

# Just Say No to the War on Drugs

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BARNEY SNEIDERMAN\*

## I. INTRODUCTION

I WOULD LIKE TO BEGIN by dedicating this presentation to George Orwell (1903–1950), the renowned English novelist, essayist, and social critic, and that is because of his brilliant and incisive commentary about the perversion of language to serve political goals. Accordingly, I am going to talk about the Orwellian distortion of language under the following headings: *The War on Drugs*; *Drugs*; *Use versus Abuse*; and *Addiction versus Habit*. I also dedicate this presentation to Lady Godiva (who, according to legend, rode naked through the streets of Coventry in the 11th century); to E.T. (that adorable extra-terrestrial); and to that noble bird that, alas, cannot fly: the ostrich. Last but not least, an acknowledgment (dedication seeming inappropriate here) to Dr. Joseph Goebbels, Minister of Popular Enlightenment and Propaganda, Nazi Germany, 1933–1945.

## II. THE WAR ON DRUGS

AS THE UNITED STATES was winding down its military commitment in Vietnam, President Richard Nixon replaced one conflict with another by declaring “all out global war on the drug menace.”<sup>1</sup> In 1986, President Ronald Reagan and the First Lady redeclared the War on Drugs in a joint television address to the American people, during which Nancy spoke that memorable war cry, “Just say no to drugs.” Actually, the word *war* was only spoken once, although in the press secretary’s announcement of the address ten days earlier, it appeared six times: e.g. “The President and Mrs. Reagan will address the Nation from their living quarters in the

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\* Professor, Faculty of Law, University of Manitoba. This paper is an expanded version of a talk given in Winnipeg on 1 October 1995, at the annual conference of the Canadian Criminal Justice Association. I have chosen to retain the informal style of an oral presentation. I would like to thank the following for helpful critiques of earlier drafts of this paper: Lee Stuesser LL.M., Alvin Esau LL.M., Gary Katz LL.B., Alan Diduck LL.B., Hymie Rubinstein Ph.D., and Michael Rosenthal M.P.A. Special thanks go to John-Paul Bogden, Editor-in-Chief of the *Manitoba Law Journal*.

<sup>1</sup> S. Duke, “The War on Drugs is Lost” *National Review* (12 February 1996) at 47.

White House on what we, the American family, can do to win the war on illegal drugs.”<sup>2</sup> The following are excerpts from the President’s opening remarks:

Drugs are menacing our society. They’re threatening our values and undercutting our institutions. They’re killing our children ... . Drug trafficking is a threat to our national security ... . Let us not forget who we are. Drug abuse is a repudiation of everything America is. The destructiveness and human wreckage mock our heritage. Think for a moment how special it is to be an American. Can we doubt that only a divine providence placed this land, this island of freedom, here as a refuge for all those people in the world who yearn to breathe free.<sup>3</sup>

After a few comments along the same line by the First Lady, the President responded that “Nancy’s personal crusade (against drugs) ... should become our national crusade.” He then went on to use the word *crusade* four more times, while also referring to the “*battle* against this cancer of drugs.”<sup>4</sup> In his continuing rhetorical flourish, he proceeded to draw a linkage between World War II and the War on Drugs and then concluded with a stirring appeal to patriotism:

My generation will remember how America swung into action when we were attacked in World War II. The war was not just fought by the fellows flying the planes or driving the tanks. It was fought at home by a mobilized nation, men and women alike, building planes and ships, clothing sailors and soldiers, feeding marines and airmen; and it was fought by children planting victory gardens and collecting cans. Well, now we’re in another war for our freedom, and it’s time for all of us to pull together again ... . It’s time, as Nancy said, for Americans to “just say no” to drugs. When we all come together, united, striving for this cause, then those who are killing America and terrorizing it with slow but sure chemical destruction will see that they are up against the mightiest force for good that we know. Then they will have no dark alleyways to hide in ... . We Americans have never been morally neutral against any form of tyranny. Tonight we’re asking no more than that we honor what we have been and what we are by standing together.<sup>5</sup>

The First Lady then chimed in with the last word:

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<sup>2</sup> Administration of Ronald Reagan (4 September 1986). National campaign against drug abuse: Statement by the principal press secretary to the president announcing an Address to the Nation by the President and Mrs. Reagan. *Weekly Compilation of Presidential Documents*, 22 (38) at 1138–39. Cited in W.N. Elwood, *Rhetoric in the War on Drugs: The Triumphs and Tragedies of Public Relations* (Westport: Praeger, 1994) at 28.

<sup>3</sup> Ronald Reagan (14 September 1986). National campaign against drug abuse: Address to the Nation. *Weekly Compilation of Presidential Documents*, 22(38) at 1183–87. Cited in Elwood, *supra* note 2 at 28–29.

<sup>4</sup> *Ibid.* at 1187. Cited in Elwood, *supra* note 2 at 30.

<sup>5</sup> *Ibid.* at 1186–87. Cited in Elwood, *supra* note 2 at 31.

Now we go on to the next step: making a final commitment not to tolerate drugs by anyone, any time, any place. So won't you join in this great, new national crusade?<sup>6</sup>

All in all, it was a brilliant performance, orchestrated by a media star turned President who years earlier had tellingly extolled television's power to shape public perceptions:

Television has the power to shape thoughts, stir emotions, and inspire actions. It teaches, it sells, it entertains, it informs, and it has the capacity to influence powerfully.<sup>7</sup>

He certainly knew whereof he spoke. His "Declaration of War Against Drugs" was promptly embraced by the "liberal" media that right-wingers love to excoriate, and I vividly recall how television responded to the Ron and Nancy Show with a flood of stories about the cocaine menace. Nancy's war cry, "Just say no to drugs," calls to mind another memorable phrase calling the nation to arms — "a date which will live in infamy" — which is how President Franklin D. Roosevelt described the 7 December 1941 attack on Pearl Harbor when he asked Congress on the following day for a declaration of war against Japan. Admittedly, although "just say no" doesn't have the ring to it that "day of infamy" does, Nancy set the tone for a relentless national policy on illicit drugs that continues to the present day.

When his turn came, President George Bush chose "the drug problem" as the theme of his first Address to the Nation.<sup>8</sup> Seven years later, that war continues in full force, and it is perhaps appropriate that President Clinton has recently appointed a retired four-star general as his drug czar. After all, if one is fighting a war, then who else but a general should be waging the campaign dictated by the Commander-in-Chief? Although my purpose is not to catalogue the horrific social costs that have been engendered by the so-called War on Drugs, I must at least give them their due. We tend to associate the War on Drugs with the United States because it is the major player; and it is the very nature of that war that the more vigorously a nation wages it, the more catastrophic are the social consequences inflicted upon itself. We in Canada have suffered less only because we have not pursued the war with the ardor and single-minded determination of the Americans. A capsule summary of the war's impact upon the United States is noted by Nova University law professor Steven Wisotsky in his book, *Beyond the War on Drugs*, where he tells us that it

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<sup>6</sup> *Ibid.* at 1187. Cited in Elwood, *supra* note 2 at 32.

<sup>7</sup> *Ibid.* at 1183–87. Cited in Elwood, *supra* note 2 at 28–29.

<sup>8</sup> George Bush (5 September 1989). Address to the Nation on the National Drug Control Strategy. In *Public Papers of the Presidents of the United States*, Book II (Washington: U.S. Government Printing Office) at 1135–40. Cited in Elwood, *supra* note 2 at 33.

... has spun a spider's web of Black Market Pathologies, including roughly 25% of all urban homicides, widespread corruption of police and other public officials, street crime by addicts, and subversive narco-terrorist alliances between Latin American guerrillas and drug traffickers as well as wholesale corruption of governments in Latin America and the Caribbean. These pathologies were foreseeable because they are a function of money.<sup>9</sup>

Yet there is even more — in truth, far more — to the debit side of the War on Drugs. The U.S. has long since passed South Africa as the country with the world's highest prison population per capita, and that is thanks to the War on Drugs. It is a war that is flooding the penal system with so many drug offenders that it is necessary to keep building more and more institutions to house these prisoners of war. Moreover, although illicit drug use cuts across racial lines, what is striking is that it is primarily young black males who are being swept off the streets of their ghettos into the correctional system. (In 1989, the newspaper *USA Today* reported that although only 12 percent of those using illicit drugs were black, 38 percent of those arrested for drug violations were black males.<sup>10</sup>) In the federal prison system alone, 62 percent of inmates — 47,000 men and women — are drug offenders. Altogether, more than a third of a million Americans are doing time for violating drug laws, and roughly another million are on probation or parole.<sup>11</sup> Prisons are also the fastest growing part of many state budgets. The war ties up the courts and diverts the police from dealing with criminals who commit the traditional type crimes that form the basis of the FBI's annual crime index (crimes against the person and property). In the U.S. the concept of civil liberties has been subverted by the practice of mandatory drug testing, the judicial removal of safeguards for obtaining search warrants in drug cases, and the random search for drugs in high school students' lockers.

And there are the horrendous civil forfeiture statutes that buttress the so-called "zero tolerance" policy. If, for example, a family member or house guest is found in possession of marijuana in your home, you the home owner can lose your property to the U.S. government unless you can prove — that's right, you have the burden of proof — that not only were you ignorant of the drug's presence but also that your ignorance was not the result of negligence. In fact, not even that limited defence was allowed until the *Anti-Drug Abuse Act* (1988) was accordingly amended; before then the mere presence of the drug was sufficient in itself to trigger forfeiture.<sup>12</sup> Last but not least, there is the D.E.A. (the U.S. Drug Enforcement Agency), those noble drug warriors who, in their zeal, have been known to

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<sup>9</sup> S. Wisotsky, *Beyond the War on Drugs* (Buffalo: Prometheus Books, 1990) at xx.

<sup>10</sup> Elwood, *supra* note 2 at 99.

<sup>11</sup> R. Reynolds, "Hooked on the Drug War" *The Hartford Advocate* (26 January 1995) 14.

<sup>12</sup> S. Duke & A.C. Gross, *America's Longest War* (New York: Putnam's Sons, 1993) at 135–45.

break into homes, terrorizing the occupants, and occasionally killing law-abiding residents who get caught in the confusion. But, then, all wars produce their “friendly fire” casualties.

Not a pretty picture, but then war never is. Furthermore, when one fights a war, one must vilify the enemy because how otherwise can the troops be motivated to fight? After all, if our adversaries are really no different from us, then why should we be warring against them? It has thus happened that those who wage the War on Drugs brand the enemy as diabolical creatures who threaten the lives and well-being of those who do not follow in their wicked ways.

As defined in Webster’s Dictionary, *dope* is a slang expression for “any drug or narcotic.” Actually, it is a slang expression for illicit drugs; no one refers to alcohol or tobacco as dope but only drugs such as heroin, cocaine, LSD, and marijuana — all of which tend to get lumped together under that pejorative heading. And who are the consumers and purveyors of such drugs — dope addicts, dope fiends, dope peddlers (invariably lurking in school grounds) or simply dopers. If one is using dope, then one is beyond the pale. The very word conjures up images of people who are out of control and behaving like crazed animals who would be pitied except that they have wilfully brought about their own degradation.

Of course, when one is waging a Manichean struggle between the forces of good and evil, one cannot be expected to wage war in accordance with the Marquis of Queensbury’s rules of gentlemanly conduct. It is thus that the Reagan/Bush Drug Czar William Bennett has publicly advocated that drug traffickers be beheaded in public squares. He presumably includes those dealing in marijuana because I heard him proclaim on the NBC Nightly News that “marijuana is the most dangerous drug of them all.” (Bennett, America’s self-anointed moral philosopher king and author of “The Book of Virtues,” a best-selling anthology of moral tales, is a close political ally of North Carolina Senator Jesse Helms, who aggressively represents the interests of the tobacco industry whenever it comes under threat. Commanding \$40,000 per speech on the lecture circuit, Bennett is living proof that virtue is its own reward.) Then there is Newt Gingrich, the Speaker of the U.S. House of Representatives, who has recently called for the mandatory execution of convicted drug smugglers. In introducing a bill to that effect, he said that if we kill enough of them: “it will have a very chilling effect on people bringing drugs into the U.S.”<sup>13</sup> On the other hand, Daryl Gates, former chief of the Los Angeles Police Department, would not stop at traffickers. As he testified before the U.S. Senate, casual drug users should be taken out and shot. He explained, “we’re in a war!”<sup>14</sup>

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<sup>13</sup> “Gingrich Urges Death Penalty for Illegal Drug Smugglers” *Washington Post* (27 August 1995) 3.

<sup>14</sup> J.D. McNamara, “The War on Drugs is Lost” *National Review* (12 February 1996) 42.

Although William Bennett comes across as a bleeding heart compared to Chief Gates, he too is no less adamant in sounding the alarm of a nation imperiled by (illicit) drugs. According to the first National Drug Defence Control Strategy, prepared by the Office of National Drug Control Policy under his direction:

Illicit drug use degrades human character, and a purposeful, self-governing society ignores its people's character at great peril. Drug users make inattentive parents, bad neighbours, poor students, and unreliable employees ... [Using drugs is] a hollow, degrading, and deceptive pleasure ... and pursuing it is an appallingly self-destructive impulse.<sup>15</sup>

In a sense, then, drug use is an atrocious crime, perhaps exceeded only by murder — although in the opinion of Nancy Reagan, “if you’re a casual drug user, you are an accomplice to murder.”<sup>16</sup> So drugs, after all, ranks with the most serious crime that one can commit. (Though tell me, Nancy, if as your drug czar has said, drug use is an “appalling self-destructive impulse,” wouldn’t it be better labelled as suicide instead of murder?) In any event, it is no wonder that the propaganda arm of the War on Drugs is waging a relentless campaign to discourage that “self destructive impulse.” At the forefront of the propaganda war stands the Partnership For a Drug Free America, whose self-avowed mission is to “reduce demand for illegal drugs by using media communications to help bring about public intolerance of illegal drugs, their use, and users.”

Hence, for example, the Frying Pan commercial. As butter sizzles in an iron skillet, the announcer intones, “This is Drugs.” After a sunny-side-up egg appears and sizzles in the pan, he informs the viewer, “This is your brain on drugs. Any questions?” Or the Russian roulette print spot, depicting two fingers loading a hand-rolled marijuana cigarette into the chamber of a revolver. As the caption reads: “The odds are that marijuana won’t ruin your life. And that Russian roulette won’t kill you.”<sup>17</sup> And then there is the video in which a terrified patient cowers in his bed as his hysterically giggling surgeon, puffing away at a marijuana cigarette, asks him, “What’s wrong with you — tonsillitis?” He replies, “No, appendicitis,” and then — as the anaesthetist (presumably also stoned) installs the face mask — he utters a pitiful “Oh, no.” At which point the voice-over asks, “Would you still say marijuana is harmless?”<sup>18</sup>

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<sup>15</sup> Office of National Drug Control Policy, Executive Office of the President, National Drug Control Strategy (1989) at 7 and 9.

<sup>16</sup> Duke & Gross, *supra* note 12 at 106.

<sup>17</sup> *Supra* note 2 at 84–85. Chapter 4 (81–101) presents a fascinating account of the Partnership for a Drug-Free America.

<sup>18</sup> The Stoned Surgeon video appears in a PBS documentary, *Altered States*, that was broadcast in April 1995.

It is of course the nature of propaganda that it distorts the truth; all that counts is whether the message gets across. It was the Nazi Propaganda Minister, Joseph Goebbels, who expressed the cynical view that if the state incessantly repeats a Big Lie, then people will come to believe it. The Big Lie propounded by the Partnership for a Drug-Free America is that society is divided into two camps: the good people who don't use illicit drugs and the evil others who do, and that the latter must be eliminated by measures, however drastic, just as one resorts to the drastic remedy of chemotherapy to root out cancer. In short, the end justifies the means.

Goebbels also believed that propaganda for the masses had to be simple, aimed at the lowest level of intelligence, and reduced to easily learned slogans repeated over and over. The Frying Pan, Russian Roulette, and Stoned Surgeon scenarios would have been right up his alley. As the old saying goes, truth is the first casualty in war.

By the way, it is not only the Partnership For a Drug-Free America that distorts the truth. Consider, for example, a story on marijuana by reporter Roger O'Neil which appeared on 12 September 1995 on the NBC Nightly News. The gist of the story was as follows. Marijuana is a dangerous drug threatening the youth of America. A new study suggests that it is addictive. It impairs learning. Once you use marijuana you then go on to cocaine, from cocaine to heroin, and from heroin to the gutter. When O'Neil delivered that final grim message, he stood next to a bum lying in the gutter of some American ghetto. The implicit message, of course, was that the bum had started down the inevitable road to degradation when he smoked his first joint. As the story faded out, the camera panned to anchorman Tom Brokaw, who had the look of concern and anguish that one would expect after hearing such a terrifying account of the ravages wrought by reefer madness.

It is not only in the realm of propaganda that Joseph Goebbels offers a parallel to the War on Drugs. At the beginning of World War II, Germans were forbidden to listen to the BBC under threat of death or imprisonment; and it was Goebbels who urged members of the Hitler Youth to inform upon their parents and anyone else that they caught listening. In that regard, consider this recent parallel that proves that, as in any war, just about anything goes in the War on Drugs. On November 6, 1991, a story appeared in the *Winnipeg Free Press* under the headline: "Turning in dope dealer pays double in November." As the article opens:

Crime pays — now more than ever. Winnipeg police are counting on the lure of big bucks to get people to turn in their neighbours, friends, or even family for cultivating marijuana ... . According to the Winnipeg Police Crime Stoppers co-ordinator, "If it takes a drug problem off the street, we don't care who makes the phone call."<sup>19</sup>

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<sup>19</sup> *Winnipeg Free Press* (6 November 1991) A17.

So for the month of November, anyone informing on someone growing marijuana, even for his own use, was promised double the normal cash reward. This, by the way, was not the first nor the last time that such a policy has been promoted by the Winnipeg Police Department.

In that same article, Winnipeg Police Vice Inspector Ray Johns was quoted as stating that: “[i]t’s our belief that young people get their introduction into narcotics through marijuana.” (At least, the learned Vice Inspector recognizes that marijuana is not a narcotic, which is more than one can say for our Parliamentarians who include marijuana as a prohibited drug under the *Narcotic Control Act*.) What Johns is referring to is the so-called “stepping-stone” or “gateway” theory, which is a matter of holy writ for the police in their waging of war against marijuana. The implicit admission behind the theory is that marijuana is not the killer drug it is often made out to be. But it must be vigorously suppressed nonetheless because there is something about the drug — what that is, is never explained — that somehow compels its user to go on to cocaine and heroin, the so-called “hard” drugs. (Recall that this was the theme of that NBC newscast that I earlier referred to.)

With all due respect for the Vice Inspector, the disreputable gateway theory presents a notion of cause and effect that is simply another example of the Big Lie. Firstly, since there are multiples of marijuana consumers for every heroin and cocaine consumer, how can one say that the marijuana user of today is the heroin/cocaine user of tomorrow? It is estimated that as many as 70 million Americans have smoked marijuana at one time or another.<sup>20</sup> Thus, if the gateway theory had any validity, then the total population of Canada would be outnumbered by Americans snorting cocaine and/or shooting heroin! I would think that most consumers of these two drugs have either used or continue to use marijuana. However, it is also true that heroin/cocaine users have also indulged in alcohol, tobacco, and a variety of prescription and over-the-counter drugs.

The fact that a cocaine user has used marijuana no more proves a cause and effect relationship than the fact that before cocaine he experienced tobacco, coffee, or mother’s milk. The gateway theory illustrates the logical fallacy called by the Latin phrase, *post hoc, ergo propter hoc* (“after the fact, therefore before the fact”). In other words, the fact that event A occurs before event B does not in itself prove that the former caused the latter. One is thus tempted to conclude that all that is proved by the gateway theory is the muddledness of its proponent. But not quite. What I mean is illustrated by the Dutch policy on marijuana, whereby the government allows its sale in specially licensed and strictly regulated coffee shops. Cultivation for personal use is also tolerated, and consequently there are hydroponic

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<sup>20</sup> E.A. Nadelmann, “The War on Drugs is Lost” *National Review* (12 February 1996) 38.



stores that furnish the means for doing so. By adopting this approach, the Dutch government is promoting a principle that it calls the "separation of markets."<sup>21</sup> In other words, if the marijuana consumer does not have to seek out an underworld connection for his drug of choice, he is less likely to be exposed to the so-called hard drugs like heroin and cocaine. In a sense, then, separation of markets acts as a *gateway* against exposure to heroin and cocaine. (By the way, the per capita use of marijuana in The Netherlands is about half what it is in Canada and the United States.)

I'll be returning to the Dutch policy on drugs in my concluding remarks, but suffice it to note that American and Canadian drug warriors treat the Dutch approach with contempt. They remind me of the hawks during the Vietnam War, who kept insisting that the only way to victory was to commit ever more resources to a cause that its critics rightly branded as unwinnable. But the War on Drugs is not being won, and more of the same isn't going to do it either.<sup>22</sup> We can distort language to paint a disastrous social policy as a war that must be fought against the menace of dope, but that does not alter the reality that the war is a losing proposition that makes the social disruption caused by Prohibition — the American war against alcohol that marked the turbulent decade called the Roaring Twenties — pale in comparison.

And now, begging your indulgence, a play in three acts, respectively titled: *Drugs, Use versus Abuse*, and *Addiction versus Habit*. The cast (in order of appearance): E.T., the Police Inspector of Vice (hereinafter called the Vice-Inspector), the Pharmacologist, and the Criminologist.

### III. THE PLAY, ACT I: DRUGS

*As in the War On Drugs, The Coalition For a Drug-Free America, Just say No to Drugs.*

*AN INHABITED PLANET IN OUR GALAXY has dispatched an emissary by spaceship to Canada to learn about the War on Drugs. They select someone who has been studying our planet from afar but who admits that he finds our species hard to understand. And*

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<sup>21</sup> J.H. VanVliet, "Separation of Drug Markets and the Normalization of Drug Problems in the Netherlands: An Example for Other Nations?" (1990) 20 *Journal of Drug Issues* 463.

<sup>22</sup> In 1992 Presidential hopeful Ross Perot made a campaign promise that, if elected, he would win the War on Drugs. Although he wouldn't say how, he did admit that "it wouldn't be pretty." I actually agree that it might be possible. A good beginning would be to follow the proposals of Chief Daryl Gates, Speaker of the House Newt Gingrich, and Drug Czar William Bennett to start executing drug offenders. Better yet, what about a full-blown Nazi-like reign of terror, in which search warrants are not required in drug cases and in which the merest suspicion that a person is tainted by illicit drugs is a sufficient ground for immediate public execution? It wouldn't be pretty, but it might work.

*so arrives one E.T. whose first appointment is with the Vice Inspector of the local police force.*

**E.T.**

On my way to your office, we passed a number of Drug Stores and I am wondering what they have to do with the War on Drugs.

### **Vice-Inspector**

Actually, Drug Stores is not what the war is all about. That is because Drug Stores are legitimate businesses selling drugs for medicinal purposes, whereas the War on Drugs is directed against the non-medicinal or recreational use of drugs. I am referring here to such drugs as heroin, cocaine, LSD, and marijuana. In fact, it is because these drugs are so harmful that it is not enough simply to outlaw manufacture and distribution. It is also necessary to target the consumer by banning possession for personal use.<sup>23</sup>

*Well, so much then for Drug Stores and their drugs. Let us assume at this point that, being a clever fellow, E.T. knows that a police officer is not an expert on the properties of drugs. So he asks to meet with someone who has scientific credentials in the field and can brief him about those dangerous recreational drugs. He is accordingly directed to a professor of pharmacology at a prestigious medical school, who graciously agrees to help him with his inquiries.*

**E.T.**

Since the War on Drugs is a war against recreational drugs, I am wondering what are the recreational drugs that cause the most harm to consumers?

### **The Pharmacologist**

That's easy to answer — tobacco and alcohol. And unfortunately, because these are two of the most widely used recreational drugs the harm they cause is therefore quite substantial.

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<sup>23</sup> As an aside, if E.T. pursued his inquiry elsewhere, he would learn about the role of pharmaceutical companies in promoting the use of drugs that are a mixed blessing: drugs that harm as well as benefit consumers; drugs that are grossly overused because of aggressive market promotion and over-prescribing by physicians. That, by the way, is the theme of a study by J. Lexchin, M.D., *The Real Pushers: A Critical Analysis of the Canadian Drug Industry* (Vancouver: New Star Books, 1984).

**E.T.**

I'm frankly surprised because I have studied the video and print materials produced by the Partnership For a Drug-Free America — and nowhere did I come across any reference to those two drugs.

**The Pharmacologist**

Well, that is because the Partnership is only concerned with illegal drugs, and alcohol and tobacco are perfectly legal. So what it means by “Drug-Free” is an America free of the use of illicit drugs.

**E.T.**

I find this puzzling, because I would think that if your society is going to ban certain drugs — a concept unknown in our world — you would ban the drugs that have the most potential to harm consumers.

**The Pharmacologist**

That's not how it works here. In any event, perhaps a good place to begin your education is by highlighting the harm caused by alcohol and tobacco. To begin with, there is the carnage wrought on the highways by drunk drivers and the drug's association with crimes of violence such as spousal abuse. Take a look at this brochure, *Alcohol the Drug*, produced by the Addictions Foundation of Manitoba. As it explains,

Alcohol like any other drug can be misused. It can be addicting. Statistics cite alcohol as a factor in:

- 64% of all homicides
- 31% of all suicides
- 40% of all hospital admissions
- 50% of all highway deaths
- 34% of all rapes
- 40% of all family court appearances.

Overindulgence can also wreak havoc upon the consumer's physical and mental wellbeing. And beyond that is the fact that the most preventable cause of mental retardation is the drinking of alcohol during pregnancy. In fact, Fetal Alcohol Syndrome (F.A.S.) is the single leading cause of mental handicap in North America. There are children and adults in our midst with literally holes in their brains because when they were in the womb they were being bathed in alcohol. To add insult to injury, the Canadian liquor industry does nothing to fund programs for these drug victims and it steadfastly opposes labels on their products warning

against drinking while pregnant.<sup>24</sup> You will recall that, according to the Partnership For a Drug-Free America, if you use any drug (i.e., any illicit drug), then the drug fries your brain like a pan fries an egg. Yet, that is precisely what alcohol can do to the fetal brain.

By the way, tobacco also takes a fearful toll upon fetal development. According to a 1995 article in the *Journal of Medical Practice*, smoking mothers in the United States annually cause the deaths of about 5,000 infants (about 2,000 from Sudden Infant Death Syndrome), suffer about 115,000 miscarriages, and give birth to about 50,000 low weight infants (40 percent of whom require neonatal intensive care).<sup>25</sup>

The public generally doesn't think of alcohol and tobacco as drugs; but there is another drug — cocaine — that is illegal, and the cocaine/pregnancy connection is being addressed. In fact, a number of American states prosecute mothers for using cocaine during pregnancy (charging them under drug laws), aided and abetted by physicians informing on their patients. Some have even gone so far as to charge mothers delivering cocaine-affected infants with "trafficking in a controlled substance to a minor." The prosecutions have rested on the dubious theory that cocaine must have passed into the newborn's blood system before the umbilical cord was severed.<sup>26</sup>

No matter that — as a number of American medical and public health organizations have stressed — such practices are likely to drive pregnant women using drugs away from pre-natal care. During his tenure as Drug Czar, William Bennett suggested that pregnant women using cocaine be forced into treatment to avoid the "real catastrophe" of a generation of children with potentially severe learning disabilities. As he explained, "If we stopped the drug problem tomorrow dead in its tracks, we would have this generation of children."<sup>27</sup> Not surprisingly, there is no public record of his expressing concern for the generation of children harmed in utero by alcohol and tobacco.

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<sup>24</sup> On a personal note, I have a good friend, a second-grade teacher in a Winnipeg inner city school. He has taught 28 years and has attended workshops on F.A.S. and F.A.E. The latter is Fetal Alcohol Effects: because it is not the full blown syndrome, it can only be described as the lesser of two evils — but bad enough! He gets to know his students as he spends ten months with a class; and in his thoughtful judgment, about one in three is affected by either F.A.S. or F.A.E. He has told me that his colleagues have also expressed the same one-in-three ratio.

<sup>25</sup> J.R. DiFranza & R.A. Lew, "Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Infant Death Syndrome" (1995) 40 *Journal of Family Practice* 385.

<sup>26</sup> In *Johnson v. State (Supreme Court of Florida)* (1992), 602 So.2d 1288, the court reversed such a conviction because the legislative history of the statute did not show the manifest intent to use the word "delivery" in the context of criminally prosecuting mothers for delivery of a controlled substance to a minor by way of the umbilical cord.

<sup>27</sup> "Bennett Suggests Forced Treatment" *Winnipeg Free Press* (18 June 1989) A21.

The Drug Czar's moral blind spot is frankly no surprise. Unfortunately, we can expect no better from the media, even from the best that the media has to offer. When *60 Minutes*, the much heralded CBS TV news program, did a recent segment on what it labelled as a major drug problem — cocaine use during pregnancy — the A and T words (alcohol and tobacco) were never even mentioned. No, all we heard from *60 Minutes* is that the drug-during-pregnancy problem is cocaine. But then of course alcohol and tobacco really aren't drugs, right, whereas cocaine is a drug and there are the drug laws in place to use against women ingesting that drug in pregnancy. But rest assured that, as with alcohol, the *60 Minutes* segment never touched upon the havoc wrought by tobacco consumption in pregnancy. Ironically, *60 Minutes* is no friend to the tobacco industry as it has done a number of highly critical segments about its practices. But still, it just never made the alcohol/tobacco connection to the hazards of mixing drugs and pregnancy.

E.T.

Given what you have told me about the effects of tobacco on fetal development, I wonder what it does to those who smoke this drug.

### The Pharmacologist

I can't help but smile when you call tobacco a drug. That it certainly is, although like alcohol the public doesn't think of it as a drug. To put it bluntly, the more we learn about tobacco the more lethal it looks, the protestations of the tobacco companies to the contrary. In fact, the most preventable cause of death is smoking; if everyone stopped smoking, our mortality and morbidity rates would plummet. But there is Joe Camel, that lovable advertising figure who has captured an impressive share of teenage smokers for his parent company; there are also cigarette ads in American fashion magazines that show anorexic models and convey the message that smoking is the way to stay slim. In fact, there is a brand of American cigarettes called Virginia Slims that is marketed particularly for women and whose slogan is, "You've come a long way, baby." Women have indeed come a long way. More are being killed by lung cancer than by breast cancer,<sup>28</sup> and teenaged girls are taking up smoking to a significantly greater extent than their male peers.

Twenty-five years ago, journalist Thomas Whiteside published a book called *Selling Death*,<sup>29</sup> subtitled *Cigarette Advertising and Public Health*. Nothing has really changed since then except that we know now that cigarettes are even more lethal than we assumed a quarter century ago. That title — *Selling Death* — is certainly an apt description of what the tobacco industry is all about. To that industry the

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<sup>28</sup> "Women's Lung Cancer Deaths Up" *Winnipeg Free Press* (2 September 1992) A8.

<sup>29</sup> T. Whiteside, *Selling Death* (New York: Liveright, 1970).

cigarette is conceived as a nicotine delivery system. As the public is well aware from extensive media coverage, there have been recent revelations that cigarette companies have been manipulating nicotine-levels in order to fine-tune the drug's impact on smokers.

By the way, cigarettes kill about 400,000 Americans and 40,000 Canadians per annum — which is roughly the number of Americans and Canadians killed during all of World War II — and all the deaths from all illicit drugs amount to only a tiny fraction of the cigarette mortality toll.<sup>30</sup> In 1995 the World Health Organization went out of its way to castigate tobacco companies for ignoring death and suffering in their pursuit of profits. According to the U.N. agency: "Every year, tobacco is responsible for the deaths of three million people around the world, one death in every 10 seconds." It also noted that one-third of tobacco-related deaths occur in developing economies where teens and women are special targets of cigarette advertising. And these dismal figures are steadily going up, not down.<sup>31</sup>

Here in Winnipeg as elsewhere, there are liquor stores and cigarette vending machines that make these drugs readily available to consumers. The drugs are heavily taxed, which means that the government has a vested interest in their sale. In fact, in Manitoba, it is the government that directly runs the trade in alcohol; in other words, the same government that wages the War on Drugs is the province's major drug trafficker.

*As E. T. raises his four eyebrows in surprise, the Pharmacologist smiles and continues.*

Well, the thinking goes like this. For one thing, about 90 percent of those who drink are so-called social drinkers who don't harm themselves or others, so why punish them because of the 10 percent who do cause harm because of excessive drinking. Besides, just about everyone drinks. The drug is so deeply ingrained in our culture that it would be impossible to enforce even a marginally effective ban against it.

From 1920 to 1933 — a time frame called the Prohibition Era — the United States engaged in such an act of folly. If you were to advocate Prohibition as a response to the ravages wrought by that drug, a liquor industry spokesperson would doubtless refer to that era of lawlessness and social chaos as an historical precedent against criminalization. I would agree, although one would be curious to know if he would make the same connection to cocaine. As is the case with alcohol, most consumers of cocaine are not harmed by its use (roughly the same percentage of

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<sup>30</sup> "Smokin Accounts for 20% of Deaths, Study Suggests" *Winnipeg Free Press* (11 October 1991) A5. See also J. Urschel, "Want a War on Drugs? Let's Take 'Em All On" *USA Today* (14 December 1993) A7.

<sup>31</sup> "WHO Hits Tobacco Firms Over Death Rate" *Winnipeg Free Press* (31 May 1995) A7.

consumers abuse cocaine as abuse alcohol). Still, the cocaine front is the major battleground of the War on Drugs and cocaine is to the Drug Warriors as the Eastern Front was to the German Army in World War II — an unmitigated disaster.

There is, by the way, a derivative of cocaine called crack cocaine, which certainly has a high harm potential. The irony is that crack cocaine is a stepchild of the War on Drugs. Because of the gross inflated black market price of cocaine, crack was developed as a cheap alternative. But that's another story.

Regarding cigarettes, an interesting point is that — unlike any of the illicit drugs or alcohol for that matter — there is little casual use. In other words, once you begin to smoke, the odds are quite high that not only will you smoke every day but also that you will smoke multiple cigarettes every day. You will smoke year in and year out, and unless you muster the awesome amount of will power required to quit the drug, you run the risk of dying of cancer or heart disease. But if we ban cigarettes we would create a black market of nightmarish proportions (which is bad enough as it is with cheaper cigarettes flowing across the American border). Besides, does it really make any sense to treat someone as a criminal just because he or she is a cigarette smoker? Better to try to educate the consumer about the health consequences of smoking; and in Canada we have been getting the message across and consumption has been dropping, except unfortunately amongst our teen-aged population (especially girls).

E.T.

True enough, but if your society had banned alcohol and tobacco way back when, isn't it fair to say that you wouldn't now be experiencing the widespread harm caused by those two drugs?

### **The Pharmacologist**

Not likely. That is because of what Nova University law professor Steven Wisotsky so aptly calls *black market pathologies*, which are an ineradicable byproduct of the War on Drugs.

*After explaining Wisotsky's phrase — see Part I of this paper — she continues.*

Can you imagine the nightmare that would be created by the criminalization of these two recreational drugs? Given the enormous demand for alcohol and tobacco, the law that would ban them would not cause the demand to vanish. Simply put, the criminal law is not a magic wand; it cannot work miracles. Instead, what would happen is the emergence of a black market to satisfy the demand. That is the way it is with the currently illegal drugs and that is the way it would be with the outlawing of alcohol and tobacco.

Still, we are making a dent on tobacco and that is by educating consumers with the straight goods. If you keep stressing the high harm potential of the drug, then many consumers will get the message and either quit smoking — no mean achievement given the addictive properties of the drug — or never start. Regarding alcohol, it is true that most who indulge are responsible consumers; but a problem with that drug is our culture, a culture that out of one side of its mouth preaches moderation but from the other side glamorizes the drug and fails to instill inhibitions against its destructive effects. We are, after all, a booze culture, and how do you deal with that?

**E.T.**

Although I am endowed with a superintelligence that has no equal on your poor planet, I admit that I am still befuddled. What, then, is the War on Drugs all about? What determines which drugs are legal and which are not?

### **The Pharmacologist**

If you'll excuse me for a minute, I can help you to a quick understanding of the War on Drugs after I make a quick trip to the Roman Catholic Church next door.

*E.T. scratches his pointed green head with wonderment but waits patiently until she returns with two bowls of water.*

One of these bowls is filled with ordinary tap water and the other with holy water, which means that it is sanctified by the Church. How can you determine which is which?

**E.T.**

I would think that chemical testing would answer that.

### **The Pharmacologist**

That certainly is an intelligent answer, but it is not the right answer. The truth is that both would test chemically as ordinary tap water; the difference between them is ceremonial.<sup>32</sup> And that, my extraterrestrial friend, is what you have to know to begin to understand the War on Drugs — that it is not the inherent properties of a drug that determine whether it is legal or illegal, that to try to understand the War on Drugs by studying the effects of the drugs themselves would make as much sense as trying to understand the difference between tap water and holy water by

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<sup>32</sup> Alas, the very clever holy/tap water metaphor is not mine but that of the renowned psychiatrist and social critic, Dr. Thomas Szasz. See T. Szasz, *Ceremonial Chemistry* (New York: Anchor Press/Doubleday, 1974).



comparing samples of each under a microscope. The War on Drugs is really an exercise in ceremonial chemistry.

To illustrate the point, take a look at this book. It is titled *Licit and Illicit Drugs*, and its subtitle is: *The Consumers Union Report on Narcotics, Stimulants, Depressants, Inhalants, and Marijuana — including Caffeine, Nicotine, and Alcohol*.<sup>33</sup> Published in 1972 by the consumer watchdog organization, the Consumers Union, it remains a valuable, comprehensive, and objective study of its subject matter.

*Given his superbrain power, E.T. is able to digest the 600-page book in 30 minutes. She then continues.*

Do you now understand why I said that the holy/tap water demonstration would help explain what the War on Drugs is all about?

**E.T.**

Yes, I do, because as the book makes clear, there is no correlation between the harm potential of a drug and its legal classification. I was also struck by the comment that: “no drug is safe or harmless at all dosage levels or under all conditions of use.”<sup>34</sup> In that regard, the authors note that ‘caffeine can be a dangerous drug,’ which I suppose would surprise most people who wouldn’t even think of their morning cups of coffee as a drug. They also have this to say about coffee which I imagine is equally applicable to tobacco and alcohol:

By keeping coffee legal, society has avoided extortionate black-market prices that might otherwise bankrupt coffee drinkers and lead them into lives of crime. And coffee drinkers are not stigmatized as criminals, driven into a deviant subculture with all that criminalization entails.<sup>35</sup>

### **The Pharmacologist**

You certainly catch on fast. There is, by the way, a voluminous body of literature that echoes the findings reported in 1972 by the Consumers’ Union. I won’t belabour the point but consider this statement by the U.S. National Commission on Marijuana and Drug Abuse. It dates from 1973 but is as true today as it was then:

The imprecision of the term ‘drug’ has had serious social consequences. Because alcohol is excluded, the public is conditioned to regard a martini as something fundamentally different from a marijuana cigarette, a barbiturate capsule or a bag of heroin. Similarly, because the referents of the word ‘drug’ differ so widely in the therapeutic and social contexts, the public is conditioned to believe that ‘street’

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<sup>33</sup> E.M. Brecher *et al.*, *Licit and Illicit Drugs* (Toronto: Little, Brown & Co., 1972).

<sup>34</sup> *Ibid.* at 536.

<sup>35</sup> *Ibid.* at 206.

drugs act according to entirely different principles than 'medical' drugs. The result is that the risks of the former are exaggerated and the risks of the latter are overlooked.<sup>36</sup>

**E.T.**

I still don't get what the War on Drugs is all about. But I'm beginning to think that what may explain it is that you earthlings are even stranger than I thought.

### **The Pharmacologist**

I can't comment on that, but I can help you understand why the War on Drugs is not about the drugs that have the most harm potential. Rather, what determines whether a particular drug is criminalized is not its inherent properties and/or potential for social harm but rather the kinds of people associated with its use. Since this takes us outside my field of expertise, I have taken the liberty to ask a colleague in the Department of Criminology to join us. He specializes in the area of Drug Control, and here he is now.

*After the introductions, the Criminologist tells E.T. that he can understand his confusion and that he will do his best to clear it up. He continues.*

### **The Criminologist**

What we have learned is that the behaviour in which people indulge is often less important than the social category assigned to them. Why do certain drugs get labelled as deviant whereas others do not? Well, it is necessary to understand that the drugs of choice of the so-called "moral centre" — the so-called solid citizens, the professional and business classes, the police, politicians, etc. — don't get criminalized. It is only the drugs whose primary indulgers are the so-called 'morally susceptible' that are placed beyond the pale. Of course, these so-called deviants also use alcohol and tobacco, but the fact that these are also the drugs of choice of the moral centre ensures that they remain legal.<sup>37</sup>

**E.T.**

Excuse me for interrupting, but isn't this concept of the 'moral centre' contradicted by the notorious American experience with Prohibition?

### **The Criminologist**

Good point, but not really. The so-called Prohibition Era — the banning of alcohol in the United States from 1920 to 1933 — is simply the exception that proves the

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<sup>36</sup> National Commission on Marijuana and Drug Abuse, *Drug Abuse in America: Problem in Perspective*, 2d report (1973) at 11.

<sup>37</sup> T. Duster, *The Legislation of Morality* (New York: The Free Press, 1970) at 247–48.

rule. Prohibition was a product of the moral fervour engendered by World War I — that a nation couldn't fight the Germans if its soldiers and armaments workers were soused with booze. Although, admittedly, also at play were the so-called Temperance Societies, which had been lobbying for the banning of alcohol for years because of its horrific social costs. But still, it was the entry of the United States into the war that made Prohibition a politically viable measure. Compared to the long drawn out War on Drugs, Prohibition was a short run experiment. The reason that it was repealed was that the "moral centre" could not abide the continued criminalization of its preferred recreational drug.

It is particularly instructive to study the history of drug criminalization in the United States and Canada — the reasons why particular drugs were banned. Indeed, as I've said, what one finds is that the currently illegal drugs were criminalized because of the people associated with their use.<sup>38</sup> In fact, it was the Canadian Parliament that set the precedent for the Americans, banning trafficking in opium for nonmedicinal purposes in the *Opium Act* (1908), followed by a ban on possession in the *Opium and Narcotic Drug Act* (1911). The legislation reflected the anti-Oriental sentiment of the day and was directed at the 'heathen' Chinese consumers of the drug, even though there was no evidence that their recreational opium use was a social problem.<sup>39</sup> (Incidentally, the Americans did not adopt a criminal law model of drug control until 1914, when Congress passed the *Harrison Narcotic Act*.) In 1923, marijuana was added to the schedule of prohibited drugs in the *Opium and Narcotic Drug Act* and was approved by Parliament with no discussion whatsoever.<sup>40</sup> (Once again, Parliament was one step ahead of Congress, which did not outlaw marijuana until the 1937 enactment of the *Marijuana Tax Act*; it is pertinent to note that at that time the drug's consumers in the United States were primarily Mexicans, blacks, and jazz musicians.) The 1923 amendment had been prompted by a series of sensationalist articles that were published in *Maclean's Magazine* in 1920 and whose stated purpose was to pressure the government to enact stricter drug laws.

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<sup>38</sup> J. Helmer, *Drugs and Minority Oppression* (New York: Seabury Press, 1975); M. Green, "A History of Canadian Narcotics Control" (1979) 37 U.T. Fac. L. Rev. 42.

<sup>39</sup> S. Small, "Canadian Narcotics Legislation, 1908–23: A Conflict Model Interpretation" in W. Greenaway & S. Brickey, eds., *Law and Social Control in Canada* (Scarborough: Prentice-Hall, 1978) 28.

<sup>40</sup> At the present time, marijuana is a prohibited drug under the *Narcotic Control Act*. Parliament has chosen to classify marijuana as a narcotic, although botanically it is not. In section 2, the *Act* broadly defines "trafficking" as including "to manufacture, sell, give, administer, transport, send, deliver, or distribute ... ." Thus, if you give a joint to a friend, then — *in the eyes of the law* — you are a narcotics trafficker!

Written by Emily Murphy, a champion and spokesperson for various social causes (including women's suffrage), the articles were published in book form in 1922 under the title, *The Black Candle*.<sup>41</sup> Her writings on the subject of drugs reek of "popular racial bias, fables, and sensationalism."<sup>42</sup> But her views were widely publicized and endorsed in newspaper editorials across the country. Her chapter titled *Marijuana — A New Menace* is replete with "documented" cases reported by police officials of the most horrific crimes committed by crazed marijuana addicts. Most of the horror stories involved Mexicans, although none was said to have happened in Canada. Still, *The Black Candle* was of sufficient influence to lead to the banning of the drug in Canada.<sup>43</sup>

Regarding marijuana, the drug was not that popular until the 1960s, and it is clear that the current war on marijuana, which is conducted with even greater intensity in the United States than here, is a war against the 1960s! The war against marijuana is a war against the 1960s because no drug is more associated with that era of political dissent, hippies, and alternative life-styles. What other explanation is there for the continued criminalization of a drug whose ill effects pale in comparison to those of alcohol and tobacco? Why else would William Bennett call it the most dangerous drug of them all? The answer is simple — holy versus tap water. It is true, of course, that there are marijuana smokers who harm themselves by overindulgence in the drug. But, as you know, one can say that about virtually any drug — whether licit or illicit. Aspirin, for example, is truly a wonder drug but it can do you serious, even life-threatening, harm. As the Consumers Union Report

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<sup>41</sup> E. Murphy, *The Black Candle* (Toronto: Thomas Allen, 1922).

<sup>42</sup> B. Anthony & R. Silverman, "Introduction" in E. Murphy, *The Black Candle* (Toronto: Coles Publishing Company, 1973) [reprint] at 3.

<sup>43</sup> Emily Murphy had her American counterpart — in the person of Harry Anslinger, the longtime Commissioner of the Federal Bureau of Narcotics. As head of the F.B.N. from 1930 to 1962, Anslinger regaled Congressional committees and the reading public with his "documented" cases of all manner of mayhem committed by crazed marijuana addicts. The February 1938 issue of *The Reader's Digest* featured an article by Anslinger (at 3–6) titled "Marijuana: Assassin of Youth." Amongst its parade of horrors was a Florida case of a youth who butchered his parents and three siblings with an axe. As Anslinger sadly noted, he was "ordinarily a rather quiet young man (who) had become crazed from smoking marijuana" (at 4). In the previous year, the Commissioner's expertise was called upon by a judge of the British Columbia County Court in the case of *Rex v. Forbes* (1937), 69 C.C.C. 140. The accused, who pled guilty to a charge of possession of marijuana, was sentenced to 18 months at hard labour and fined \$200 (and threatened with an additional six months at hard labour if in default of payment). The judge cited Anslinger as authority for the proposition that there was an "ever growing menace attending the use of this deadly drug to which so many young men and girls of high school age in the United States are becoming rapidly and in ever increasing numbers addicted" (at 141). He also noted that, according to the Commissioner, "murders, suicides, robberies, criminal sexual assaults, hold-ups, burglaries and deeds of maniacal insanity are yearly being caused by the use of this deadly narcotic drug" (*ibid.*).

explains, there is virtually no drug — legal, illegal, prescription, over-the-counter — that is harm free. Two years after the publication of *Licit and Illicit Drugs*, that point was underscored when the distinguished medical authors of a book called *Pills, Profits, and Politics* reported that an estimated 130,000 deaths occurred annually in the United States from adverse reactions to prescription drugs.<sup>44</sup> The figures are even higher now but are never connected to the so-called drug problem, and William Bennett would no doubt respond that these are medicinal drugs and that somehow this makes the difference.

So now, you have a clear understanding of the term “ceremonial chemistry,” which might also be called “political pharmacology” or “Calvinist pharmacology.” In short, it is not the inherent pharmacological properties of drugs that determine their legal status. It is rather at the political level that these decisions are made.

### The Pharmacologist

There is an important point that I should reiterate. Over time the public has been so brainwashed that most people do not even think of alcohol and tobacco as drugs, a mindset illustrated by that oftspoken phrase, “alcohol and drugs” — as in, “Such-and-such a community is having problems with alcohol and drugs.” Its explicit meaning is that although alcohol may be a problem, it is not a drug problem. In the early 1970s, a “substances regarded as drugs” survey was conducted in the United States. When asked which substances on a list were drugs: regarding alcohol only 39 percent of adults and 34 percent of minors said Yes, and regarding tobacco only 27 percent of adults and 16 percent of minors said Yes.<sup>45</sup> Is there reason to think that the brainwashed public is any less misinformed today than two decades ago? I think not.

Although alcohol is far and away the major drug problem affecting our youth, one hears time and time again that young people do not regard alcohol as a problem because, after all, it is not a drug! I recently watched a Detroit television news programme, in which some teenagers were deploring the effects of alcohol on many of their peers and were saying, “Just because it’s not a drug doesn’t mean that it can’t harm you.”

What could be more absurd than to watch a baseball or football game on TV where an anti-drug commercial is followed by a beer commercial, the latter extolling the connection between beer and being a real man. Even as respectable an organization as the AAA (Automobile Association of America) has called for the

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<sup>44</sup> M. Silverman & P.R. Lee, *Pills, Profits, and Politics* (Berkeley: University of California Press, 1974) at 264.

<sup>45</sup> *Supra* note 28 at 10.

banning of beer commercials in a 50-page booklet titled, *Myth, Men and Beer*. As the booklet (published in 1988) states:

Beer is represented as an essential element in masculinity, so that one cannot be attained without the other. In our view, this is a distorted and dangerous message to broadcast to young people.

### **The Criminologist**

The only thing I'd like to add is that all those Drug Warriors — the Reagans, George Bush, William Bennett, Newt Gingrich, Daryl Gates, and their Canadian allies — are quick to bemoan government intrusion into the private lives of the citizenry. Get government off the backs of the people, they have all said. But, hey, drugs are different, right?

### **E.T.**

Thank you both for enlightening me, but I still find this somewhat confusing. I suppose that if I were not a stranger to your planet and in particular to your species, I would have a better understanding of what you call the War on Drugs. But as it is I still find it difficult to grasp why you earthlings would pursue such a mindless policy.

### **The Pharmacologist**

I have the same trouble. All I can say is that it might help you get a handle on the War on Drugs by reading this book. It is called *Alice in Wonderland*.

## **IV. THE PLAY, ACT II: DRUG USE VERSUS DRUG ABUSE**

### **The Pharmacologist**

In any event, continuing with your education, let me tell you about the “use” and the “abuse” of drugs. When I use the term “drug abuse,” I mean that the consumer is being harmed by the drug (either in the physical and/or psychological sense or in his relationship with others — family, friends, workmates, even strangers). In other words, what abuse means is that for the user the burdens stemming from consumption have exceeded its benefits. For example, as used nonmedically in our society, alcohol is taken occasionally and in moderation with few undesirable side effects by the great majority of users. But then there is abuse, and I am here referring to those who get into trouble with the drug: impairing judgment and coordination sufficient to cause an auto accident, increasing aggressiveness that results in crimes of violence (more often than not against one's spouse), or causing irreversible damage to the brain, liver, and other body parts. So much, then, for the distinction between drug use and drug abuse.

However, when a drug is criminalized, there is no use but only abuse. If you smoke a joint on the weekend as part of a social evening with your friends — if the drug is one aspect of a good time had by all — then you are a drug abuser simply because there is no legally recognized use of illicit drugs. Even if you are smoking marijuana for its medicinal properties — for example, to combat the nausea of chemotherapy — you are still considered a drug abuser! In any case, I know that my colleague would like to pick up this theme of use-versus-abuse.

### The Criminologist

Students of criminal law are familiar with two Latin terms: *malum in se* and *malum prohibitum* (wrong in itself and wrong by the force of law). On the one hand, there are such traditional crimes as murder, robbery, kidnapping and assault, which regardless of any particular penal code would be universally regarded as wrong in themselves: i.e., *malum in se*. Consider, on the other hand, offences such as carrying open liquor in your vehicle, an act which is not wrongful in itself (e.g., an unsealed bottle of whiskey on the back seat that is just sitting there). It is wrongful because the act is so defined by law: it is *malum prohibitum*.

In summary, then, one must understand that when a drug is criminalized, whether the drug harms the user is beside the point. By definition, then, one cannot use an illicit drug. One can only abuse, and surely abuse is wrong in itself. In other words, the public at large has been conditioned to accept illicit drug use as *malum in se*.

## V. THE PLAY, ACT III: DRUG ADDICTION VERSUS DRUG HABIT

### The Pharmacologist

Finally, a word about drug addiction and the tobacco habit. In the War on Drugs, addiction is a term that is used all too lightly. If you use heroin or cocaine, then you are an addict. But the evidence is that the majority of those who use heroin and cocaine do not do so on a day in, day out basis. I am certainly not saying that these drugs cannot be addictive, but since most users are not addicted, it is the properties of the drug combined with the psychosocial makeup of the user that determine whether a person becomes hooked.<sup>46</sup> But, still, we do know that there is one drug for which casual use is a rarity — that most of those who start using it will wind up consuming it compulsively over time. And quitting is harder than quitting heroin, and that drug is nicotine! Consider the following excerpt from a chapter in the Consumers Union Report, titled *Nicotine as an addictive drug*:

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<sup>46</sup> Note that genetic predisposition may also be involved; it is certainly a contributing factor in some cases of alcoholism.

One hallmark of an addicting substance is the fact that users seek it *continuously* day after day. If they can take it or leave it — take it on some days and not be bothered by lack of it on other days — they are not in fact addicted. Judged by this standard, nicotine is clearly addicting; the number of smokers who do not smoke every day ... is very small. The typical pattern of nicotine use, moreover, is not only daily but hourly. Nearly four male smokers out of five and more than three female smokers out of five consume 15 or more cigarettes a day — roughly one or more per waking hour ... . No other substance known to man is used with such remarkable frequency. Even caffeine ranks a poor second.<sup>47</sup>

By the way, tobacco shows stunning parallels with heroin in terms of its addictive power. But the point is that we only talk about the tobacco habit. If we were to call it what it is — an addiction — then we might have to admit that it is, after all, a drug. On the other hand, if you are an infrequent user of heroin or cocaine — in other words, if you can take it or leave it — you are still at risk to be labelled a drug addict.

Be that as it may, the tobacco industry not only continues to assert that there is no scientific proof that their product is harmful but also heatedly denies that it is addictive. The industry has transformed its stance of wallowing in righteous indignation into an art form, as illustrated by an Associated Press release on 4 April 1988. When the then U.S. Surgeon General C. Everett Koop stated that nicotine was addictive, the vice-president of the U.S. Tobacco Institute responded that: "It is apparent that anti-tobacco zeal has overtaken common sense and good judgment." In a comment that can only be described as pure unadulterated *chutzpah*, he added:

To imply that the 55 million American tobacco-smokers are drug-abusers is to subvert and divert attention from the nation's war on illicit drugs. It is a trivialization of the country's urgent concerns with hard drugs and verges on irresponsibility.

*So endeth the extraterrestrial's lesson on the subversion of language to serve a political agenda. As he prepares to leave our planet, E.T. telepathically dispatches the following message to home:*

"I have encountered earthlings. They have a bizarre and nonsensical custom. They proudly call it the War on Drugs. I regret to report that my mission has failed — we have yet to discover intelligent life elsewhere in the universe."

## VI. THE OSTRICH AND THE NAKED EQUESTRIENNE

IN DECEMBER 1993, JOCELYN ELDERS, the then U.S. Surgeon-General, publicly stated that it was time to consider whether legalizing drugs might help fight crime.

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<sup>47</sup> *Supra* note 33 at 223.



I heard former Drug Czar William Bennett's response on CNN: "She's morally obtuse, nutty, just plain nutty." And President Clinton reacted quickly to disassociate his administration from her comment, authorizing the White House communications director to inform the media that "it's nothing we would ever entertain." Clinton himself announced that he had no intention of reviewing the War on Drugs agenda of Ronald Reagan and George Bush. Like them, he is content to bury his head in the sand whilst the war continues to wreak its havoc upon a beleaguered public. Still, the ostrich cannot fly and neither can the War on Drugs. The difference is that the ostrich accepts nature's will whereas the Drug Warriors remain unshaken in the mad belief that a war that by its very nature is unwinnable is actually winnable. John Cleese of Monte Python fame could capture the essence of the War on Drugs in a two-minute routine. His gangly body covered with feathers, he jumps out a window, furiously flapping his arms and chanting a "Just Say No to Drugs" mantra. Not surprisingly, he plummets to the ground, landing on John Q. Public and crushing him like a bug. Cleese gets up, brushes himself off, and says, "I'll get it right next time" — and with a look of grim determination, he leaps up the stairs on his way back to the same window. Repeat the scene *ad nauseam* and one has a capsule history of the War on Drugs.

It may well be that President Clinton is not a true believer in the holy drug crusade. But he is a shrewd politician, who no doubt fears that questioning the legitimacy of the War on Drugs is politically the kiss of death. During the Cold War, there were politicians who profited by accusations of "soft on Communism" levelled against their political opponents, and Clinton knows that the accusation of being "soft on drugs" would provoke the same kind of backlash. In welcome contrast, there are a number of public figures with solid conservative credentials who have expressed the same view as Dr. Elders, including free market economist Milton Freedman, Reagan's Secretary of State George Schultz, and William F. Buckley, conservative media pundit and editor of the magazine, *National Review*.<sup>48</sup>

What they have come to recognize is that the criminalization of drugs carries in its wake social costs that typify efforts to stamp out so-called consensual crimes; and that the greater the zeal invested in the process — as in the War on Drugs — the more the havoc that is wreaked. To know what the War on Drugs is really all about is to know the nature of the society that pursues it with such grim determination. Of course, I am referring to the United States. I suggest to you that the War on Drugs is really about scapegoating, about the need to conjure up enemies with whom to wage battle. It is about a characteristic of American society that dates back to the Salem witch trials of 1692 and that carries an unbroken thread through the Red Scare of the early 1920s, the McCarthy Era of the 1950s (the so-called

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<sup>48</sup> *Supra* note 12 at xviii.

Communist witchhunts), the War on Drugs, and the recent spate of cases involving unfounded allegations of ritual sexual child abuse (particularly notorious are the cases involving day care centres). In short, the War on Drugs is as American as apple pie.

It is a war waged by a country whose tobacco industry has found prosperous new markets in third world countries, and whose tobacco farmers benefit from generous government subsidies to promote their lethal product overseas. By the way, keep in mind that the reason for one of Canada's drug smuggling problems — tobacco — is that the Americans won't use the taxing power to discourage consumption as we do. What I'm talking about is hypocrisy, about a war that wallows in it up to its red-white-and-blue eyeballs.

I'm talking about an America whose black ghettos are awash with crack cocaine; and instead of confronting the socioeconomic breeding grounds for crack, it mounts what is in effect a race war against the drug's consumers. About a country that invades Panama to get rid of one drug trafficker (formerly on their payroll) — killing hundreds of innocent people in the process — and then quickly pulls out its troops, in effect guaranteeing that the illicit drug business would continue as usual. Panama was President Bush's doing; he called it Operation Just Cause. Good old George, as a Drug Warrior he stood as tall in the saddle as his mentor, Ronald Reagan.

I am here reminded of that 19th century Mexican general who lamented, "Poor Mexico, so far from God, so near the United States." I won't comment on the theological aspect of his remark, but regarding the geographical all I'll say is, poor Canada. It is true that we have not embraced the war with the singleminded fanaticism of the Americans, but being neighbours we cannot escape the taint of their unrelenting Drug War rhetoric. Yet it is equally true that Canada, no less than the United States, embraced the Police Model of drug control early in this century; and that, albeit we do not enforce the law with the same rabid intensity of the Americans, we are still committed to the pursuit of a bankrupt and shameful policy that has caused far more harm than any good that it has sought to accomplish.

Of course, the War has been good — good for the politicians who garner votes by showing that they are not soft on drugs, good for those in the business of building and running prisons, good for bloated bureaucracies like the D.E.A., good for people in the burglar alarm business because of all the break-ins committed by those who steal to get the money to pay the inflated black market price for their drugs of choice, and finally, last but not least, good — hey, wonderful — for organized crime.

Is there another way? Is there anything to learn from elsewhere? I have referred to the principle of *separation of markets* that informs Dutch drug policy. It operates

in tandem with another principle: what the Dutch call *harm reduction*.<sup>49</sup> Although Dutch law prohibits the possession and sale of cocaine and narcotic drugs such as heroin, the provisions against possession are in effect not enforced. The rationale is as follows. If the person's use of an illicit drug is not dysfunctional, then there is no reason for state intervention. However, if the drug use is dysfunctional, then the arm of the state that should be involved is not law enforcement but rather public health. And why not? If someone is having a drug problem, what do we accomplish by labelling him a criminal? In any event, we would much sooner get him into treatment if the state treats him as a patient — as one with a health problem — rather than as a criminal. In short, if drug use then not the state's business; if drug abuse, then it is the business of public health, not criminal justice.

What we have to recognize is that the pursuit of pleasure through recreational drugs — whether licit or illicit — is part and parcel of the human condition. In his insightful book, *Intoxication: Life in Pursuit of Artificial Paradise*, Dr. Ronald Siegel, a renowned professor of psychopharmacology at U.C.L.A., refers to recreational drug use as the “fourth drive.”<sup>50</sup> Exhibited by both animals (e.g., cats and catnip) and humans, the pursuit of intoxication, according to Dr. Siegel, is as natural and powerful a drive as sex, hunger, and thirst. His thesis probably explains why anthropologists have yet to discover a society that has not featured the non-medical use of drugs. In other words, it is human nature that we are talking about, and the notion of a society rid of recreational drug use is an impossible dream. The War on Drugs is a war on the biological and social nature of our species; it is a civil war, a war on our own people, those who do not use the right drugs. As Pogo says, the enemy is us.

The era of the compact disk is no place for that old fashioned and terribly outdated record player that keeps grinding out the message that a drug is either legal or illegal, and if it is illegal then that means War. A century ago, Queen Victoria referred to the women's suffrage movement (women seeking the right to vote) as a “mad wicked folly.” That it surely wasn't, but if ever there was a social policy that deserved that label — a “mad wicked folly” — it is the War on Drugs.

So, where do we go from here? Are there feasible alternatives to a social policy that wallows in hypocrisy and moral bankruptcy? The Drug Warriors and their allies have buried their heads in the sand because they cannot abide a different way; but the point that we'll never know of alternatives until we come up for air and start looking. For those who are prepared to extricate their heads (and brains) from the sand, I suggest the following points to ponder.

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<sup>49</sup> *Supra* note 21. As indicated by his article's title, VanVliet also uses the phrase “normalization of drug problems” as another description of “harm reduction.”

<sup>50</sup> R. Siegel, *Intoxication: Life in Pursuit of Artificial Paradise* (New York: E.P. Dutton, 1989).

There is a need to guide the public policy of drug control according to the harm principle. Each drug, regardless of its label as licit or illicit, must be considered on its own merits. What is the particular drug's relative potential for both personal and social harm? And what can we do to minimize the harm? In other words, we need a policy that is tailor-made for each particular drug. For example, in Canada we have done a fairly good job along that line with regard to tobacco, as a combination of public education and high taxes has served to decrease consumption. But we must keep in mind not only that every drug has the potential to cause harm but also that what determines any drug's impact upon the consumer and society is not simply the chemistry of the drug. It is rather the interaction between the drug and the consumer. As the authors of the Consumer Union Report explain in their introduction:

Readers who traditionally think in terms of the effect of a drug will learn here that even the simplest (psychoactive) drugs have a wide range of effects — depending not only on their chemistry but on the ways in which they are used, the laws that govern their use, the user's attitudes and expectations, and countless other factors.<sup>51</sup>

Marijuana is a case in point. Recall my reference to the reefer madness NBC news item and the statement that the drug impairs learning. What I object to is its presentation as a categorical statement: marijuana impairs learning. Actually, the reference was to a study suggesting that even if they have not smoked marijuana for a day, some heavy smokers may have trouble performing simple tasks that involve sustaining and shifting attention. Still, that is a far cry from saying that the drug inevitably produces that result. Furthermore, to say that a drug "impairs learning" is more ominous than to say that it affects attention. But I'll say once again that there are no totally harmless drugs. After all, even that wonder drug aspirin can cause gastric bleeding, mental confusion, blood clotting, and a host of other unpleasant and sometimes life-threatening side effects.<sup>52</sup> The solution is not to criminalize those who have a drug problem but rather to formulate nonpunitive strategies to deal with their dysfunctioning. It makes no sense to treat alcohol and tobacco abusers as criminals, just as it makes no sense to treat marijuana, cocaine, and heroin abusers as criminals.

I am encouraged by the recent news that a number of Canadian Senators have publicly called for the de-criminalization of possession of small amounts of marijuana and hashish.<sup>53</sup> I applaud their sentiment, albeit I would go further as I believe

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<sup>51</sup> *Supra* note 33 at xi.

<sup>52</sup> M.J. Rodman & D.W. Smith, *Pharmacology and Drug Therapy in Nursing* (Toronto: J.B. Lippincott Company, 1968) at 163.

<sup>53</sup> "Senators High on Legalizing Marijuana" *Toronto Star* (17 May 1996) 3.

it unconscionable to criminalize the possession of any drug for personal use. I simply cannot accept the concept that a person becomes a criminal because of what she ingests into her own body, whether it be marijuana, tobacco, cocaine, alcohol, or a steady diet of cream puffs, cheese blintzes awash in sour cream, and Big Macs. To my mind, the very notion of the crime of possession of drugs for personal use invokes the spectre of the state as Orwellian Big Brother. If the substance leads the consumer to batter his spouse or cause an auto accident, then prosecute him for the substantive offence. But otherwise leave him alone, although offer him help if his drug consumption proves dysfunctional. But that is of course a far cry from branding him as a criminal. I am here reminded of what Dr. Helen Nowlis, a renowned drug researcher, has aptly called “the drug problem problem” — the harm caused by the manner in which society has approached the question of drug control.<sup>54</sup>

By the way, the possession of alcoholic beverages for personal use was not criminalized during the Prohibition Era. Rather the law was directed against manufacture, sale, and importation. So at least the tragic social costs of Prohibition were not compounded by grinding ordinary consumers into the jaws of the criminal justice system.

Way back when, I read a marvelous book, a true classic, called *The Limits of the Criminal Sanction*, by Stanford law professor Herbert Packer.<sup>55</sup> Packer outlines six criteria as “a benchmark for the optimal use of the criminal sanction.”<sup>56</sup> The final one — which he suggests is the most important — is that, with regard to the conduct in question: “There are no reasonable alternatives to the criminal sanction for dealing with it.”<sup>57</sup> I would suggest that this ground alone furnishes sufficient reason to decriminalize possession for personal use. Surely, a Health Model that truly distinguishes between use and abuse and seeks to help, not criminalize, abusers is a far preferable mechanism of social control than the Police Model. Another criterion that Packer weighs heavily is that “the conduct ... is not condoned by any significant segment of society.”<sup>58</sup> Aside from those who do not use marijuana but who don't mind that others do, there are an estimated 2,000,000 marijuana smokers

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<sup>54</sup> *Supra* note 33 at 521.

<sup>55</sup> H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

<sup>56</sup> *Ibid.* at 296.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

in Canada who in one fell sweep are branded as criminals.<sup>59</sup> I personally deplore a system of criminal law that brands such sizeable numbers of its subjects as outlaws not because they commit crimes against persons or property but because they choose to ingest a particular drug.<sup>60</sup> In Victorian England over a hundred years ago, the renowned philosopher John Stuart Mill published his memorable book-length essay, *On Liberty*, in which he had this to say about the limits of criminal sanctions:

The principle is, that the sole end for which mankind are warranted...in interfering with the liberty of action of any of their members is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant ...<sup>61</sup>

Those were wise words then and they are wise words today. Would that those who rant and rave about “getting government off the backs of the people” come to make that connection to the War on Drugs! Of course, it is true that there are consumers of illicit drugs whose drug use directly leads to crimes committed against persons and property. But that is a byproduct of the war itself — the artificially inflated black market cost of drugs that are criminalized is bound to drive abusers to commit crimes for the money to afford that cost. That aspect of the War on Drugs is, I suggest, as bizarre and nonsensical as anything that Alice ever stumbled upon in Wonderland.

In any event, I can well imagine a loud chorus of angry voices protesting that decriminalizing possession for personal use sends the wrong message — that it would encourage the use of illicit drugs. I doubt that. It is fanciful to believe that there are hordes of solid citizens who have thus far shied away from illicit drugs but who would somehow be prompted to indulge if possession were decriminalized. (Bear in mind that when a number of American states drastically reduced penalties for marijuana possession in the 1970s, there was no discernible increase in consumers.) I rather think that my proposal would be sending the right message — that

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<sup>59</sup> D. McKenzie, ed., *CCSA/ARS 1996 Canadian Profile*. Although the smoking of marijuana is not a crime, possession of that which is smoked is. See section 3 of the *Narcotic Control Act* which establishes possession of a narcotic as an offence. Thanks to Dr. Diane Riley of the Canadian Centre on Substance Abuse (CCSA) for referring me to McKenzie as the source of the oft-quoted 2,000,000 figure.

<sup>60</sup> William Bennett and those of his ilk would argue that illicit drugs cause harm to society because they “degrade the character” of their consumers. But surely such an amorphous and ideologically-driven excuse for invoking criminal sanctions is unsound and dangerous public policy. It was, by the way, that kind of pompous moralizing that explains the onetime criminalization of gay sex and the selling/advertising of birth control products in Canada and the current criminalization of the former in about half the American states.

<sup>61</sup> Quoted in N. Morris & G. Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: University of Chicago Press, 1969) at 4.

the time has come to seek a new way and that, in the meantime, the least we can do is to proclaim an armistice in the war against those who possess illicit drugs for personal use. That is the first step, but who can say at this juncture where we will end up? But at least that would be a good beginning.

But beyond that one small but needed step, we must seek to devise a model of drug control that is markedly different from the Police Model framework of the War on Drugs. In the quest for a new way, I suggest that we see what there is to learn from the Dutch drug control policy, what one could call an integrated Health/Police Model. Its two overriding principles — *separation of markets* and *harm reduction* — are health-oriented, albeit the Health Model rebounds to the benefit of the Police Model because the latter is ill-equipped to suppress consumer demand for drugs. As Professor Ethan Nadelman, the director of the Lindesmith Center, a drug policy research institute in New York City, sums up the Dutch experience:

American drug warriors like to denigrate the Dutch, but the fact remains that Dutch drug policy has been dramatically more successful than U.S. drug policy. The average age of heroin addicts in the Netherlands has been increasing for almost a decade; HIV rates among addicts are dramatically lower than in the United States; police don't waste resources on non-disruptive drug users but, rather, focus on major dealers or petty dealers who create public nuisances. The decriminalized cannabis (marijuana) markets are regulated in a quasi-legal fashion far more effective and inexpensive than the U.S. equivalent.<sup>62</sup>

Dutch drug policy reflects two aspects of the Dutch national character: a tolerance for diversity coupled with pragmatism (if one cannot suppress an activity — e.g., drugs or prostitution — then bring it out into the open and regulate it). There is much to be said for that philosophy. Our way has been different, ever since Canada embraced the Police Model in 1908 and the United States in 1914. But it is incumbent upon us to seek a new way, one that inevitably will proceed by bumps and starts, requiring fine tuning as we learn from our mistakes along the road to developing a social policy that minimizes the harm caused by dysfunctional drug use (i.e., drug abuse). That hope was expressed two years ago by Barbara Ehrenreich in a thoughtful essay, *Kicking the Big One*, in which she indicted drug prohibition as “an evil [that] grips America, a life-slapping, drug-related habit” and proposed that:

It's not necessary to quit cold turkey. Consider starting with marijuana, then easing up on cocaine and heroin possession, concentrating law enforcement on the big-time pushers. Take it slowly, see how it feels. One day at a time.<sup>63</sup>

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<sup>62</sup> *Supra* note 20 at 39.

<sup>63</sup> B. Ehrenreich, “Kicking the Big One” *Time* (28 February 1994) 60.

I agree with Ehrenreich that the place to begin is with marijuana but that drug law reform cannot end there. It is thus my fervent hope that, if Senators are prepared to question the criminalizing of small amounts of marijuana, they will go on to question the very legitimacy of the war itself.<sup>64</sup> There is a voluminous body of literature — both American and Canadian — presenting alternatives to the Police Model of drug control, and all that it takes to seek new paradigms is the moral courage to Just Say No to the War on Drugs. A good place to start the quest for a new way is by reading the cover story in the 12 February 1996 issue of William Buckley's magazine, *National Review*. Titled "The War on Drugs is Lost," it contains seven articles (the first by Buckley himself) that prove the point. The final article is by Yale Law Professor Steven Duke, co-author of *America's Longest War: Rethinking Our Tragic Crusade Against Drugs*. I'll leave you with Duke's final paragraph — the cover story's last word:

The only benefit to America in maintaining prohibition is the psychic comfort we derive from having a permanent scapegoat. But why did we have to pick an enemy the warring against which is so self-destructive? We would be better off blaming our ills on celestial invaders flying about in saucers.<sup>65</sup>

Unfortunately, that "psychic comfort" is very much in evidence in the 1996 U.S. presidential campaign, as the incumbent and his opponent strive to outdo one another in their commitment to the War on Drugs. The President stood as a true Drug Warrior when he proclaimed "I hate drugs" during his renomination speech before his party's national convention. He reiterated that war cry in the first televised debate with Senator Dole. But he is not to be outdone by the Senator, who by the way is a staunch defender of the tobacco industry and who has informed the American public that cigarettes really aren't addictive (although he has recently backtracked from that position, saying that since he is not a doctor he cannot say for certain). The Senator has called for more police and more prisons to combat the menace of drugs. When asked if he would implement a "zero tolerance" policy, he replied that it would be "zero, zero, zero, zero tolerance." And he has managed to blame the President for the recent upsurge in illicit drug use by teenagers.

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<sup>64</sup> I would also couple the decriminalization of possession for personal use with the legal availability of marijuana for medicinal purposes: e.g., for cancer (reducing the nausea caused by chemotherapy), for multiple sclerosis (easing pain), for glaucoma (reducing pressure on the eyeballs), and for AIDS (stimulating appetite). There is no more cruel aspect of the War on Drugs than the denial of the drug to those who can benefit from its medicinal properties and for whom there are no adequate legal substitutes.

<sup>65</sup> *Supra* note 1 at 48.



Yet, the inescapable truth bears repeating: that more of the same — more police, harsher penalties, and more prisons — is not going to win a war that by its very nature is unwinnable. That is because of the Black Market Pathologies referred to earlier; there are such enormous amounts of money to be made that the market in illicit drugs is virtually unstoppable. As the author of a recent magazine article titled “The Phony Drug War” expressed it: “Putting a murderer in jail means one less murderer on the street. Putting a dealer in jail creates a job opening.”<sup>66</sup> Simply put, law enforcement efforts to suppress the importation and cultivation of illicit drugs have a *push down, pop up* effect. If one hydroponic marijuana operation is uncovered, then another simply pops up in its place. If cocaine production were to vanish overnight in Colombia, it would soon flourish elsewhere in South America. And if it stopped throughout South America, it would thrive in Asia. And if not Asia, then Africa. Alas, one can also say the same about heroin.

In a telegram to Prime Minister Chretien, an organization of concerned parents — who describe themselves as “volunteers working to stop substance abuse by children” — expressed its impassioned opposition to the relaxation of criminal penalties for marijuana. As it asked the Prime Minister, “What do you want for Canada, a drug-free society or a drug-filled society?”<sup>67</sup> But the truth is that we will never have a “drug-free” society. Recreational drugs are here to stay; as I have been told by more than one high school and junior high school teacher, marijuana is virtually available to any student who wants it.

I too as a parent share the concern of those parents who worry about children abusing drugs. But what reason is there to believe that we have no choice but to persevere in a rigid commitment to a policy that has done such a dismal job of keeping children (and adults) away from drugs? If a business conducted an enterprise with the dismal track record of the War on Drugs, its board of directors would long since have been turfed by outraged shareholders. Is there a better way? The point is that we'll never know until we begin to look, to expand our horizons beyond the limited vision of the Drug Warriors. I have suggested that at the very least we consider the *decriminalization* of illicit drug use: that whatever the drug, possession for personal use fall outside the ambit of the criminal law. As the distinguished American criminologist Elliott Currie has commented: “decriminal-

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<sup>66</sup> J.W. Shenk, “The Phony Drug War” *The Nation* (23 September 1996) 11.

<sup>67</sup> Lambton Families in Action for Drug Education, Inc. telegram to the Right Honourable Jean Chretien, 7 June 1994.

ization is not a panacea; it will not end the drug crisis, but it could substantially decrease the irrationality and inhumanity of our present punitive war on drugs.<sup>68</sup>

Since decriminalization is only a half way measure, should we go all the way to *legalization*: a free market in which illicit drugs are made as legally available as tobacco and alcohol? Professor Currie says no, at least as regards heroin and cocaine, and as he explains his view is coloured by the nature of American society:

Evidence ... confirms that much (though, of course, not all) of the harm caused by endemic drug abuse is intrinsic to the impact of hard drugs themselves (and the street culture in which drug abuse is embedded) within the context of a glaringly unequal, depriving, and deteriorating society. And it affirms that we will not substantially reduce that harm without attacking the social roots of the extraordinary demand for hard drugs in the United States. Just as we cannot punish our way out of the drug crisis, neither will we escape its grim toll by deregulating the drug market.<sup>69</sup>

On the other hand, he also acknowledges that "there is a strong argument for treating marijuana differently from the harder drugs."<sup>70</sup> Professor Currie is but one of many thoughtful critics who have argued against the call for escalation of the War on Drugs on the grounds that "more of the same [won't] do the job."<sup>71</sup> But if we don't simply want more of the same, then we must do what we are supposed to do in a democracy on contested issues of public policy: proceed in a calm and measured fashion to talk and listen and debate the merits of conflicting views.

I am pleased to report that this kind of debate is already happening on Parliament Hill. The House of Commons Health Committee is currently holding hearings on Canada's drug policy, as a follow-up to the recent enactment of *The Controlled Drugs and Substances Act* (not yet proclaimed). The new Act, which replaces the *Narcotic Control Act* and sections of the *Food and Drugs Act*, embodies the Police Model and, if anything, is even more punitive than the old law. When the Act, originally called Bill C-7 and then Bill C-8, was before the Senate Legal and Constitutional Affairs Committee, it drew the ire of the Canadian Bar Association. In expressing its strong opposition to Bill C-7, the C.B.A.'s National Criminal Justice Section rightly noted that

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<sup>68</sup> E. Currie, "Towards a Policy on Drugs" in H.T. Wilson, ed., *Drugs, Society, and Behavior* (Guilford, CT: Dushkin Publishing, 1996) at 216. Excerpted from E. Currie, *Reckoning: Drugs, the Cities, and the American Future* (New York: Hill and Wang, 1993). Note that about 30,000 Canadians are annually convicted of simple possession.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.* at 214.

[T]he criminalization approach to drug control has proven ineffective for decreasing drug use, reducing crime, or improving health status in the general population.<sup>72</sup>

The brief then went on to make the startling admission that:

To recommend diminishing the prohibitionist approach ... is in direct contradiction to the self-interests of lawyers, in that any decriminalization would ultimately mean less work for lawyers ... . However, the National Criminal Justice Section takes the position against continued prohibition, contrary to the economic self-interests of lawyers, because we firmly view that position to be in keeping with our professional responsibility to advance the public interest.<sup>73</sup>

In its later submission to the Senate against Bill C-8, the C.B.A. reaffirmed its stand:

We submit that it is in the public interest to take the harm-reduction approach rather than the criminalization approach. It will mean, of course, less work for lawyers ... .<sup>74</sup>

Wonder of wonders — that an organization of lawyers has advocated against the profession's own economic interests! The C.B.A.'s principled stand is a clarion call that I hope will inspire the House's Health Committee to take a critical look at what we have wrought by our single-minded devotion to the War on Drugs.

Finally, a word to Nancy and Ronald Reagan, George Bush, Bill Bennett, Newt Gingrich, Daryl Gates, their newest ally, Bill Clinton, and all the other Drug Warriors, American and Canadian, who keep telling us that what we require is more of the same: more drug police, harsher punishments, more prisons, and more education on the evils of illicit drugs. You remind me of the story of the emperor strutting around in what he believed was a splendid new cloak, and all save a small boy were too embarrassed to tell him the truth: that he was wearing nothing but the suit he was born with. So to all of you cloaked in the mantle of the War On Drugs — surprise, it's made of see-through glass, and if you glance in the mirror you'll discover that you too have the look of Lady Godiva on that memorable day in Coventry so long ago. But at least she could hold her head proudly. Yours should be bowed down with shame.

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<sup>72</sup> National Criminal Justice Section of the Canadian Bar Association, *Submission on Bill C-7* (May 1994) at 1.

<sup>73</sup> *Ibid.* at 19.

<sup>74</sup> (28 March 1996) 3 Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs at 3.5.

