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TOWARDS A COMPASSIONATE AND COST-EFFECTIVE DRUG POLICY: A FORUM ON THE IMPACT OF DRUG POLICY ON THE JUSTICE SYSTEM AND HUMAN RIGHTS*

**New York Society for Ethical Culture
April 11, 1996**

DON JOHNSON:

Good evening. My name is Don Johnson. I'm the senior leader here with the New York Society for Ethical Culture. We want to welcome you to this forum tonight.

Ethical Culture is now celebrating its 120th year here in New York City. From its beginning, Ethical Culture has been committed to attributing worth and dignity to every human being. We believe deeply in ethics as the bonding force among people and as a means by which each of us can reach personal integrity. We believe the best test of religion is one's actions and deeds, and particularly how we treat one another.

And we have throughout our history been committed to the idea that it is human beings who are responsible for the world in which we find ourselves. If our world is to be better, it is because we will give ourselves to the kind of vision, thoughtfulness, attentiveness and action that will make it a better place.

We have also, particularly in this time period when our culture seems so needy, come to emphasize the public interest, and particularly public dialogue, the need for people to be involved in conversation with one another, not with sound bites, not with yelling at one another, but true dialogue where issues are talked about in a rational and balanced way.

We are also committed to helping ensure that both we, ourselves, and others have the opportunity to become active in our citizenship, and that the goal of all of this is that we may find within our midst as a nation the kind of civil courage in which we can function in ways that will make sure our country moves forward.

We welcome you to this program tonight and thank all of those who are on the panel, and I want to thank Tom Haines for his role in this program, as well as our own Social Service Board. Thank you for being here.

* EDITOR'S NOTE: This transcript has undergone minimal editing to remove the cadences of speech that appear awkward in writing.

TOM HAINES:

My name is Tom Haines. I'm the Chairman of the Executive Committee of the Partnership for Responsible Drug Information. This might be called our "coming-out" party. It is the first public display of what we do.

We were brought together by a group of people who were interested in getting drug policy reconsidered. "Reconsidered" is to some legalization, to some treatment, and to others, more enforcement. We think that the problem in the present atmosphere is that drug policy is not being thought about by the politicians, by the media, et cetera.

This came to us because we started thinking about this. We were horrified at what was going on with the current drug war, and we started thinking about it and thought maybe we would go back to look at what happened during the repeal of the 18th Amendment¹ and alcohol prohibition.

We discovered that there were several groups that were responsible for the repeal of alcohol prohibition, a principal one being a voluntary committee of lawyers. This group had decided that what was happening in society was not what was intended by the temperance laws. And so they got together. They were elite lawyers and they got together and they decided that they would see what could be done about alternatives. And so they had a retreat, they had a number of meetings and invited attorneys to join them, and they went through bar associations, of all things, to get the laws reconsidered.

Ultimately, they got a resolution passed by the American Bar Association that called for the repeal of the 18th Amendment and the associated laws, the Volstead Act.²

Ultimately, after that, they got to the Democratic and the Republican national conventions and presented a platform plank. And I'd like to read to you just one "whereas" from that plank. It says, "Whereas, the direct results of attempted enforcement have been to imperil the liberties of the people, to finance organized crime, to plunge politics into corruption, to clog the courts of justice, to fill the prisons, and to subject important communities to a rule of conduct which they disapprove and strenuously resist, so

1. U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI. See generally DAVID E. KWIG, *REPEALING NATIONAL PROHIBITION* (1979).

2. Ch. 85, 41 Stat. 305 (1919).

that large sections of the electorate have come to regard the Federal government as a hostile and alien power.”³

This “whereas” was written in 1931. It seemed to us that this is our problem today. The VCL gave us an outline as to how to proceed, and the outline indicated that you don’t go to politicians to ask them to change the laws, because politicians in the very next election, when they announce that they would like to reconsider the laws, will be killed by the accusation that they are in favor of popular use of controlled substances. At that time it was alcohol, now it’s drugs.

The media today has the same sensitivity with regard to their advertisers. They don’t want to take any position that appears to favor drugs. And so we thought maybe we should follow their track. And then we started looking at bar associations to see where they were at. And we discovered that there were three bar associations that had already considered these drug laws.

The first one is the Rochester bar. They issued a report that was called “Justice in Jeopardy.” After appointing a committee to the task, they started to look at the drug laws from the point of view of the damage the laws were doing. And then another such committee was formed by the Association of the Bar of the City of New York, and the person that was probably the most influential in forming that committee, was a gentleman named Robert Sweet. And he proceeded, as a liaison from the Twentieth Century Commission of the Bar Association, to suggest that drugs were one of their principal issues. And he finally wound up as the chairman of this Drugs and the Law Committee.

He subsequently turned the chairmanship of that committee over to one Kathy Rocklen, who is now the chairman of that committee. And under her guidance, after the hearings or the discussions that were held by the committee through Judge Sweet, through Judge Sweet’s tenure and through Kathy Rocklen’s tenure, for 12 years, they finally produced a report. The report is entitled “A Wiser Course than Drug Prohibition.”

We then discovered that the County Lawyers Association, a third bar, had taken on this issue, and they are now in the process of releasing a report that’s in the same direction as the first two.

So we thought that there should be public hearings on this issue, or public forums where people could debate and discuss and get

3. The Voluntary Committee of Lawyers, Inc., Resolution Urging the Repeal of the 18th Amendment (unpublished document on file with the FORDHAM URBAN LAW JOURNAL).

out what's going on, so that everyone can hear what their thoughts are, when people have specialized in this issue. Hence, our panel today. This is the first of three.

And we would like to invite you to the other three, but we'll talk about that later.

I'd finally like to thank the panelists and Judge Sweet for coming to this forum. I'd like to thank Kathy Rocklen for agreeing to be the moderator. And I'd like to thank our co-sponsors, which I'll introduce to you at the end of this session.

Thank you very much.

KATHY ROCKLEN:

Good evening, ladies and gentlemen and honored guests. Thank you for joining us at this public forum organized to explore the subject of drug policy reform.

This evening, a distinguished member of our judiciary and a tireless advocate for drug policy reform, Judge Sweet, will be joined by experts on drug policy from the medical and academic worlds, private foundations and other interested organizations, who will give us their views on the impact of drug policy on the justice system and on human rights.

We'll begin the program tonight with an address by Judge Sweet, who is a United States District Judge for the Southern District of New York. Judge Sweet's remarks will be followed by a question and answer period in which panelists and the audience will participate, as well. Our panelists are Ernest Drucker, Professor of Epidemiology and Social Medicine at Montefiore Medical Center, Albert Einstein College of Medicine; Robert Gangi, executive director of the Correctional Association of New York; Julie Stewart, who is the founder and president of Families Against Mandatory Minimums; Richard Stratton, the editor-in-chief of "Prison Life" magazine; and Carol J. Weiss, addiction psychiatrist and Clinical Assistant Professor of Psychiatry and Public Health at Cornell Medical Center.

We're going to begin with Judge Sweet's address. Judge?

I'm sorry. I was admonished to remind everybody that you've got question cards inside your programs. And so if you would complete these, there will be runners available to take them up to the front so that we can present them to the panel. Thanks.

HON. ROBERT SWEET:

Good evening, ladies and gentlemen, and thank you, Kathy. How fortunate we are to be in this place and in this company. I see many good and accomplished citizens of our city here. One of the pillars of New York for many, many years is Ted Kheel, sitting modestly in the back. And there are others equally distinguished, I know.

Everybody here owes a great debt of gratitude to Tom Haines and to Mary Cleveland in particular, and to the Partnership for Responsible Drug Information. Their organization for this evening and those to follow is superb. And I must believe that what they've done and are doing is going to open, pry open the minds and hearts of our fellow citizens.

To prove my point, let me turn to the panel. Our moderator is bright, and a leader of the bar in our city. And her committee has produced the most thoughtful and effective report on drug policy which has emerged from the organized bar.

Ernie Drucker is a distinguished academic at an outstanding institution, and a long-time and effective advocate for human rights, not only here in this country, but internationally.

Julie Stewart has courageously fought against arbitrary incarceration, and she's built an effective organization bit by bit with her own conviction and determination.

Robert Gangi and Carol Weiss and Richard Stratton are recognized leaders in their special fields of competence.

But right now it's our collective responsibility, you and I, together with the panel, to search for a spark of knowledge that may illuminate this very critical issue for our present-day world.

The assignment that I've been given is to consider the impact of our present drug policy on the justice system and human rights. Of course, this is just the right place to do that. For 120 years, as you've heard, this Society has sought to promote understanding and the knowledge of ethics and morality and human rights. From Felix Adler to Don Johnson, this Society has been led by thinkers steeped in the concepts of humanism, democracy, and intimately familiar with religious tenets right across the board. Reform rabbis, Baptist ministers, Episcopalians, Unitarians, agnostics, martyrs, countless concerned citizens have strengthened this Ethical Society over its existence.

And tonight, this Society is joined by thirty other organizations concerned about the health and the ethics and the justice of our society. So we must believe that a coalition and an ethical force

can effect change, no matter how difficult it is to break through the barriers of today's mythology and accepted wisdom.

Of course, I wish I were a better and more famous keynoter for you. I wish, for example, that I were President Clinton. I wanted to be President for a long, long time. But obviously, I'm not. I am, however, a Federal judge, and recently we've been getting rather more attention in the media, although some of us have been doing it the hard way. (Laughter) Anyway, what you see is what you've got, and I'd better get on with it.

To shorthand my conclusion right up front, let me say that I believe our current policy of criminalizing the use and the commerce of particular mind-altering substances has failed of its purposes, has weakened the justice system, and impinged upon human rights. As a consequence, I believe that criminal sanctions should be removed and our society should be educated about the use of drugs, all drugs, and that to the extent that drugs create a problem for the society, that problem be considered for what it is, an issue of public health.

I'd like to perform the task of examining this subject by first simply stating some facts, which I think are incontrovertible, then to offer some personal observations about the issue which I've gathered over the past six and a half years. Finally, despite the much advertised quality of judges to dwell in ivory towers or occasionally even in very expensive concrete and steel ones, it would almost be irresponsible not to recognize some of the implications of drug policy on Fourth Amendment issues. One might even say, not to do so would be unbearable.

Finally, I'd like to offer some thoughts about the future for drug policy, justice system, and human rights. As they used to say on "Dragnet," if there are any of you here old enough to remember that show, "Just give me the facts, ma'am."

A hundred years ago, we had no national policy with respect to mind-altering substances, no complaints about the effects of drugs on the society, although morphine and cocaine were freely available. The only laws on the subject were ordinances in San Francisco prohibiting opium dens,⁴ which were an expression of prejudice against Chinese immigrants.

At the beginning of the century, the temperance movement gained strength, and it created an atmosphere which began to seek

4. See *Ex parte Hong Shin*, 98 Cal. 681 (1893), citing *San Francisco, Cal.*, St. 1880, p. 102 (Apr. 16 1880) (repealed 1947).

an absolute ban on alcohol. The Harrison Act⁵ was enacted in 1914 without debate as a revenue measure. It taxed marijuana and all drugs. In 1917, near the end of World War I, the prohibition against alcohol use was enforced by criminal sanction, and Prohibition was under way. And the same mindset in the Twenties resulted in the establishment, still in the Treasury Department, of a Narcotics Division to deal with the perceived problems of addiction and the clinics which distributed drugs to addicts.

In the Thirties, the Food and Drug and Cosmetic Law⁶ was adopted, and the Federal Bureau of Narcotics was formed. Harry Anslinger, an empire builder who saw his chance, became its head. He demonized marijuana, sought stronger enforcement and harsher penalties, and outright criminal prohibition.

"Reefer Madness"⁷ portrayed the inevitable destruction of the individual who smoked a joint. Mandatory minimum sentences of two years' duration were adopted in 1951, and drugs started being the scapegoat for the ills of the society, reaching perhaps its climax in 1987 when Congress began imposing mandatory minimum sentences of up to 20 years and life for those participating in drug distribution.⁸

Treating the use of drugs as a health measure lost out to criminal prohibition. And what's been the result of this criminal prohibition and why doesn't it work?

We have the highest jail rate for any Western nation, almost a million incarcerated at a cost of \$20 billion a year.⁹ Federal drug cases have trebled in ten years, up 25 percent in 1993, with marijuana cases up almost half that amount.¹⁰ The total Federal expenditure, in the drug war this year under last year's proposed budget would exceed \$17 billion, over a billion of which will go to Federal prisons.¹¹

Ten years ago, the expenditure to enforce the prohibition against drugs was \$5 billion for all governments, Federal, state, local.¹² At the same time, over 77 million Americans have used drugs at one

5. Ch. 1, 38 Stat. 785 (1914).

6. Federal Food, Drug, and Cosmetic Act (Copeland Pure Food and Drugs Act) (FFDCA) (Humphrey-Durham Act), ch. 675, 52 Stat. 1040 (1938).

7. REEFER MADNESS (Motion Picture Ventures 1936).

8. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 841(b) (1994)).

9. See, e.g., Robert W. Sweet, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 44.

10. *Id.*

11. *Id.*

12. *Id.*

time or another, with 22 million using them recently, in the latest survey. Those seriously dependent are estimated to be about six million, with maybe a million or a million and a half seriously disordered.¹³

Serious violence, street crime are increasing, with drive-by shootings and random violence. It's very hard, parenthetically, to get any data on these matters and to get any systematic knowledge. But, there is one good study that shows that in 1988, 40% of all New York City felony indictments were for drug violations.¹⁴ And the study of the homicides indicated that 78% of drug-related crimes were systemic, that is, turf related. We can't walk the streets safely without looking over our shoulders. More money, more crime, more prisoners, about the same number of addicts. So those numbers demonstrate to me that our present prohibitive policy has failed flatly and without serious question.

But why doesn't it work? Why is it that when one kingpin falls, another rises to take his place? Why are drug rings managed from the prisons?

Because the profits from the trade are huge. Because the trade is illegal. The *Economist* estimates that the markup on cocaine and heroin is 20,000% from the cost of materials to the sale to the consumer.¹⁵ The drug market in the United States is estimated at about \$150 billion a year.¹⁶ In some of the cases before me, it's been established that in New York City today a kilo of cocaine is sold at retail for \$50,000 to \$75,000.¹⁷ You can get it wholesale in New York for \$15,000 to \$20,000. That same kilo can be purchased in Costa Rica for \$5,000, and in Colombia for \$1,000. In a recent case, I had a group of distributors, and this was just one group in an area of the city, that sold 36,500 kilos a month for gross sales of almost \$20 million a month.¹⁸ That persuades me that this \$150 billion figure is not so far off the mark.

13. See, e.g., Mathea Falco, *Toward a More Effective Drug Policy*, 1994 U. CHI. LEGAL F. 9 (1994).

14. Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCIENCE 939 (1989).

15. *The Wages of Prohibition*, THE ECONOMIST, Dec. 24, 1994, at 21.

16. Sweet, *supra* note 9, at 44.

17. See, e.g., *United States v. Benitez*, 920 F.2d 1080 (2d Cir. 1990); *United States v. Jiminez*, 789 F.2d 167 (2d Cir. 1986); *United States v. Nunez-Rios*, 622 F.2d 1093, 1095 (2d Cir. 1980); *United States v. Matos*, 781 F. Supp. 273, 275 (S.D.N.Y. 1991); *United States v. Matos-Peralta*, 691 F. Supp. 780 (S.D.N.Y. 1988); *United States v. Serna*, 625 F. Supp. 548, 552 (S.D.N.Y. 1985).

18. Sweet, *supra* note 9, at 44.

A Federal study of narcotics described in the New York Times in December of 1989 was headlined "This study means that narcotics is one of America's major industries."¹⁹ The Federal Reserve tells us \$125 billion in currency is missing from the economy, most of it attributable to drug sales, but who knows? It's a vast underground, untaxed, unregulated economy. And it's the money in the trade that drives it.

Attorney General Reno has reported the conclusion of a Miami grand jury that unless interdiction of drugs is 75% effective, it cannot succeed. And she has characterized the 75% figure as impossible. It's the profits, literally warehouses stuffed with cash, that make the drug trade unstoppable and an "equal-opportunity" employer.

To paraphrase George Stephanopoulos, it's the money, stupid. Even the most hardened drug warrior has difficulty with these facts. And any factual cost/benefit analysis for the society as a whole seems clear. End the criminal prohibition and the illegal profits and treat the use of mind-altering drugs as we do tobacco and alcohol. Treat them as they are, a health problem.

We do seem to have learned something. The term "drug war" seems to be in disrepute. And of course the reason is obvious. It certainly can't be argued that the conditions which we face are the consequences of some malevolent plan of a foreign power. And our territorial sovereignty is no way challenged. This is not a war, but the result of our own native-grown desire to use drugs. We're 6% of the world's population, and we consume 50% of its mind-altering substances, according to Joe Califano.²⁰ To quote Pogo, we have met the enemy and he is us.

If these are the facts, and I do think that they are accurate, what was it that woke me up and forced me to recognize them?

When I was in college, I sang, "Cocaine Bill and Morphine Sue, strolling down the avenue two by two." I had no idea what those words involved. "Hey, baby, have a (sniff) on me, have a (sniff) on me." I had absolutely no idea what that was all about. During the war, of course I became aware of the dangers of alcohol, but there was no drug use on my ship. In the Fifties, I was an assistant United States Attorney, and I felt myself fortunate that I was not assigned to prosecute drug cases, because it seemed to me it was

19. See, e.g., *In Quotes*, N.Y. TIMES, Dec. 10, 1989, § 3, at 14 (quoting Robert B. Reich).

20. See JOSEPH A. CALIFANO, THE 1982 REPORT ON DRUG ABUSE AND ALCOHOLISM (1982).

the futility of the Prohibition era. But I didn't think about it much, and when I became Deputy Mayor of the City in the middle Sixties, I for the first time really focused on the issue. Those were the days of methadone maintenance and psychological treatment and therapeutic communities.

After I became a Federal judge, I managed to avoid a searching examination of the problem, except in my role as an administrator of justice in adjudicating drug cases and sentencing offenders.

Then in 1987 came a mandatory minimum sentence. In 1987 came the laws,²¹ and in 1988 came a sentence. The laws were initially declared unconstitutional by the lower court judges, a conclusion which, frankly, I thought then and think now has a great deal of merit. But anyhow, I finally was forced to sentence a first-time offender just eighteen years old to a mandatory minimum term of ten years. Because he was working at the only job he could get: as a security guard in a "drug store." Wrong kind of drug store.

I thought then and remain convinced now that it was an unjust sentence. And it forced me to think about the criminal drug prohibition and its effect on the justice system and society.

When I talked to some of the leaders of the thinking in this area and discovered some of the facts that I've just recounted, I reached the conclusions which I've stated. And then I stated those conclusions at a meeting which I thought was closed to the press, but which turned out not to be. And I found myself on the front page of *The New York Times*.²²

Since that time, December of 1989, until this evening, I've been a participant in the debate, a respondent in proceedings against me, and the subject of a number of epithets, "muddle-headed" being the kindest among them.

Let me share some of the reactions that I've had during this process. The first is the astonishing difficulty in explaining the position and to center the discussion on facts and realities. Very early in the process, on my first exposure on a national interview program, I encountered the "crack babies," and they have remained with me ever since. The numbers are elusive, but the imagery evokes very powerful emotions.

Over time, of course, research, particularly here in New York and I think in Ernie's institution, has revealed that lasting damage has not been established, and that the difficulties of the newborns

21. 21 U.S.C. § 841(b)(1)(A)(viii) (1994).

22. See, e.g., Stephen Labaton, *Federal Judge Urges Legalization of Crack, Heroin and Other Drugs*, N.Y. TIMES, Dec. 12, 1989, at A1.

have arisen out of a constellation of problems, including alcohol, malnutrition, inadequate prenatal care, as well as drug use. Of course, that makes perfect sense. But it's the devil's own job to get the issue to be considered rationally. On almost any discussion program, the best one can do is to utter a few sound bites. To advance a thesis, to consider an antithesis, and to seek a resolution is just not possible. Image prevails over all else. The controversy, the contest is what counts, not the merits underlying the controversy.

Kathleen Jameson at the Annenberg School at the University of Pennsylvania recounts Leslie Stahl's interchange with Michael Deaver concerning Stahl's series covering President Reagan's re-election campaign in 1984. Leslie Stahl had a series of programs in which she captured the events which President Reagan participated in, and then she gave the facts with respect to the events. One that I remember was President Reagan at Omaha Beach with flags and veterans, and Leslie Stahl said, "But, in fact, the Reagan Administration has not assisted the veterans." And then she gave facts and figures. Another one was a picture of President Reagan at the State of the Union address pointing to a woman in the balcony, a community activist who was black. And there was a split screen with President Reagan and the woman and a discussion of the President's comments about what he'd done for the community, and so on, to identify Reagan with the black constituency. And Leslie Stahl gave the facts.

Well, there were a number of these, five, six, seven. And it was carried on CBS, and the day afterwards Michael Deaver called Leslie Stahl up and said, "Leslie, that was a really great program."

And she said, "Did you watch it?"

And he said, "Yeah, yeah, I watched it."

And she said, "Well, didn't it kind of get to you a little bit?"

And he said, "Oh, that stuff you said? No, that doesn't matter. You showed the pictures again."

And, of course, that's the issue.

These issues, these images in our drug debate so far have not been apple pie and motherhood. Over the last five years I've observed another dishonesty in the debate besides imagery and war terminology. Drugs and the drug user are made scapegoats, a phenomenon which is the subject of a clear analysis by Dr. Thomas Szasz in his recent book, *Our Right to Drugs*.²³

23. THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (1992).

Drug use is vilified. The user is a menace to be prosecuted and jailed. Now, while the causes for addiction of a particular individual remain uncertain, it has to be conceded that among the elements are genetics, environment, social conditions, psychology, psychological, social deprivation or lack of a strong value structure. But as a society, we blame the victims, not the cause. The "drug war" approaches being a code signal to describe an attack on the underprivileged, the victimized and those against whom society has discriminated.

Although blacks make up 12% of the nation's population and but 20% of those who use drugs, more than 50% of the 750,000+ people arrested for drug abuse violations each year are black.

Nationally, one out of three black men between the ages of eighteen and thirty is under correctional control, and the percentage approaches a staggering 50% in our nation's capital. And drug enforcement is the principal cause. Maybe it's not too much to say that in this regard the justice system has become unjust and discriminatory.

Individual rights have also suffered in the name of the war on drugs. The elimination of an accused's right to pre-trial release for most charges under the Controlled Substance Act,²⁴ heightened restrictions on post-conviction bail, invasions into the attorney-client relationship through the criminal forfeiture provisions of the Comprehensive Crime Control Act.²⁵ Annual requests for wiretaps in 1990 were up over 400% from 1980. Over the past decade, the courts have cut back Fourth Amendment rights, and the criteria that must be satisfied to get a search warrant have been relaxed. In cases involving illegal drugs, the courts permitted the issuance of search warrants based on anonymous tips, tips from informants who have proven to be corrupt and unreliable, permitted warrantless searches of fields, barns and private property near residents, lowered the permissible ceiling for aerial warrantless searches, and upheld the use of evidence obtained under defective search warrants on the grounds that the officers were acting in good faith.

The various holdings taken together have been characterized by some lawyers as the "drug exception" to the Fourth Amendment.

That, of course, leads unavoidably to the controversy surrounding the decision of my brother, Judge Harold Baer, in which he

24. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

25. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 21 U.S.C., 28 U.S.C., 29 U.S.C., and 42 U.S.C.).

suppressed the fruits of a warrantless pre-dawn police search of a car in Washington Heights. The fruits were a significant amount of narcotics, worth the customary millions. He concluded that the search was unreasonable under the facts as he found them.²⁶

The hue and cry extended through City Hall, the Congress, and even to the President.²⁷ The present Chief Judge of the Court of Appeals for the Second Circuit and three of his distinguished predecessors issued a statement pointing out the threat to judicial independence created by this firestorm and the calls for resignation and impeachment.²⁸

There was a rehearing. Additional evidence was presented and Judge Baer concluded upon the additional evidence that there were grounds to make the stop and to conduct the search.²⁹ This week, the Chief Justice weighed in on the issue, only to be opposed by the presumed Republican Presidential candidate, Senator Dole.³⁰

The merits of the decision and whether the decision on the rehearing will be appealed by the defendant and are not, to me, the most significant aspects of this most revealing and disturbing series of events. One point is unescapable: because drugs were involved, the rule of law and the appellate process were ignored. A political attack was mounted, even to the point of suggesting that the role of judges should become part of the national presidential debate, in order to determine which party produced the greatest number of criticizable judges.

It was even suggested that an incorrect decision was a grounds for impeachment, which is contrary to law, appellate procedure, the Constitution and common sense.

Not one of those who attacked the decision, as far as I'm aware, even gave lip service to the protection which is offered all citizens against an overzealous constabulary by the Fourth Amendment. Nor did the difficulty which judges face when they resolve these issues. Not one recognized the threat, clearly perceived by the Founding Fathers, nor their determination to provide the indepen-

26. *United States v. Bayless*, 913 F. Supp. 232, 243 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

27. See, e.g., Michael Kramer, *Cheap Shots at Judges Where Clinton and Dole Take Presidential Politics Too Far*, TIME, Apr. 22, 1996, at 57; Greg Smith & Timothy Clifford, *Judge Backs Off Drug Ruling*, N.Y. DAILY NEWS, Apr. 2, 1996, at 7.

28. *Bayless*, 921 F. Supp. 211, 211 (1996).

29. *Id.* at 217-18.

30. See Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A1.

dence of the judiciary that would permit judges to render unpopular decisions when they concluded Constitutional rights were at stake.

It's both obvious and terrifying, and established by this episode that the misunderstandings surrounding drugs and their use is a genuine threat to our society.

The analogy to Vietnam is most compelling. When the former Surgeon General of the United States, who certainly knew a health problem when she saw one, suggested that the question of our drug policy be studied, she was fired.³¹ When Congress adopted a crime bill which called for a commission to study the sources of crime and violence in the United States, including the effect of drugs, they decided not to fund it.³² In short, as with the Vietnam conflict, our public officials will not tolerate an open examination of the facts.

Just recently, through the good offices of the New School for Social Research, one of the outstanding institutions of our city, I had the good fortune to hear both Robert McNamara and Daniel Ellsberg on the subject of the failure of public officials to tell the truth. Virtually all of those privy to the actual facts by 1966 knew the Vietnam War was not only unwinnable, but based on a false premise. But this truth was not allowed to emerge. When Ellsberg released the Pentagon Papers in 1971, the coverup ended. McNamara in his recent book, in retrospect and publicly, admits that he and the President misled, that is, lied, to the American people.

There is, then, not only an issue of appropriate policy in terms of cost/benefit analysis, but a fundamental issue of morality, of truth-telling. And here the analogy is even more telling. For the fact is that the drug war as it's currently defined cannot be won and the people should be told so.

There's a subsidiary justification sometimes heard for this coverup, then and now. The people support the war, and therefore there's no reason not to tell them what they want to hear.

But that public support, if indeed it is there, is a product of ignorance, fear and emotion, and, as in the case of Prohibition, reality can be recovered if the truth is told, which is, of course, why all of us are here tonight.

31. See Robert Kearns, *Legalize Drugs? Elders Sparks Firestorm*, SALT LAKE TRIB., Dec. 9, 1993, at A18. However, the controversy regarding Elder's stance on drugs occurred well before her dismissal.

32. See Ann Devroy & Eric Pianin, *GOP Weighs in on Ounce of Prevention; Budget Critics Call Program that Hired Panetta's Wife a Waste*, WASH. POST, Mar. 14, 1996, at A4.

Notwithstanding the compelling logic of the Vietnam analogy, these present circumstances raise a personal problem for me, which I'll impose on you by sharing. I continue to believe in the conclusions that I reached in December of 1989, but I don't have to get hit over the head to know that this view in the minds of some is a demonstration of what is wrong with the judiciary—soft-headed, liberal judges—and gives ground to those who would weaken the independence of the judiciary. To challenge what is perceived as a majority view, even in the heartfelt conviction that the majority view is in error and at least must be examined, could be said to be unwise and harmful to the support by the public that the judiciary must have in order to perform its function. Yet, as in the case of Vietnam, dissent must be the life blood of a free society and our confidence in the rule of law has to be strong enough to permit an open discussion of a major national issue.

So, what to do? I think we must press on and recommend reform. We should treat this as a health problem and learn from the experience that we've had with tobacco, where education has reduced the usage 50%. We should medicalize marijuana. We should be sure that needle exchange is offered to help those infected by AIDS. Openness and education, not incarceration, should be the hallmarks of the policy. If nothing else were to force reconsideration of our policies, the AIDS epidemic should be enough.

I have a simple proposition. Take the \$50 billion a year now being spent on enforcing the criminal prohibition on drugs and spend it on education. All kinds of education, including health education. Accept the recommendations of President Nixon's commission on the drug laws and that of the National Academy of Sciences in 1982, and end the criminalization of marijuana.³³ Drugs should be treated the same as alcohol: barred from minors, subject to truth in advertising, and a source of tax revenue, and not left underground. And, like alcohol, those who harm or pose a threat to others under the influence of drugs should face criminal sanctions.

The public policy debates should strike at the heart of the issue, not at its fringes.

Is it time in the world to recognize that the responsibility for conduct is an individual matter? The consequences are individual.

33. See, e.g., Dale Gieringer, *California's Bankrupt War on Pot*, S.F. EXAMINER, Aug. 24, 1990, at A23; John P. Walters, *Illegal Drugs and Presidential Leadership*, WALL ST. J., Sept. 24, 1996, at A22.

And that societal decrease can be effectuated only if they accord to the mores of the society. That Lord Moten was right: the test of a civilized society is its compliance with the unenforceable.

And above all, it's morally wrong for public officials to conceal the facts.

There are signs of progress, and maybe we'll hear some more about that tonight. As Tom said, the end of prohibition came not from strong Congressional leadership, but through an increased awareness from the Wickersham Commission and from lawyers and concerned citizens, and the electorate came to the persuasion that Prohibition no longer made any sense.

It's through honest discourse and the care and attention of people like yourselves that this policy can and will be changed. There remain, even in our modern world, moments of magic and power when a transforming idea is expressed and understood by those present in such a fashion that it changes and clarifies. Martin Luther King on the Mall, Marian Anderson at the Lincoln Memorial, the student protests against the war in Vietnam, the abolition movement, even the Declaration of Independence.

I cherish the hope that this may be such a moment, and this is the right place and the right group. And maybe a spark will have been struck that can be converted by those present here and other like-minded citizens into a bright light of knowledge and conviction that can illuminate our public discourse and change our present drug policy. Thank you very much.

KATHY ROCKLEN:

Thank you, Judge Sweet. We're going to turn to the question and answer section of this program now. And since the purpose of this forum is to encourage dialogue, those of you who have questions please take a moment to write them on the cards we provided, and someone will come get them.

I've got a couple up here, so I'll start with what's before me, which is a question for Judge Sweet. "Could you comment on the impact of mandatory sentencing laws both on the numbers of people going to prison and on the balance of power among judges, prosecutors and defense attorneys?"

HON. ROBERT SWEET:

I think the Senate Judiciary Committee is trying to collect from all judges reactions to those very questions. There's no doubt that the sentencing guidelines have a serious impact on the prison pop-

ulation. Whether it's an increase of about 50%, I'm not sure. But it's somewhere in there.

In terms of the distribution of power in determining sentences, the only power is with the prosecutor. Because it's only the prosecutor that can, if you will, make a deal that will avoid the imposition of mandatory minimum sentences. I suggest that the world is now stood on its head, when the prosecutor has this power to determine sentences and judges are totally out of the mix. I'm sure that Julie or Bob or others would have useful things to add to that.

ROBERT GANGI:

In New York, the effect of mandatory sentencing laws that relate to drug offenders has been extraordinary. Last year, 45% of the people sent to state prison were sent for drug offenses. And most of them are not major dealers or kingpins. Most of them are low-level street dealers and users. In fact, in New York State there are almost 6,000 people in state prison on the sole conviction of drug possession. Not selling, not dealing, just drug possession. And it costs nearly \$200 million a year of the state taxpayers' money to keep those people confined.

And the total prison population of drug offenders in New York State is over 23,000, and that's about 34% of the state prison population.³⁴ So the effect of these laws, mandatory sentencing laws and the so-called war on drugs, has been extraordinary in terms of the impact on the prison population and the effect on the state budget.

The only thing that's going to get more money in Governor Pataki's budget proposal for this year, the only area of government funding, is prisons.³⁵ He's proposing cuts in virtually every other area of government funding, including community-based drug treatment.³⁶ So the "war on drugs," which sort of provides the fuel for the engine which is the mandatory sentencing laws, not only drives an expanding prison population, but also dramatically distorts our government priorities in New York State.

34. See David C. Levin, *Curing the Addiction to Punishing Addicts*, N.Y. L.J., May 24, 1993, at 2.

35. See Robert Gangi, *Pataki's 'No Frills' Prisons Mean Trouble For State*, BUFFALO NEWS, Mar. 14, 1996, at B3 ("Pataki's recently submitted budget, for example, calls for huge increases in prison construction at a time when New York State is cutting virtually every other area of government funding.")

36. See *id.*

KATHY ROCKLEN:

Julie, could you comment on alternative approaches to mandatory minimums?

JULIE STEWART:

No, that's not my expertise. But I would just like to comment on mandatory sentencing, for those of you who don't know what it is. The term "mandatory minimum" means that the judge has no discretion, but must give the sentence that the legislators have determined is appropriate, based on the weight of the drug. It has nothing to do with the role of the defendant, the defendant's role in the offense or his culpability.

These sentences were passed in 1986 and have fueled the federal prison growth. In 1980, 25% of the people in federal prison were there for drug offenses;³⁷ today that number is 62%.³⁸

As far as alternatives, what my organization promotes, and Judge Sweet probably wouldn't fully agree with me here, is a guideline system of some sort that allows judges to have a starting point for sentencing any offense, but then be able to ratchet the offense up or down, depending on the circumstances of the case. We support that system simply as a way to try to create some kind of uniformity, so that a judge in California and a judge in Texas at least have a similar starting point for a similar crime, but then are able to factor in all the specifics of the case.

HON. ROBERT SWEET:

There's another aspect of mandatory minimums that's really quite inhuman. You face a defendant on the day of sentence. Parenthetically, almost every defendant on the day of sentence, as he looks at the bench, knows that a mistake has been made, and will say, "I'm sorry. It was a bad mistake." But I am simply a clerk. I have no power. He is being sentenced by the Congress of the United States, which never sees the defendant, knows nothing about his crime, knows nothing about his history, knows nothing about his background.

Now, that is, in my view, a pretty inhumane system.

37. See Claudia MacLachlan, *New Prisoners Near Annual Record*, NAT'L L. J., Aug. 21, 1995, at A11.

38. *Id.*

JULIE STEWART:

I should add that there is no parole any longer in the Federal system,³⁹ so when we talk about a ten-year sentence or a fifteen-year sentence, the defendants do the whole time. There is no parole anymore.

KATHY ROCKLEN:

Judge Sweet, would you comment on the New York Police Department's new plans for cracking down on drug dealers?⁴⁰

HON. ROBERT SWEET:

Well, it goes without saying, based on what I have already said at probably much too great length, that quite clearly it won't work. It may be very nice for a section of downtown Brooklyn for a little while, but wait and see what happens in Queens and so on.

But there are two on the panel that I think have some really fairly clear ideas as to these statistics and what this is going to do in terms of enforcement, and I'm thinking in particular—there may be others, but I'm thinking of both Bob and Ernie, as we were talking earlier on just this subject. I think they've got some fairly clear ideas as to how it's likely to turn out.

KATHY ROCKLEN:

Ernie, do you want to comment on this?

ROBERT GANGI:

Am I going first?

KATHY ROCKLEN:

Go ahead.

ROBERT GANGI:

I'd like to go to your previous question about alternatives, which actually might have been my question. So I'll answer my own question.

Alternative punishments and alternative treatment can work. I mean, they're not panaceas, but the evidences is that good, inten-

39. Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984), Pub. L. No. 98-473, 98 Stat. 1987.

40. *Major Gains in Drug Crackdown*, N.Y. TIMES, Aug. 26, 1996, at B2.

sive drug treatment programs can be effective in helping people straighten out their lives, and generally speaking, a good drug treatment program in prison or in the community shows lower recidivism rates than for people who have just been sent to prison. And the question that I always ask people when I'm being accused of some of the things that Judge Sweet says liberals on this issue get accused of, is: "Well, tell me, would you rather encounter someone in a dark alley after they've done three years at Attica or after they've been in a drug treatment program for a year and a half?" And inevitably, the preferred choice is the person coming out of a drug treatment program.

So I think it's very important for us to emphasize that drug treatment does work. Not to present it, again, as a panacea or as a cure-all, but good, well-thought-out, well staffed drug treatment is an effective alternative to prison. And again, to remember, in terms of the politics of this issue, at least in New York State, we're cutting back on drug treatment while we're expanding funds for prisons.

On the police tactics, as far as the "war on drugs" goes, again, the so-called "war on drugs," I think you have to be very skeptical about the mid-term and the long-term effects of the new policy that Giuliani and Bratton have put into effect, that actually started this Monday, on April 8th.⁴¹ It's really very similar to the strategy that Koch and Ben Ward put into effect in 1989, when Koch was running for whatever it was, his third or fourth term as Mayor.⁴²

And what the research showed at that time was that there was a temporary positive effect, in that there seemed to be less drug dealing on the street and drug use on the street. But what the research also showed is that one of three things basically happened. The drug dealing and use on the street came back when the cops left, or the drug dealing and drug use went indoors, where it went on at pretty much the same level, or it moved to nearby communities. So the overall effect seemed to have been negligible on the drug trade and drug use in New York City.

The other criticism that I would suggest is that it's not accompanied by any efforts at drug prevention or drug treatment. I think

41. Mitch Gelman & Michael Powell, *New Top Cop Declares War; Bratton Vows to Take Back Streets from Thugs and Drugs*, NEWSDAY, Dec. 3, 1993, at 5; see *Mayor Giuliani's Policing Strategy; Drug Busts by Beat Cops*, N.Y. TIMES, Apr. 8, 1994, at A26.

42. See Michel Marriott, *Increase in Drugs Impinges on City Services, Koch Says*, N.Y. TIMES, Sept. 16, 1988, at B3; *Police, Drugs, and the Social Contract*, N.Y. TIMES, Aug. 27, 1988, § 1, at 24; Anthony DeStefano, *Koch Calls for Strategy in Drug Battle*, NEWSDAY, Mar. 5, 1988, at 11.

when the cops move into a community and become an effective anti-drug-dealing presence, there is a sort of "window of opportunity" there for treatment, because some of the people who have a hard time finding drugs will be more likely to be receptive to treatment if it was offered and available. But again, the strategy that's being implemented by New York City doesn't include that component. And I think that's a significant and unfortunate oversight.

ERNEST DRUCKER:

I have a different view of this phenomenon than a lot of my friends and colleagues, to whom it's obvious that the "war on drugs" is associated with so much carnage because of the terms of engagement.

When you look at this recent drop in homicides,⁴³ which is not just true of New York, but of many cities around the country, it must be taken very seriously. You can get away with explaining some of it by demographic changes (fewer young people), but that will shift in the future. You simply have to look at who these homicides have been among in this period and you have to look not just at the fact that they've gone down in recent years, but that they went up in the years before that. This phenomenon occurred over about a ten-year period, which is the height of the war on drugs.

The kinds of homicides that have gone up and gone down in that period are the fastest-growing rate of homicides among young adult males, especially African-Americans.

Domestic disputes go on and people kill each other for all sorts of reasons. And they're not particularly amenable to enforcement. Homicide is not something that you deal with preventively in law enforcement. You deal with it after the fact. And usually law enforcement strategies don't have much impact on homicide.

But they do, in fact, have an enormous effect on the character of the drug trade and drug markets. The activity of those markets (how clandestine they are, how violent they are, how widespread they are) is, in fact, very responsive to police activities. But in exactly the opposite way that you might want.

When such huge profits are involved, police activities throw gasoline on the fire of an illicit trade. Imagine if the Friday night poker games that take place all over America were subject to the same sort of enforcement practice of breaking down doors and

43. See Paul Moses, *Judge My Record, Not Style, Rudy Says*, NEWSDAY, Dec. 29, 1996, at A3; *Drop in Crime is Reported*, N.Y. TIMES, Jan. 15, 1996, at B3.

sweeping people away. If you just chose some bit of very common behavior and decided that it's illegal, technically, and that you're going to enforce those laws with tremendous vigor, it might get very dangerous for people involved in it.

The other thing that's happened relates to the guns that are available within this trade, another American bit of insanity. The combination of these drug laws and the availability of firearms is the most lethal combination and what these homicides are about. They're about the young adult men in the drug trade of the inner city—with guns. The rise is clearly related to the drug trade, but the decline doesn't correspond to a decline in the number of drug users. By every important survey, the number of hardcore heroin injectors and cocaine users has pretty much stayed the same or risen. The number of drug overdose deaths, another important measure of violence, has gone up 300% among African-Americans in the last six years in the United States, and become the major cause of death among young adults in areas where HIV is low, like the West Coast.

So it's not that the drug trade is smaller, it's that it's moved indoors in some places and became less violent. And what this new campaign (to press on with intensive sweeps) is going to do is uproot it from those indoor marketplaces, which in fact are much safer. There are countries like the Netherlands that have made it their national policy to get the drug trade off the streets and move it into what are called "house addresses," where individual dealers are tolerated, provided they don't break certain rules of decorum in the community. People come and go and buy drugs and use drugs there, but that's preferable to it being out in the central square of the city. And the Europeans have made that an explicit harm-reduction strategy of district zoning. It goes wrong sometimes, as it did in Zurich, Switzerland, where it became a magnet for foreign dealers. In other places, it's worked quite well.

This new effort is going to disrupt that pattern that's happened and will establish new turf wars, as Judge Sweet said, in the adjacent neighborhoods.

KATHY ROCKLEN:

Thank you. I've got a couple of questions up here about the District Attorney's decision to drop the charges against the marijuana buyers' club here in New York City. Does anybody want to comment on the significance of that case?

ERNEST DRUCKER:

I'll be happy to, if nobody else does.

KATHY ROCKLEN:

Go ahead.

ERNEST DRUCKER:

For those that aren't familiar with this case, there's been an arrest and a prosecution, but eventually charges were dropped, I believe, against Johann Moore, a young man who's been a part of a small group of people distributing cannabis to people with AIDS, with cancer, who have essentially medical justification for using cannabis.⁴⁴ There's a good deal of evidence at this point that cannabis is a useful drug, smoked for nausea associated with chemotherapy, AIDS, cancer, and it has been useful for glaucoma.⁴⁵

This incident in New York is particularly interesting because of the fact that people don't seem to be aware that in San Francisco at the same time a similar activity has taken place where a group of people have gotten together to give out cannabis to others who need it for medical purposes.⁴⁶

In New York there are about thirty people in the network, I believe, whereas in San Francisco now there are 7,000 people who attend a facility that's four stories high with fifty paid staff, distributing kilos of marijuana every week to people, most of whom have letters from their doctors. It's seen as an extremely useful activity in the community, by the police of San Francisco, by the mayor, both the previous mayor and the current mayor of San Francisco, to the degree that the Drug Enforcement Agency, which usually doesn't put up with this sort of thing, could not enter the city and apprehend these people.⁴⁷ They apparently have some limits left to working without the support of local law enforcement officers, which they could not get. The City of San Francisco has stood up on its hind legs and said, this is crazy. We have a city full of people

44. See, e.g., Michael Cooper, *Marijuana Seller Vows to Aid the Ill*, N.Y. TIMES, Apr. 7, 1996, at 7.

45. See, e.g., Don Feder, *Medical Marijuana Policy up in Smoke*, BOSTON HERALD, Jan. 20, 1997, at 23.

46. See, e.g., Christopher Reed, *Dope Shop Takes Pot Luck with U.S. Tolerance*, THE GUARDIAN, Jan. 16, 1997, at 13.

47. EDITOR'S NOTE: The San Francisco Cannabis Cultivators Club was shut down by state drug agents in August, 1996, but reopened following the passage of California Proposition 215, which decriminalized the medical use of marijuana. See Glen Martin, *Medical Pot Users Light Up*, S.F. CHRON., Jan. 16, 1997, at A17.

with AIDS. This seems to help them in a number of important ways. It doesn't hurt anyone else. Do it.

And Dennis Perrone has done this, and the one here in New York is a modest example. There are twenty to thirty such cannabis clubs going on around the country with the knowledge of local authorities, including President Clinton. I know the guy running the network in Washington, Steve Smith, sent Clinton a letter saying "I'm doing this," after working on his campaign.

So there does seem to be some truce around this. Why did the prosecutor in New York drop it? I don't know enough.

ROBERT GANGI:

It's hard to imagine Rudy Giuliani endorsing this practice or letting it continue on a wide-scale basis in New York City.

ERNEST DRUCKER:

Maybe he shouldn't be asked.

ROBERT GANGI:

New York City cops pick up people smoking marijuana in the street all the time. I mean, people are being arrested for marijuana use in New York City now on a regular basis.

KATHY ROCKLEN:

Well, all right, but that's a different issue than buyers' clubs.

I wanted to ask Carol if you have a position on medicalization of marijuana.

CAROL WEISS:

As opposed to legalization of marijuana? Certainly it's the only illicit drug currently used on the street that could be justified for its medical use.

Yes, it definitely has a medical purpose. I mean, there are other ways to disseminate it. There's a drug called Marinol, which is pharmaceutical THC in tablet form,⁴⁸ which can be prescribed widely by physicians for AIDS patients who are suffering from the effects of chemotherapy. So there's no reason not to medicalize marijuana. But there are medical forms of it available already.

48. Delta-9 tetrahydrocannabinol (THC) is the chemical compound responsible for marijuana's narcotic effects. *Marijuana Expert Panel Says Medical Use of Drug is Worth Study*, AIDS WEEKLY PLUS, Mar. 10, 1997.

KATHY ROCKLEN:

I understand, though, that there are problems with the tablets. For example, if you're nauseous, if you can't keep the tablets down, and that generally inhalation is more effective.

CAROL WEISS:

Absolutely. No, I agree. I mean, I think that there are medical uses for marijuana. For sure.

KATHY ROCKLEN:

Does anybody else want to comment on medicalization of marijuana? No? Okay. How about needle exchange? Ernie, do you want to chat about that?

ERNEST DRUCKER:

Well, I'm not sure there's a specific question about it. I mean, I don't know how familiar the audience is with the extent of needle exchange programs here and elsewhere. One of the ways AIDS is spread into the population is through the sharing of needles by drug users, which has been well known in public health and medicine for thirteen or fourteen years now. And many other countries in the world, when learning this fact, decided to see if they could take advantage of this to stop the spread of AIDS, and have done so successfully in a dozen countries I can name.

The United States had a different course, in the name of the "war on drugs," and I concur with Judge Sweet very much on this. Because you have the inability to face the truth about not only ethical problems within the criminal justice system, but also on issues of science and public health. The truth gets distorted.

Needle exchange, having been demonstrated to reduce the spread of AIDS pretty convincingly in a number of well-done studies here and abroad (paid for by the United States government in some instances), still is not acceptable in the United States. United States federal funds may not be used for paying for needle exchange programs.

Initially clandestine groups did this as civil disobedience. One individual, John Parker, has been prosecuted forty times for giving out needles. But these programs have spread. In some areas like Connecticut, they not only tolerate it, they actually changed the needle and paraphernalia laws to make it a reasonable thing to do and support it with state funds.

Here in New York, the state AIDS Institute, under the Health Department, has given a waiver to some groups to do the needle exchange. But those initiatives are very modest. Perhaps in the United States 3% of people who use needles on a regular basis have access to clean needles through needle exchange programs, largely through volunteer community activists. So although we've proven that this works, the federal government will not support it, and the state of drug war politics does not permit any political figure to advocate this. Therefore, we do not use federal funds and there are no needle exchange programs in the country adequate to address the problem.

KATHY ROCKLEN:

Well, Carol, what strategies can we employ to try and get more needle exchange programs in New York? Do you have a comment on that?

CAROL WEISS:

Well, I think it's very important to try to impart the concept of harm reduction. I think this is a concept that's very alien to most of the American people. We on the panel and in the field are familiar with that notion. Most of the people, though, out there in this country are very interested in solving the drug problem, that is, getting everybody who uses drugs to stop using drugs, which is an unrealistic goal. But it is one that people just can't seem to drop. People are very stuck on that.

I was speaking earlier about how even in the hospitals you see well-meaning young doctors always trying to take the patients who come into the hospital for AIDS or other medical reasons off of their methadone, for example, because they think that that's the right thing to do. They're in the hospital, this is the right time to get them drug-free. This is just a goal that people can't get out of their heads.

So we have to really teach people about reality, as the Judge so poignantly spoke about, that there are ways to meet our goals in steps that are more based in reality and more realistic, and that is harm reduction.

So that's what we have to do. The other issue is to make people aware of how much they hate drug addicts and people who are involved in the drug world. And that this visceral hate—"scape-goat" is the word the Judge used earlier—really, I'm saying this as a psychiatrist, also, that this hate affects our reasoning and our

judgment. We hate these people, we hate what they've done to their families, we hate what they've done to the community, and we just want to be mean to them. We want to put them away, we want to beat them up. If we could do that we would do that too.

We have to teach people that it's natural to have negative feelings toward people who are doing these things to the communities and to their families, but that you have to try and put those feelings aside to come up with pragmatic and good solutions. Needle exchange being one of them, methadone maintenance being another. But we cannot kick people out of treatment if they don't clean up within two months. We have to recognize that people have to stay in treatment for years sometimes to get better.

You know, there are states where if the person doesn't get better within a certain number of months, they're not allowed to stay in the methadone clinic any longer. There are other states where the permitted dose of methadone is legislated at sub-therapeutic levels. You're not allowed to have greater than a certain dose, which does not make rational sense.

So those are some of my thoughts on the matter.

KATHY ROCKLEN:

Thank you. I have a question up here for anyone on the panel. The word "decriminalization" leads many people to envision joints, vials of crack, et cetera, being sold over the counter or in vending machines. How can drugs actually be made legal and kept out of the hands of minors? Witness the increase in smoking among teenagers.

Does anyone want to comment on this question?

HON. ROBERT SWEET:

Well, I sort of took a position on that and I'll stick with it. I don't think you can make a rational distinction between mind-altering substances. I just don't see how it's possible. The most commonly used mind-altering substance, obviously, is alcohol. And the society has dealt with that in varying ways.

There is the laboratory of the several states. In some parts of the country you can't buy alcohol. In other parts, you can. Sometimes it's state operated, other times there are restrictions, et cetera, et cetera.

I think what you have to do is to recognize that this is a reality. If you want to address the problem of people using drugs, then I think what you have to do is address the reason why they want to

use drugs. What is there about the society that causes them to want to use mind-altering substances?

But if you were to handle this the way you handle alcohol, I think there's respectable authority for the proposition that people would be able to handle it, most people would be able to handle it just the way they handle alcohol, and it wouldn't create an impact on their lives.

Now, there will be those who will become addicted, even as there are those who become addicted to alcohol or overeating or ice cream. So I think we just have to be honest about it. Some estimates that say somewhere between 7% and 15% of the people who use mind-altering substances become addicted. And that is a reality. That should be addressed as a public health program.

Now, the great mystery, I suppose, in all of this is what if one of us were to become suddenly anointed and have the power to do what we think is the right thing to do, what would be the result?

It's very hard to get statistics with respect to prohibition, for the obvious reason that distribution was illegal and you couldn't get good statistics. But there have been some people up at Boston University who studied this and the best evidence that I've seen was that alcohol use dropped when Prohibition started, slowly came back, so that during the middle of that period it was at about the same level as it was prior to Prohibition. And then, when Prohibition ended, it stayed more or less constant, and then crept up in later years.

It seems pretty obvious to me that anybody who really wants to get mind-altering substances today can do it. And therefore my persuasion is that it would not be the end of our society and that society would not fade out or self-destruct, but that it would treat this as it treated alcohol. After all, alcohol—I'm sorry—*tobacco* is the most addicting drug of all and causes tremendous harm: 400,000 deaths. Now we're just beginning to get a grip on that as a society. But it seems to me that's the way it should be dealt with.

RICHARD STRATTON:

Well, I think the big argument is that if we legalize drugs, that suddenly we'll have a lot of people using drugs indiscriminately, and we'll have a lot more drug addicts. I think that a way to test that, and I think we've discussed, a lot of the panelists have mentioned this before, but certainly the least harmful of all these drugs that we're talking about is marijuana. It's the most actively used,

most readily available illegal substance. And it seems to me that we could start the whole process by starting with marijuana.

We can't really point to terribly bad effects that marijuana's had on society. There are a lot of people who have used marijuana for many, many years and continue to function in a normal way. So I think that we might be able to discount the entire argument about legalizing drugs by starting with marijuana by using it as a test drug to see exactly what kind of effect legalization would have.

I think we could deregulate the use of marijuana. It's very easy to grow marijuana. People could use it in their own homes and we don't see any relationship between marijuana and crime, except that people who buy marijuana now on the black market have to subject themselves to criminal sanctions.

So I think that's the reasonable way to begin, to legalize marijuana, or deregulate marijuana, and see what happens.

I think we do have to distinguish between drugs, though. I mean, I think that some drugs are definitely more dangerous than others. When you're talking about heroin and crack and cocaine, we need to make sure that people are educated about what those drugs can do to you in the long run. So I think it's important that we do what we're doing now, that we get out and discuss these things. But to just say no to drugs and to drug use and to the whole idea of what drugs are doing to our society is insane.

CAROL WEISS:

I'd like to add something to that, though, because one of the platforms that I'm always standing on is that it's important to recognize that a drug is not a drug is not a drug. There are different drugs, as Richard pointed out, and they do have different effects and they do have different patterns of use. And in my opinion I feel there are problems if you use the medicalization or legalization of marijuana as a model to study legalization of cocaine or heroin, because they really are used differently. Cocaine is used much more in a binge pattern, and you run into much more serious problems when you look at how these drugs are going to be administered, especially in the case of cocaine.

I'm very interested in the practical solutions to what would happen if you legalized cocaine. Because, what do you do when somebody is coming back for the umpteenth time for his three- or five-dollar hit, and now he's wildly paranoid and agitated and scratching at the bugs on his face and is clearly psychotic because he's

come for his tenth or hundredth hit of crack at 2:00 in the morning?

What are the practical solutions to that? Do the stores close down at midnight? Is there going to be a black market trade anyway when they close down? Do you train bartenders not to give somebody a drink when they're drunk? Do you train the vendors not to dispense any more when the person's obviously paranoid and psychotic and agitated?

These really are some serious practical problems. I'm glad that person asked that question.

ERNEST DRUCKER:

Just to complicate things a bit, I think that you really do have to go back to the fundamental question of the right to use drugs. And it may not be a right that some people approve of, but it's obviously a right that many people choose to exercise. And most of those people do not have anything resembling a "problem" with the drugs that they use: that includes the so-called "hard drugs," such as heroin and cocaine.

The vast majority of people who use these drugs use them only briefly, intermittently, and then stop using them. Another very large proportion use them for some extended period, may even develop what's called a dependency on them, but at some point they change that behavior in dramatic ways, usually without the help of treatment. More people stop the regular use of drugs without treatment than with treatment, which is also true of smoking cigarettes.

So you have to say that the drug policy that we have applies to only a small proportion of people who use drugs. It's like constructing your alcohol policy around Bowery alcoholics and saying, "That's the model for how we want to construct how we think about alcohol." It's the wrong way to think about it, and it's certainly the wrong way to construct policy.

In thinking about how you actually would change drug policy more directly, you only need to think of how you would create an alternative to prohibition; "Legalization" is a completely useless term. Prohibition is a very explicit policy which tries to regulate something by forbidding it and punishing people as much as possible. Everything else, other than prohibition, is, to my mind, best understood as "regulation," not legalization. And you can regulate it very loosely, like we do the Friday night poker game, or quite tightly, like we do Prozac prescriptions.

We live in a world in which people use drugs. New drugs are coming all the time. In some way, the drugs we're talking about here are very peripheral to the pharmacopoeia, what people in large numbers actually take. The number may be a million Americans who are using heroin on anything like a regular basis, compared to 4 million on Prozac and 10 or 20 million on Valium.

So if we want to look at our drug policies, we have to somehow integrate these other currently outlawed botanical products into that system, and take them out of that totally unregulated and untaxed free market. And the place to start, obviously, is with the people that everyone's so concerned about: the drug addicts. Drug addicts who are dependent on a drug should have some other way of getting that drug aside from an illegal market on Tenth Avenue. There ought to be another way. If it were my sister or brother, I'd certainly do anything I could to get them that drug without going out to Tenth Avenue to buy it.

We have a million such people, and they sit at the core of what we think of as our drug problem, selling drugs to others to promote their own habit, fostering the violence associated with buying and selling drugs under prohibition, the destruction of communities, all centered around this very small group of people. Medicine is quite capable at this point of prescribing various drugs that will deal adequately with the cocaine addict's addiction, with the heroin addict's addiction, with the amphetamine addict's addiction. Every one of these particular drugs, which are so demonized, in fact has reasonable therapeutic responses available. But not in the United States, I should point out. In other countries of the world, where people study medicine just as hard and write just as good textbooks, and do just as good research as we do, they've made a commitment, especially the medical professions, to the idea that addiction is a treatable condition, and we shall treat it as best we can.

And treatment means that you approach a person's dependency with the understanding that you can't just make it go away. So you give methadone. In some cases you give heroin. In other cases you give amphetamines. And in some cases they've even given forms of cocaine, with reasonable results.

We're learning more about how the brain works and what drugs are. The future is actually quite bright in terms of the ability to use medical treatment to intervene in this thing we call addiction. There's no need to criminalize it.

(Applause)

KATHY ROCKLEN:

I have a question up here on the regulation of tobacco. This is for Judge Sweet. Do you have any thoughts on the potential collateral effects of the class actions against the tobacco industry on any effort to distribute drugs in some regulated way?

HON. ROBERT SWEET:

First, I really don't have much knowledge on the subject, except what one reads in the press. And I don't see why there would be a connection, myself.

I think the most encouraging thing that might come out of all of that is that it might turn out that the truth has been known all along and not told, and that if that were the case, the analogy again to Vietnam and to the drug situation might be helpful. I don't see an effect other than that. Maybe others feel differently.

KATHY ROCKLEN:

Any other comments on tobacco? I have a couple of questions up here about the economic reality of a multi-billion dollar drug law enforcement business and a comparison of that business to the military-industrial complex. I guess the thinking is that the drug enforcement business is so entrenched, how will we get rid of it? Bob, are you smiling because you want to respond?

ROBERT GANGI:

Well, the other term that's being applied to that kind of analysis is the prison-industrial complex. And certainly that's true. We have created, through the extraordinary expansion in the use of prisons, which has been driven in large part by the anti-drug law enforcement efforts, these very powerful interest groups which continue to promote these policies and practices, and which are hard to resist.

In New York State, for example, the corrections officers' union is a powerful force in Albany, and they want more prisons, because more prisons means more jobs. In California, I think the same thing holds, based on an article I read in *The New York Times*,⁴⁹ and my guess is it's true in at least some other states.

Also in New York State what you have is the phenomenon where upstate rural communities have determined that prisons can

49. Fox Butterfield, *Political Gains By Prison Guards*, N.Y. TIMES, Nov. 7, 1995, at A1.

be the solution to their economic recession/depression. So they lobby for expanded funds for prisons, and then they lobby for the prisons to be placed in their communities.

Dan Feldman, who is the chair of the Corrections Committee of the New York State Assembly, has done an analysis of where we've been building prisons in the last fifteen to twenty years in New York State. And it turns out that over 89% of the Department of Correctional Services' expenditures in New York State takes place in districts which are sparsely populated and which are represented by Republican Senators from the New York State Senate. So that becomes another sort of political factor, another factor that drives the expansion of prisons. But it's not based on a consideration of whether locking up more people makes sense from the standpoint of justice, from the standpoint of improving the quality of life. There are these very, very strong economic interests.

RICHARD STRATTON:

It goes even beyond that. Now you have private industry going into the prison business. And the prison business is booming in the United States. Anybody who's spent any time in the system understands that really besides the drug war what's fueling this whole thing is that there is a lot of money in locking people up. There's more money to be made in locking people up in prisons than there is in looking at the kind of social services that might go towards helping those people.

When you get to prison, you have to work and you're paid some meager amount of money. You have to then buy everything, from your toothpaste to your shampoo and whatever else, at a marked-up price. Then there's this whole other underground economy in prison. There's factories in most of these prisons now where they're making products that they're selling, a lot of times in the private sector.

So there are huge amounts of money being made in the prison industry, which is why we have the American Correctional Corporation of America and Wackenhut, one of the biggest security firms, now traded on Wall Street. They're in the prison business. They're building prisons.

The State of Texas is now renting space, renting prison cells to other states and bringing prisoners from Massachusetts and all over. They're saying, "Sure, we know how to do it down here. We'll lock everybody up. We're making money on this thing."

So I think that's very important that we all stay focused on that, that it's really about money, just like everything else in the United States. You have to follow the money. As long as people are making a lot of money in locking people up, it's going to continue.

ROBERT GANGI:

In fact, everybody here's going to be locked up. We didn't tell them that. You're going to be arrested on your way out.

RICHARD STRATTON:

On your way out of the room, right. You'll be working for the government tomorrow.

ERNEST DRUCKER:

I think we need to do better. We can't ignore a moral issue because there's money to be made in building prisons, and there's money to be made tending to prisoners. It's called the "gulag" by the rest of the world. They understand that what's going on here is very similar to what went on in the Soviet Union for a very significant portion of the population, if not for everyone.

Recognize that it can be different. The country of Norway hates drug addicts much more than we do, actually. They're really very uptight and do not like the idea of people losing control with alcohol or any other drugs, and have among the harshest drug penalties in the world. The length of sentences for the offenses are much more strict than our own, actually.

However, they have a correctional system and correctional professionals who run the prison systems (the warders work with an association of prisoners themselves), that has set a limit on the number of prison cells they shall have in the country of Norway, as a percentage of population. And they have voted quite decisively not to increase that number of cells.

So what has happened, as the length of sentencing has gone up for drug offenses, is that they've developed a backlog of people who are awaiting imprisonments. So they've essentially created a waiting list to go into prison, which is the strangest thing. Because they believe deeply that it's a mistake to have more than a given percent of the population in prison (I don't know the exact numbers, but it's less than our own). We have about ten or twelve times as many people per capita in prison as most of the European countries that have similar drug problems to our own and have

similar attitudes towards drug problems to our own for the most part. But they do not have this ferocious enforcement industry that seems not to have any responsibility to respond to any other civic concerns. "Oh, we're making money. Of course."

So, ultimately, the incarcerating state's ethics become indistinguishable from the drug dealer's rationale for what he does—it's immoral, but profitable.

ROBERT GANGI:

It's also, in terms of the politics of this, Judge Sweet obviously touched on this, building prisons has become part of the political agenda, first of all, of most mainstream politicians. But certainly, it's certainly a major part of the right-wing Republican agenda.

I mean, there's a basic blueprint that I think right-wing Republicans have, and they've applied it in most states where they've taken power in recent years. Pataki's doing it in New York State. And the blueprint includes cutting services and welfare for poor people, tax breaks, mainly for the well-to-do, leaner government in every area except law enforcement, and tougher law enforcement.

Tougher law enforcement is most dramatically represented by more prisons and the death penalty. That's being applied, as I said, in most states where you have right-of-center Republican governors. So they see this as a winner for themselves politically. And again, consideration of merit is not a major factor in these kinds of determinations and decisions. It works for them politically and they'll keep chasing it.

JULIE STEWART:

I guess I'd add that I don't think we can just blame Republican governors. I mean, look at the Democratic President we have. He's supporting this, too. (Applause)

ROBERT GANGI:

I'm willing to blame Democrats also.

JULIE STEWART:

Thank you.

ROBERT GANGI:

I think it's striking, though, what the Republican agenda is.

JULIE STEWART:

Well, I just want to point out with regard to how much money is to be made from building prisons and having this prison-industrial complex, that it's costing all of you. It's costing you from your tax dollars to support this. So you're paying for it, too.

Somebody else is making money, but not you guys. You're paying for it. Unless you want to invest in Wackenhut, which is probably a really good investment.

RICHARD STRATTON:

I think another fallout of the mandatory minimums, too, which no one has really touched on, but it's very interesting, is that what happens with the mandatory minimums a lot of times is the real bad guys, so-called, don't actually end up doing all that much time. Because what you can do is, if you've got a lot of money or you've got a lot of people you can rat out, you can make a deal with the prosecutor and get charged with a much lesser offense.

I mean, take a guy like Carlos Lehder. I'm sure everyone who's following the drug world has heard of this guy. I mean, he was supposedly one of the most notorious drug importers the world has ever seen. He ended up doing like four or five years or something like that in some witness protection program somewhere because he testified against Noriega.

The reality is that the big guys don't do serious time because they can buy their way out by making deals where they give up assets or they give up people that they know. Meanwhile, it's the poor person on the street or somebody who's just trying to make a buck who doesn't know anybody that he can testify against, or she—a lot of women get caught up in this thing as mules, or because they've got a boyfriend who's in the drug business. These are the people who are getting these outrageous sentences and going to prison for twenty years. First-time, non-violent offenders, people who were just like anybody else up until they got this sentence. So it's very important to look at that.

Also, another thing is that a lot of these people that are going to prison for these long terms are non-violent people. They're not people who are out there, you know, sticking people up with guns, who are hurting people. They're just people who got caught up in the drug trade.

So it's not having the effect that we hoped that it would by putting the so-called kingpins behind bars for long periods of time.

It's sweeping up a lot of people who are instantly replaced by thirty other people.

KATHY ROCKLEN:

That will have to be the last word, since I'm told we're out of time. I'd like to thank all the participants for an interesting program, and thanks to everyone for coming. Good night.

