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DRUGS AND THE LAW: “WAR GAMES”†

*Terry J. Hatter, Jr.**

Rising like a mushrooming nuclear cloud over this drug battlefield are many false perceptions that distort our minds and prevent us from developing realistic strategies to combat this societal ill. Before I get to the topic at hand, let me mention a few other perceptions or misconceptions—and I am not going to tell any lawyer jokes. I merely refer you to events on the East Coast, Colin Ferguson,¹ and on the West Coast, O.J. Simpson.²

Was there really peace before the drug war? Did we only have peace when we did not have affirmative action? When we did not argue about timetables or quotas? There was only one quota then—100% white male. Were those the good old days, when minorities, women, and homosexuals were not actively competing in the workplace?

Without doubt our streets—particularly those in the ghettos and barrios—were less mean in the past, before the advent of drive-in cleaners and drive-by shootings. But I remind you that this more tranquil urban existence was prior to the introduction of addictive drugs and assault weapons into these seemingly “uncivilized” communities. Drugs were not grown in the ghettos and barrios, nor were guns manufactured there.

Is nonviolence wrapped in “law and order” alone? Are the voices in the White House and on both sides of the aisle on Capitol Hill really clarions of justice? Or, are they simply doomsayers when they loudly proclaim that there must be law, order, and harsh punishment—not justice—to ensure a civilized society?

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Source citations in the footnotes that follow have been provided by the Law Review staff to assist the reader in further research. —*Eds.*

* Judge, United States District Court for the Central District of California.

1. *People v. Ferguson*, No. 86739 (N.Y. Crim. Ct. Nassau County Mar. 23, 1994), *appeal docketed*, No. 95-03160 (N.Y. App. Div. filed Mar. 28, 1995).

2. *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Oct. 3, 1995).

Where is the morality, the sanity, or the justice in a sentencing scheme that mandates the same punishment for those with five grams of crack cocaine in poorer, minority neighborhoods as those with 100 times that amount of powder cocaine in upscale areas³—and the crack comes from that same powder!

How can one explain the shrill cry of “Three Strikes and You’re Out”⁴ even before the baseball season has rolled around? Or, how can one justify the so-called sentencing guidelines and mandatory minimums that effectively take the discretion from federal judges—those historically charged with the task of balancing the protection of society with the proper punishment of the convicted criminal?

Is this the height of civilization, when the resources, reputation, confidence, and parental support for public education are at such a low ebb? In a highly civilized society, a society with justice, how can we pay carpenters and police officers more—much more—than we pay those who are entrusted with educating our children? How can we blame the schools for the failures of society, just as we blame the justice system for societal problems that cause crime? And how can the wealthiest nation in the world tolerate homelessness and the proposed dismantling of the school lunch program for children while, conversely, it plans tax cuts for the rich?

But, let me return to the so-called “war on drugs.” Congress declared “war” in the 1980s, responding to sensational reports in the media about the highly addictive nature of crack cocaine and its relationship to violent gang activity. In its declaration, Congress determined that the use and selling of crack cocaine, which—as I already indicated—comes from powder cocaine, should be treated 100 times more severely than a like amount of powder cocaine.⁵ What is of great interest here is that blacks comprise almost ninety percent of the total number of those convicted for violating crack laws.⁶ Conviction of a drug offense involving just fifty grams of crack usually gets a black male the same ten-year mandatory minimum sentence as

3. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE & FEDERAL SENTENCING POLICY 35 (1995) [hereinafter SENTENCING COMMISSION REPORT]. See generally 21 U.S.C. § 841(b) (1988 & Supp. V 1994) (establishing mandatory sentencing scheme for crack cocaine and powder cocaine drug offenders).

4. “Three strikes” is the popular term used to describe legislation that calls for the life incarceration of violent criminals upon their third felony conviction. See, e.g., CAL. PENAL CODE § 1170.12 (West Supp. 1995).

5. See SENTENCING COMMISSION REPORT, *supra* note 3, at 116-17.

6. *Id.* at 156.

a person—usually a white male—convicted of a violation involving five kilograms of powder cocaine. More simply, a person—again, usually a black male—will receive five years in a federal prison for possessing 5.1 grams of crack, while a person—usually a white male—with an equal amount of powder cocaine will get probation.

Clearly, crack is perceived worse than other forms of drugs, but is this the reality? Those who study the effects of narcotics believe that drugs such as methamphetamines and heroin are just as lethal, addictive, and disruptive as crack.⁷ Further, it is these drugs—not crack—that are the drugs of choice in white suburban communities where their use is on the rise.⁸ And what about the perception or misconception that Blacks abuse illegal drugs more than other races? A recent study by the National Institute on Drug Abuse concluded that Whites were the race most likely to abuse drugs, followed by Latinos.⁹ Guess who was dead last—Blacks!¹⁰

Some other perceptions and realities:

What is the biggest single reason for the epidemic of crime in our inner cities?

Most black men cannot find jobs. The United States Department of Labor figures show over forty percent unemployment among young black males.¹¹

What is the reason for chronic unemployment among black males?

The major causes of chronic unemployment among black men are lack of education and prison records.¹²

What is the biggest single reason that black males have criminal records?

Since the 1980s, thousands of black males have been imprisoned on nonviolent drug charges.¹³

7. Michael Checchio, *The Bias in Drug Laws*, CALIFORNIA LAW., May 1992, at 19.

8. *Id.*

9. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1993, at 18-19 (1994).

10. *Id.*

11. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REP. NO. 888, EMPLOYMENT IN PERSPECTIVE: MINORITY WORKERS 2 (1994).

12. See Sonia Nazario, *State's Black Men Facing Grim Situation*, L.A. TIMES, Dec. 11, 1993, at A1.

13. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992, at 520 (1992) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS] (stating that in 1992 alone, over 5000 black men were sentenced for nonviolent drug offenses).

What is the relationship between drugs and violence?

All illegal drugs combined result in approximately 4,500 to 5,000 deaths annually,¹⁴ or about one percent of those killed by alcohol and tobacco.¹⁵ This means that tobacco kills more people each year than the total killed by illegal drugs in the last century. The violence associated with illegal drugs is more directly related to their illegal distribution!¹⁶

Which drug causes the greatest burden on national medical resources?

Alcohol and tobacco lead the list.¹⁷ As much as forty percent of all hospital care in the United States is related to alcohol related conditions.¹⁸

Which drugs are the most addictive?

Former Surgeon General C. Everett Koop concluded that out of all drugs, tobacco is one of the most addictive.¹⁹ Many heroin and cocaine addicts report that it is easier to kick their drug habits than their tobacco habits.²⁰ And, even with this data, we spend so very little on drug prevention and drug treatment.²¹

Can we stop foreign drug production?

By the federal government's own estimates, approximately one percent of the worldwide drug crop could supply the entire United States' illegal drug consumption. United States drug enforcement agents, working together with foreign government support, have never seized more than one percent of the world's drug supply in a given year,²² leaving ninety-nine percent left to supply the United States.

14. See John M. Leighty, *Alcohol, Tobacco Take Heavy Toll, Get Little Notice*, L.A. TIMES, Nov. 23, 1986, pt. 1, at 3.

15. See *id.*

16. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS, CRIME, AND THE JUSTICE SYSTEM 5 (1992).

17. Leighty, *supra* note 4, at 3.

18. Constance Holden, *Alcoholism and the Medical Cost Crunch*, 235 SCI. 1132 (1987).

19. Allan Parachini, *Koop Focuses on Addiction and Nicotine*, L.A. TIMES, May 10, 1988, pt. 5, at 1.

20. A survey by the Addiction Research Foundation in Toronto found that one-third of their patients felt it was "much harder" to kick tobacco addiction than heroin, alcohol, or cocaine addiction. *Id.*; see also Leighty, *supra*, note 4, at 3 ("Medically, alcohol and cigarette addictions are the hardest to break.").

21. See OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY 113 (1995) [hereinafter DRUG CONTROL STRATEGY] (allocating less than one-third of the 1994 federal drug control budget to prevention and treatment programs).

22. In 1992, the highest year on record, total federal drug seizures—532.7 metric tons—comprised 1.8% of the total worldwide drug potential production—290,956 metric tons. DRUG CONTROL STRATEGY, *supra* note 21, at 49, 147.

No one has ever supplied any credible evidence that there is even a possibility that we can eliminate drug production in other countries.

When my colleague United States District Judge Sterling Johnson of the Eastern District of New York was a United States Attorney, he theorized that law enforcement would have to increase drug seizures at the borders by more than 1400% to have any impact at all on the drug trade, and that was assuming no corresponding increase in world production.

Can we apprehend all of the drug dealers in the United States?

Absolutely not! Most prisons are already filled to capacity,²³ and at least half of the states in the United States are under federal court orders because of severe prison overcrowding.²⁴ Los Angeles County, the largest county in the nation with a population in excess of ten million, directly recognizes this fact. Recently, Los Angeles Sheriff Sherman Block announced a plan to release thousands of convicted prisoners who had not yet completed their sentences.²⁵ This announcement came even though the Sheriff had threatened to release thousands of prisoners just three years ago.²⁶ On each occasion, the stated reason for the early releases was lack of space and lack of tax dollars to build new jails.²⁷ At the present rate, for every person who goes to jail, another will be released early. Mandatory minimums and other tough drug laws have not solved our drug problem. We do not need new prisons. We must put the right people in prison!

What does it cost to put just one drug dealer in prison?

By estimation, the cost for arrest and conviction of a drug dealer averages \$150,000 alone. The cost of each additional prison bed is at least \$70,000.²⁸ The cost to house a federal prisoner exceeds \$20,000 annually²⁹ and, with the average drug sentence longer than seven years,³⁰ this figure balloons to another \$140,000. The total amount,

23. William L. Armstrong, *Prudent Use of Prison Space: The Sentencing Improvement Act*, 11 J. LEGIS. 237, 238 (1984).

24. *Id.*

25. Mark Sabbatini, *Budget Cuts Prompt Early Prisoner Release*, L.A. TIMES, Mar. 3, 1995, at B1.

26. *Id.*

27. *Id.*

28. U.S. GENERAL ACCOUNTING OFFICE, PRISON COSTS: OPPORTUNITIES EXIST TO LOWER THE COST OF BUILDING FEDERAL PRISONS 29 (1991).

29. *Many Drug Criminals in Federal Prisons Found Not to Be Violent*, L.A. TIMES, Feb. 5, 1994, at A16.

30. Marcia Chambers, *Sua Sponte*, NAT'L L.J., June 7, 1993, at 13, 14.

in excess of \$360,000, could educate several hundred young people. Moreover, for each drug dealer in prison, the public incurs related welfare costs.³¹ On the other hand, studies show that every dollar spent on treatment and education saves approximately five dollars in related welfare costs.³²

What is the effect of the "war on drugs" policy on the black community?

One-fourth of all young black men in the United States are in the prison system, on probation, or on parole,³³ many having been convicted of nonviolent drug offenses.³⁴ In the nation's capital, over forty percent of young black males are in jail or on parole.³⁵ Additionally, over ninety percent of young black males in Washington, D.C. have arrest records.³⁶ These figures are not dissimilar for inner-city black males in other large urban areas throughout the country.³⁷ Two-thirds of black male high school students will be dead, severely disabled, or in prison before age thirty. Most of them will be incarcerated for nonviolent drug offenses.

For every black male who goes to college today, three others will go to prison.³⁸ At this rate roughly one-half of all young black males in the nation will have been arrested and have gone to prison by the year 2000. After serving lengthy sentences, most will be released back to society, uneducated and unskilled. And, because they are black men with prison records, they will be unemployable, *permanently!* Young Latinos face many of the same problems—and the consequences are as severe.³⁹

What do we do?

31. See, e.g., Armstrong, *supra* note 23, at 240 (arguing that prison costs do not reflect the cost to society as a whole).

32. See generally ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK 27 (1993) [hereinafter AMERICA'S CHILDREN AT RISK].

33. Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* 8 (The Sentencing Project, 1990).

34. *Crime Bill Elicits Strong Reactions From Diverse Groups*, THE THIRD BRANCH, March 1994, at 4.

35. See Jamin B. Raskin, *Inmates of the District*, RECORDER, Dec. 5, 1994, at 8.

36. *Id.*

37. *Id.*

38. John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution, and the Black Community*, 24 U.C. DAVIS L. REV. 557, 611 (1991) (citation omitted).

39. Megan McLaughlin, *Letter to the Editor*, N.Y. TIMES, June 10, 1994, at A28 (citing a study conducted by the Federation of Protestant Welfare Agencies).

Cicero said, "The well-being of the people is the chief law."⁴⁰ I certainly agree. Therefore, let us put pressure on the President and Congress to change the drug laws so that they are fair to all Americans. We must insist that politicians and the media immediately stop using minority and poor Americans as scapegoats for the ills of all of society. We must insist that this country be more honest with itself and with us! We must prevent the so-called Contract with America⁴¹ from becoming a "Contract on Underprivileged America."

We continually hear about drugs and violence in minority communities and, indeed, drug dealing creates violence.⁴² But, I suggest to you that the proliferation of assault weapons and guns is the main cause of violence throughout this country. According to the National Education Association, forty children are killed or injured by guns every day.⁴³ Gunshot wounds are the leading cause of death for both black and white male teens in the United States today.⁴⁴ And yet presidential candidate and United States Senate majority leader, Bob Dole, is calling for a roll back of the assault weapons ban.⁴⁵ The general arrest rate for juveniles rose more than twenty-five percent in the last ten years,⁴⁶ with an almost eighty percent increase in the number of murders committed by juveniles with guns.⁴⁷ We must continue to urge federal and state governments to adopt and enforce strong gun control legislation to protect our young people.

40. AMERICA'S CHILDREN AT RISK, *supra* note 32, at 77 (citation omitted).

41. REPUBLICAN NAT'L COMM., REPUBLICAN CONTRACT WITH AMERICA (1994).

42. *See, e.g.*, Jaqueline Bryks, Note, *Exigent Circumstances and Warrantless Home Entries: United States v. MacDonald*, 57 BROOK. L. REV. 307, 331 n.139 (1991) (discussing violence associated with territorial disputes among rival drug dealers); Robert L. Hotz, *Experts Warn of New Generation of Killers*, L.A. TIMES, Feb. 18, 1995, at A29 (linking juvenile homicide with guns and crack cocaine).

43. AMERICA'S CHILDREN AT RISK, *supra* note 32, at 38 (citing National Education Association News, Press Release, NEA Calls for Efforts to Curb School Violence (Jan. 14, 1993)).

44. C. Everett Koop & George D. Lundberg, *Violence in America: A Public Health Emergency*, 267 JAMA 3075, 3075 (1992).

45. Faye Fiore, *Dole Mounts Drive to Repeal Gun Ban*, L.A. TIMES, March 18, 1995, at A1.

46. Francis B. McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 637 (1994).

47. AMERICA'S CHILDREN AT RISK, *supra* note 32, at 38 (citing R. William Ide III, Remarks at the President's Drug Advisory Council's National Leadership Forum (Dec. 12, 1992)).

Importantly, too, federal and state governments must make substance abuse treatment a priority, emphasizing drug use as a *health* problem. We should promote treatment and prevention, rather than harsh criminal sanctions and incarceration, which have proven to be unfair and unworkable.

Given the sharp increase in juvenile violent crime—especially gun crimes by young males against other young males, minority and white—Congress and state legislatures should focus their legislative and financial efforts on the problem of youth crime.

Between 1985 and 1990 the firearm homicide rate among black males ages fifteen to nineteen almost tripled from 37.4 to 105.3 per 100,000;⁴⁸ among black males ages twenty to twenty-four years old, the gun homicide rate rose from 63.1 to 140.7 per 100,000.⁴⁹ Even among younger black males, ages ten to fourteen, the rate of firearm deaths rose from 3.0 to 6.9 per 100,000 according to the National Center for Health Statistics.⁵⁰ The same report shows significant gun violence among young white males as well, with an increase of gun deaths from 5.8 to 14.0 per 100,000—over 150% increase for males age fifteen to nineteen.⁵¹ For white males between twenty and twenty-four, the rate grew from 9.9 to 17.1 per 100,000.⁵²

Most criminologists agree that most criminals retire from crime before age forty.⁵³ Law professor Albert Alschuler of the University of Chicago believes, as I do, that crime rates are driven by demographics.⁵⁴ For example, if the general population has a larger percentage of young males—that is, ages sixteen to twenty-three, the rate rises; if not, the rate declines.⁵⁵

It seems clear that concentrating on directing juveniles and young males away from crime should pay big dividends for all of us. But, seventy percent of government spending on crime control is for enforcement, leaving only thirty percent for prevention.⁵⁶

48. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 13, at 385 tbl. 3.137 (1992).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. David Hess, *Massive 20-Year Crime Crackdown Had Little Effect*, DENV. POST, Jan. 25, 1994, at A9.

54. *Id.*

55. *Id.*

56. U.S. GEN. ACCOUNTING OFFICE, *CONFRONTING THE DRUG PROBLEM 2* (1993).

Following the currents of media-driven public opinion, politicians in Washington and the state capitols attempt to win votes by legislating harsher penalties for younger and younger children. This results in a loss of a whole generation of young men and a waste of money. Instead, we must look for ways to prevent their entry into crime. Forty and fifty years from now we will still be paying an average of \$30,000 per year in today's dollars to house harmless octogenarians in prison—their greatest threat to society being the cost of the incarceration.

Criminal justice professor Frank Cullen at the University of Cincinnati recently said:

[A] rational public discussion of crime is not occurring

At every level, from Congress to the state legislatures, there are lots of punitive policies being proposed without any—I mean, *any*—consideration as to whether they can work or not. It's irresponsible, but no political leader now, in this climate, can risk standing up to it.⁵⁷

One is reminded of the French politician who, upon hearing a mob in the street below his window, said, "I must go down and see where the people are going, so I can lead them."⁵⁸

Finally, we must provide ethical and emotional support to our young people. It used to be said that "it takes a whole village to raise a child."⁵⁹ We do not live in villages any longer—barely in communities—but it still takes a whole family, nuclear and extended, to give the love and guidance that will help ensure a child's future success. These families must include fathers—fathers responsible for the children they sire!

I close with a folk parable:

Two men were fishing by a stream when an infant floated past. The first fisherman jumped in, rescued the child and handed him up to safety in the second fisherman's arms. No sooner had they settled the child down on the grass, when a second infant floated along. Again, the fishermen jumped in and rescued the baby. A third baby floated along, a fourth, and so on. The fishermen saved each in turn.

57. Hess, *supra* note 53.

58. See RESPECTFULLY QUOTED 194 (Suzy Platt ed., 1989) (attributing variation to Alexandre Ledru-Rollin, a leader of the 1848 French Revolution).

59. Linda D. Elrod, *Restructuring Schools as Families: Report of a Conference*, 28 FAM. L.Q. 347 (1994) (reciting an African Proverb).

Finally, a whole group of babies came floating downstream. The first fisherman grabbed as many as he could and looked up to see his friend walking away. "Hey," he shouted, "what's wrong with you? Aren't you going to help me save these babies?" To which the second fisherman replied, "You save these babies, I'm going upstream to see who's throwing all those babies into the river!"⁶⁰

60. Folk Parable, *reprinted in AMERICA'S CHILDREN AT RISK*, *supra* note 32, at v.