directly related to the due functioning of the legislative process."[112]

Citing these cases, the *Forrester* court stated that granting immunity to judges "would do no more than extend to the judiciary the immunity from civil damages arising out of certain personnel decisions that is already enjoyed by the coordinate branches."[113]

There are several reasons why this argument is unconvincing. First, as the *Forrester* court conceded,[114] the doctrine of separation of powers mitigates against judicial consideration of employment decisions of the legislative and executive branches. By contrast, the judicial branch would police itself in employment matters; there would be no issue of the separation of powers.

There is another significant difference between immunity for judges and immunity for legislators: Legislative immunity is supported by an explicit constitutional provision—the speech and debate clause.[115] There is no counterpart for judges. Judicial immunity has been a creation of the common law.[116]

Finally, the comparison of different types of immunities is suspect.

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108. *Forrester*, 792 F.2d at 654, citing Harlow v. Fitzgerald, 457 U.S. 800, 811-13 (1982).

109. Davis v. Passman, 442 U.S. 228 (1979). However, in dissent Justices Powell and Rehnquist hinted that they might support immunity for employment decisions by legislators. *Id.* at 254 n.3.

110. Agromayor v. Colberg, 738 F.2d 55 (1st Cir.), *cert. denied*, 469 U.S. 1037 (1984).

111. Browning v. Clerk, 789 F.2d 923, *reh'g en banc denied*, 793 F.2d 380 (D.C. Cir.), *cert. denied*, 107 S. Ct. 601 (1986).

112. *Id.* at 929 (emphasis in original removed).

113. *Forrester*, 792 F.2d at 655. "[T]he unifying rationale is that, if an employee's duties are intimately related to the functioning of the particular process (whether executive, legislative, or judicial on either the federal or state level), then personnel decisions regarding that employee are also part of the process." *Id.*

114. *Id.*

115. U.S. CONST. art. 1, § 6, cl. 2.

116. *See* Feinman & Cohen, *supra* note 5.

The immunities seem to have developed independently of each other.[117] More importantly, "[b]ecause the administrative and judicial systems are so dissimilar, the policy determination of an appropriate rule must include different factors."[118]

2. *Injunctive Relief*

It is well-established that judicial immunity serves as a bar only to damages. The Supreme Court stated in 1984 that "[j]udicial immunity is not a bar to prospective injunctive relief against a judicial officer . . . acting in her judicial capacity."[119] In an employment case injunctive relief could include a former employee's reinstatement to the position under the judge.[120] That such relief is unlikely to be granted is irrelevant; a judge would nonetheless have to go to trial, and reveal his reasons for employment decisions. This would, of course, work against the stated goal of those who argue for judicial immunity for employment decisions.

Courts could rule that injunctive relief may *never* be awarded against a judge in an employment case. There are two problems with this. First, this would be contrary to the recent Supreme Court decision on the availability of injunctive relief.[121] Second, the need to change a well-accepted part of judicial immunity is an indication that the damage done to the doctrine of judicial immunity by extending it to employment decisions may be difficult to predict beforehand. The doctrine may be a house of cards; if one starts playing with one card, the effect on the others may be substantial.

3. *The Availability of Other Remedies*

Courts are in disagreement on whether the availability of other remedies should be considered in determining whether judicial immunity is to be granted. In *Stump v. Sparkman*[122] there was no alternative remedy, but the Supreme Court nevertheless granted immunity. The plaintiff was a girl who had been sterilized without proper judicial

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117. *Id.* at 204 n.8.
118. *Id.*
119. Pulliam v. Allen, 466 U.S. 522 (1984).
120. Under Title VII, "front pay" is prospective injunctive relief, and as such could be assessed against a judge. *See infra* note 135. "Backpay" would be unavailable.
121. *Pulliam*, 466 U.S. at 522.
122. 435 U.S. 349 (1978).

procedure. There was, of course, no way to reverse what had been done to her. Justice Powell wrote in dissent that underlying the doctrine of judicial immunity, beginning with *Bradley v. Fisher*,[123] "is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist *alternative forums and methods for vindicating those rights*."[124] Justice Powell added that "where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption . . . is inoperative."[125]

Three months after *Stump* was decided, the Supreme Court (through Justice White, who also wrote the *Stump* decision) stated that "correctability of error on appeal" is one of the many checks on malicious actions by judges that tend to "reduce the need for private damages actions as a means of controlling unconstitutional conduct."[126] This was reiterated in 1985.[127] On the other hand, in 1984 Justice Powell wrote in dissent that *Stump* "indicates that judicial immunity does not depend upon the availability of other remedies."[128] The Justice said this in a footnote, however; the text mentioned that "[a]dequate remedies were expressly available . . . ."[129]

The lower courts have followed the Supreme Court in being inconsistent in their treatment of the importance of other remedies. Some courts have denied immunity and given as one reason the unavailability of other remedies.[130] Other courts have said that alternative remedies are irrelevant, but pointed out that they existed in the case under

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123. 80 U.S. (13 Wall.) 335 (1871).

124. *Stump*, 435 U.S. at 370 (Powell, J., dissenting) (emphasis added).

125. *Id.*

126. Butz v. Economou, 438 U.S. 478, 512 (1978). *See also* Block, *supra* note 5, at 924 ("The availability of appellate correction of error is . . . absolutely central to the logic of judicial immunity.").

127. Cleavinger v. Saxner, 106 S. Ct. 496, 501 (1985).

128. *Pulliam*, 104 S. Ct. at 1987 n.13 (Powell, J., dissenting).

129. *Id.* at 1987.

130. *E.g.*, *McMillan*, 793 F.2d at 155 (judicial employment decision) ("Unlike situations more closely aligned with the judicial process, there is no other adequate means of review for a judge's possible constitutional violations."); Atcherson v. Siebenmann, 458 F. Supp. 526, 538 (S.D. Iowa 1978) (judicial employment decision) ("The decision in this instance was not subject to a judicial appeal . . . ."), *rev'd on other grounds*, 605 F.2d 1058 (8th Cir. 1979); Cronovich v. Dunn, 573 F. Supp. 1330, 1336 (judicial employment decision) ("There is no right of appeal from the decision."), *modified*, 573 F. Supp. 1340 (E.D. Mich. 1983).

consideration.[131]

There may at times be an alternative remedy available for judicial employees fired for illegal reasons. Judge Posner, dissenting in *Forrester*, wrote that a wrongfully-discharged probation officer has administrative and judicial remedies against the employing agency—the court, rather than the judge.[132] He added, though, that the remedy was limited to equitable relief: "the fired employee can get reinstatement with back pay but cannot get common law damages."[133] Courts, however, may hesitate to require an employer to rehire an employee who left on bad terms or whose job involved confidential information.[134] For this reason, there may not be any adequate remedy available to employees fired by judges but unable to sue because of judicial immunity.[135] This is another reason why courts should not grant judges immunity for their employment decisions.

4. *Remedies for Sexual Harassment*

In recent years sexual harassment in the workplace has received much attention.[136] Courts have granted remedies to employees who

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131. *Browning*, 789 F.2d at 930 (legislative employment decision). "Although we are not suggesting that a lack of alternative remedies would alter our decision today, we note that Congress has provided for internal procedures to address complaints such as [the plaintiff's]." The court stated, though, that it was unclear whether damages could be obtained from the procedure. *Id.* at 931.

132. *Forrester*, 792 F.2d at 662 (Posner, J., dissenting). *Cf. McMillan*, 793 F.2d at 155 ("normally the only means an at-will employee has to question and correct the motives of a judge's employment decisionmaking is a civil rights suit.").

133. *Forrester*, 792 F.2d at 662 (Posner, J., dissenting).

134. *See* 2 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 55.21, at 11-25 (1986) ("The fact that the position involved handling of confidential information has contributed to the denial of reinstatement, when it was apparent that trust had been eroded by the litigation").

135. However, under Title VII a dismissed employee may be able to gain "front pay"—that is, pay extending beyond the date of the court decision. A. LARSON & L. LARSON, *supra* note 134, at § 55.39, at 11-80.59. This is considered to be injunctive relief, *id.* at § 55.39, 11-80-60, and hence could be assessed against a judge. *See* Pulliam v. Allen, 466 U.S. 522, 541 (1984) (judicial immunity not a bar to *prospective* injunctive relief).

Most judicial employees are probably not, though, covered by Title VII; the statute does not cover employers with fewer than fifteen employees, 42 U.S.C. § 2000e(b), or an "immediate advisor" to a state elected public official. 42 U.S.C. § 2000e(f).

136. *E.g.*, Cook, *The New Bias Battleground: Sex Harassment*, Nat'l L.J., July 7, 1986, at 1.

have been subjected to sexual harassment.[137] One small aspect of judicial immunity for employment decisions is that there may not be any damages remedy for confidential judicial employees who are sexually harassed by a judge. For example, a law clerk—because of his or her close relationship to the decisionmaking process—would probably not be able to sue a judge for damages under *Forrester*; if the clerk was the victim of sexual harassment, there would be no remedy other than injunctive relief.[138]

The cases so far that have concerned judicial immunity for employment decisions all involved hiring, firing, or worker assignment decisions. It might be much more difficult for a court to grant immunity in a case in which the plaintiff was alleging sexual harassment. Immunity for sexual harassment is, though, a logical corollary of immunity for employment decisions.

5. *Congressional Abolition of Judicial Immunity for Actions Under Title VII*

Another reason why judges should be liable for their employment decisions is that this apparently is the will of Congress. In 1972 Congress amended the scope of Title VII to include most state employees.[139] Congress specifically stated which state employees would be covered by Title VII and which would not.

> [T]he term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of the State government, governmental agency or political subdivision.[140]

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137. *E.g.*, Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986).

138. As discussed *supra* note 135, an employee covered by Title VII may be able to obtain an award of *future* earnings, which is considered to be prospective injunctive relief. Resorting to public opinion, impeachment, or a judicial disciplinary procedure might punish the wrongdoer, but would provide no compensation to the victim.

139. The previous law explicitly excluded all state employees. 42 U.S.C. § 2000e(b) (1971).

Federal employees are not covered by Title VII. 42 U.S.C. § 2000e(b) (1978).

140. 42 U.S.C. § 2000e(f) (1978). For interpretations of this section see

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In short, elected public officials, and their personal staff and immediate advisors, are not covered by Title VII.

This specific inclusion of some employees, and exclusion of others, suggests that Congress was abolishing judicial immunity for actions under Title VII. Many judicial employees would be unable to maneuver around the exceptions in the statute; but those who could avoid the exceptions—such as employees of nonelected judges who employed fifteen or more persons—could sue under Title VII.

The question of Congressional repeal of judicial immunity was once before the Supreme Court. The Court in *Pierson v. Ray*[141] ruled that Congress in enacting 42 U.S.C. § 1983 did *not* repeal judicial immunity. According to the Court, "The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. . . . [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine."[142] In contrast, the exceptions to Title VII are specifically stated. Congress would not have so clearly stated exceptions to Title VII if it intended that others would continue to exist. The failure to include immunity for all state court judges suggests that Congress intended to abolish broad judicial immunity from Title VII actions against judges.

A determination that state court judges are not automatically immune from suit under Title VII would create a significant inconsistency. An employee fired because of his or her race might be able to sue a judge under Title VII; the same employee fired because of the exercise of constitutional rights—such as freedom of speech—would be barred from suing because of judicial immunity. Violations of Title VII could be remedied, but not violations of the Constitution. This incongruity further suggests the folly of providing widespread judicial immunity for employment decisions.

6. *Judicial Immunity and Respect for the Courts*

Judicial immunity is a balancing of interests—one individual suffers for the greater public good. It is important to recognize, however,

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Teneyuca v. Bexar County, 767 F.2d 148 (5th Cir. 1985); Clark v. Tarrant County, 798 F.2d 736, 742-43, *reh'g en banc denied*, 802 F.2d 455 (5th Cir. 1986); Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir.), *cert. denied*, 105 S. Ct. 112 (1984) and 105 S. Ct. 1194 (1985); Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206, 211 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

141. 386 U.S. 547 (1967).

142. *Id.* at 554-55.

that respect for the law may decline as people in power are held to be immune from the laws. This important point is rarely stated in majority opinions; more often judges in dissent will express the thought.

Justice Rehnquist, in arguing for wider immunity for executive branch officials, wrote in dissent that the "ultimate irony" of the Supreme Court's decision in *Butz v. Economou*[143] was that "in the area of common-law official immunity, a body of law fashioned and applied by judges, absolute immunity within the federal system is extended only to judges and prosecutors functioning in the judicial system."[144] Justice Rehnquist wrote that he believed that this was so because judges do not understand the pressures and difficult decisions that nonjudicial officers face. "But the cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as 'lesser breeds without law.' "[145]

Judge Posner, dissenting in *Forrester*, wrote that "federal judges must be sensitive to the accusation of arbitrarily exempting themselves from liabilities which they have imposed in the name of the Constitution on other public officials, state and federal."[146] Similarly, a judge on the Eleventh Circuit, dissenting in a 1985 decision, wrote that "[t]his case also points out the reason citizens and legislators are increasingly demanding that lawyers and judges charged with ethical violations be judged not by other lawyers and judges under the 'good ole boy' system, but by persons outside the legal profession."[147]

This concern that judges may be viewed as the beneficiaries of a double standard is not so strong so as to suggest that there be *no* judicial immunity; but it is important enough that judicial immunity should not be extended lightly. Especially in light of the other weaknesses of the argument for immunity for employment decisions, the concern for the public image of judges and the courts mitigates against expanded judicial immunity.

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143. 438 U.S. 478 (1978).

144. *Id.* at 528 n.* (Rehnquist, J., dissenting).

145. *Id.*

146. *Forrester*, 792 F.2d at 660 (Posner, J., dissenting).

147. Dykes v. Hosemann, 776 F.2d 942, 954 n.1 (11th Cir. 1985) (Hatchett, J., dissenting), *cert. denied*, 107 S. Ct. 569 (1986).

7. *The Speculative Effect of Liability for Employment Decisions*

A central weakness of the argument for judicial immunity for employment decisions is that it requires much speculation. It is by no means clear that a judge's concern over a civil rights or Title VII suit by a former employee will affect the way the judge performs his or her duties and that this in turn will affect the rights of the litigants. Perhaps such a concern will affect the judge—this will be conceded, for the moment. But will this have an effect on the rights of the litigants?

A divorce action filed against a judge would likely have a great effect on the judge; it will be more difficult for the judge to concentrate and keep his or her mind on the judicial work to be done. But there can be no argument made that a judge should be immune from suit for divorce. The argument might be made in response that an employee is closer to the judicial process than a spouse. However, this should not be determinative; if the rights of the litigants are affected, then under the *Forrester* opinion suit should be barred by immunity.

Now if the Supreme Court upholds *Forrester* then judges down the road would of course not be held to be immune from being sued for divorce. This clearly will not happen. The point, though, is that the argument that litigants will suffer if judges can be sued for employment decisions requires a great deal of speculation; the proposition is by no means obvious, despite reassuring words from the *Forrester* majority.[147.1] Immunity is not something to be granted lightly;[148] the need for immunity should be better established before it is extended to employment decisions by judges.

8. *The Unclear Limits of Immunity for Employment Decisions*

A final weakness of the *Forrester* opinion is that it is an opinion whose limits are markedly unclear. The court was careful to limit the opinion to the facts of the case:

> We, of course, express no opinion on other decisions relating to Judge White's staff or even to probation officers in a different court system, because it must be determined in each case that the grant

147.1. *See* Guercio v. Brody, 814 F.2d 1115, 1120 (6th Cir. 1987) ("The integrity and independence of judicial decisionmaking is in no way impaired if judges are called to account for their personnel decisions. Liability for wrongful personnel decisions would not have a chilling effect on the judicial decisionmaking process.").

148. *See supra* notes 87 to 89 and accompanying text.

> of immunity advances the policies behind it. We have, as we must, addressed only the facts of the case before us.[149]

The court also stated that "the nature of this relationship depends on the facts of each case. We cannot set forth a general rule, because the interaction between the judge and the members of his staff does not always appropriately implicate the decisions of the judge *qua* judge."[150]

But as Judge Posner pointed out in dissent, there were few limits to the logic of the majority. "The majority is so intent on writing a narrow opinion that it leaves the scope of its new immunity entirely uncertain. Can it really be that the doctrine is to be limited to the firing of probation officers in Illinois juvenile courts?"[151] Under the majority opinion, immunity would inevitably extend to hiring (as opposed to firing) decisions. Judge Posner noted that "[i]t would be a curious notion that a judge must hire probation officers without regard to their race or sex but is free to fire them on the basis of their race or sex."[152] The immunity would also extend to employees other than probation officers. Law clerks, staff attorneys, and friends of the court, to name a few, are close enough to the judicial process that under *Forrester* they would likely be barred from suing because of judicial immunity. Where the limits will be set, though, is unclear.

The *Forrester* majority's holding that the granting and denying of immunity for judicial employment decisions must be made on a case-by-case basis has a fatal flaw: it undermines the goals of judicial immunity.

First, in determining in a particular case whether a judge is entitled to immunity, courts will have to probe into the way the judge worked with his or her staff. Did the judge rely on the advice of the employee? This would have to be determined before the court could decide the immunity question. The *Forrester* majority's goal is to keep courts away from the sensitive parts of a judge's work. The test they enunciated does not achieve its purpose; it requires probing into the judge's chambers. An example of this is the 1985 case of *Laskowski v. Mears*.[153] The district court noted that in an earlier judicial immunity

149. *Forrester*, 792 F.2d at 658.
150. *Id.* at 657.
151. *Forrester*, 792 F.2d at 664 (Posner, J., dissenting).
152. *Id.* at 659 (Posner, J., dissenting).
153. 600 F. Supp. 1568 (N.D. Ind. 1985).

case[154] a court had imputed a "special status to the judge-probation officer relationship."[155] The *Laskowski* court said that it did not agree with this "rule of thumb."[156] This would be proper under *Forrester*, as cases should be decided on the particular facts. The *Laskowski* court said that "[i]n the case at bar, the facts which might implicate judicial independence are *as yet* undisclosed. I do not know how closely Judge Mears worked with [the plaintiffs]. . . . Summary judgment *at this stage* would be inappropriate."[157] Under the rule set out in *Forrester*, courts would have to probe into the judge's chamber just to determine whether immunity should be granted. This works against the stated goal of the immunity.

The *Forrester* opinion works against the goal of judicial immunity in another way. Immunity is supposed to allow judges to act without concern for later litigation in which they might be defendants. The Supreme Court long ago said that if a judge is concerned that he might be sued, "he would be subjected for his protection to the necessity of preserving a complete record . . . before him of every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show . . . that he decided as he did with judicial integrity . . . ."[158] In short, immunity is to serve as protection against the "chilling effect" posed by the threat of litigation. In a similar vein, the *Forrester* court stated that without immunity a judge might lose confidence in his or her employee, but hesitate to fire him because of the threat of litigation.[159] The incompetent employee will be retained, and the quality of the judge's decision-making will suffer.[160]

The *Forrester* opinion does not guard against this chilling effect, since decisions are to be made on a case-by-case basis. The *Forrester* court noted that "[e]ach court system differs in the manner in which it allocates responsibility to court personnel."[161] The Seventh Circuit stated a half-year before the *Forrester* opinion was announced that "it is impossible to generalize about the nature of an individual type of position, such as bailiff or secretary; job responsibilities and duties can vary greatly between different governmental units or even within a gov-

154. Blackwell v. Cook, 570 F. Supp. 474 (N.D. Ind. 1983).
155. *Laskowski*, 600 F. Supp. at 1574.
156. *Id.*
157. *Id.* (emphases added).
158. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 349 (1871).
159. *Forrester*, 792 F.2d at 658.
160. *Id.*
161. *Id.* at 657-58.

ernmental unit."[162]

The practical effect of the case-by-case approach in *Forrester* is that the only way for a judge to determine whether he or she has immunity for a particular employment decision is to be sued. The "chilling effect" will still be great. The law of judicial immunity under *Forrester* is so vague, so uncertain, so ill-defined, that judges could not act with the assurance that they would be immune from liability for employment decisions. Most judges, knowing the uncertainty in this area of the law, will act as if there were no immunity. In short, not only are the assumptions on which the immunity is based weak; in addition, *Forrester* immunity does not even achieve its stated goals.[163]

V. Conclusion

For all of the reasons discussed above, judges should not be immune from suit for damages for their employment decisions. To grant judges immunity for personnel actions is not warranted by the Supreme Court's opinions on immunity and would be bad policy—the immunity would be unclear in scope, would deny an important remedy to persons whose rights have been violated, and will diminish respect for the judiciary. Further, immunity for employment decisions will not even serve the goals suggested by supporters of the immunity.

There does not appear to be any middle position on judicial immunity for employment decisions. One is either for it or against it. Numerous proposals for altering judicial immunity have been offered. One of the most commonly suggested middle-ground approaches is that under certain circumstances there be immunity only if the judge acted with good faith.[164] This alternative to absolute judicial immunity would not work in employment discrimination cases, however. A finding of unlawful discrimination precludes a finding of good faith. "By defini-

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162. Meeks v. Grimes, 779 F.2d 417, 420 n.2 (7th Cir. 1985).

163. *See Forrester*, 792 F.2d at 664 (Posner, J. dissenting) ("Absolute immunity provides real security only if the scope of the immunity is well-defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what.").

There is, of course, one way to avoid the uncertainty that plagues the *Forrester* standard: judges will be immune from suit for *all* employment decisions. This is not an attractive alternative, however.

164. *See, e.g.* Feinman & Cohen, *supra* note 5, at 261-64 (discussing various proposals).

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tion, there can be no liability unless the plaintiff shows that the defendant intentionally discriminated against her because of her sex," the Eighth Circuit has said.[165] "If the jury finds that intentional discrimination has occurred, . . . 'good faith' on the part of the defendant is logically excluded."[166] Since the case for absolute judicial immunity is fatally flawed, and since there is no middle-ground alternative, there should be no immunity whatsoever for the employment decisions of judges.

Denying judicial immunity for personnel decisions will also refocus attention on an important yet too often ignored aspect of judicial immunity: the recognition that there is no immunity for ministerial acts. In the 1879 opinion of *Ex Parte Virginia*,[167] the Supreme Court denied immunity to a judge who was charged with excluding blacks from juries.[168] The Court said that the "duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. . . . It is merely a ministerial act. . . . That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?"[169]

Several courts deciding cases involving judicial immunity for personnel decisions have mentioned the ministerial distinction derived from *Ex Parte Virginia*.[170] Often, though, the distinction is not men-

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165. Goodwin v. Circuit Court, 729 F.2d 541, 545-46 (8th Cir. 1984). Intent need not be proven in "disparate impact" cases under Title VII. But it seems likely that practically all litigation against judges would be individual actions, rather than allegations of systemic discrimination.

166. *Id.* at 546. *But see* Atcherson v. Siebenmann, 605 F.2d 1058 (8th Cir. 1979).

167. 100 U.S. 339 (1879).

168. *Id.* at 349. The judge had been criminally charged, and filed a habeus petition to obtain his release. *Id.* at 340-42. The Court denied the petition, and stated that there was no immunity for ministerial acts. *Id.* at 349. The fact that the case involved criminal charges does not affect the decision's importance for civil immunity cases. Judge Posner noted that *Ex Parte Virginia* involved a criminal prosecution, but said that "it would be surprising if a suit for civil damages brought by the prospective jurors whom the judge had discriminated against would have been deemed barred by the doctrine of absolute immunity." *Forrester*, 792 F.2d at 664 (dissenting).

169. *Ex Parte Virginia*, 100 U.S. at 348.

170. *See, e.g.*, Atcherson v. Siebenmann, 458 F. Supp. 526, 538 (S.D. Iowa 1978) ("ministerial" duty), *rev'd on other grounds*, 605 F.2d 1058 (8th Cir. 1979); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (same), *aff'd*, 734 F.2d 1000 (1984), *rev'd en banc on other grounds*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); Cronovich v. Dunn, 573 F. Supp. 1330, 1337 (same), *modified*, 573 F. Supp. 1340 (E.D. Mich. 1983); Doe v. County of Lake, 399 F. Supp. 553, 556

tioned. One reason for this is that the case which established the modern rule for judicial immunity—*Stump v. Sparkman*[171]—made no mention of the distinction between ministerial and judicial duties. One scholar has written that "[j]udging from the opinion, [Justice] White was not aware of the discussion in *Ex Parte Virginia* when he set down his test for a judicial act; judging from the test itself, White was unaware of the need to distinguish judicial acts from administrative or legislative acts in the context of judicial immunity."[172]

Interestingly, the Seventh Circuit—alone among all courts of appeal—has modified the two-prong *Stump* test to include the ministerial acts distinction. Ten months before *Forrester* was decided the court gave a three-prong test for determining whether an judge's act is judicial, and the first prong was "whether the act or decision involves the exercise of discretion or judgment, or is rather a ministerial act which might as well have been committed to a private person as to a judge."[173] Both this case and *Ex Parte Virginia* are cited together in a footnote in *Forrester*,[174] but the court does not seriously consider this distinction.[175] By contrast, five days later in *McMillan v. Svetanoff*,[176] the same circuit stated that the "[h]iring and firing of employees is typically an administrative task."[177] For the Seventh Circuit, apparently, *Ex Parte Virginia* is worth considering only when it supports the

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(N.D. Ind. 1975) (ministerial or administrative duties); Shore v. Howard, 414 F. Supp. 379, 385 (N.D. Texas 1976) (same); Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981) (same); Mason v. County of Delaware, 331 F. Supp. 1010, 1017 (E.D. Pa. 1971) (administrative duties); Sherwood v. Farrar, 9 Emp. Prac. Dec. (CCH) ¶ 10,202, at 7906 (W.D. Mich. 1975) (same).

The court in Shore v. Howard, 414 F. Supp. at 385, described *Ex Parte Virginia* as "still valid and often-cited." The Sixth Circuit recently stated that hiring and firing confidential personnel is an "administrative act." Guercio v. Brody, 814 F.2d 1115, 1119 (6th Cir. 1987). The court cited *Ex Parte Virginia* with approval. *Id.* at 1117.

171. 435 U.S. 349 (1978).

172. Block, *supra* note 5, at 920-21 (citation omitted). *See also* Note, *supra* note 5, at 1509 n.49 ("*Stump* makes no reference to the *Ex Parte Virginia* distinction" between ministerial and judicial acts). *Cf.* Supreme Court v. Consumers Union, 446 U.S. 719 (1980) (Virginia Supreme Court in regulating the conduct of attorneys held to have been acting in a legislative capacity).

173. Lowe v. Letsinger, 772 F.2d 308, 312 (7th Cir. 1985) (citing *Ex Parte* Virginia).

174. 792 F.2d at 656 n.10.

175. *See id.* at 656 ("saying that something is an administrative act, as opposed to a judicial one, simply states the conclusion.").

176. 793 F.2d 149 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986).

177. *Id.* at 155.

court's decision.

The importance of the ministerial tasks distinction is that it suggests that some bright lines have been and can continue to be drawn in the area of judicial immunity. A judge should be absolutely immune for judicial rulings, but open to suit for employment decisions, just as would an ordinary citizen. Supreme Court precedent calls for this, and so does elementary fairness.

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