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Is Our Drug Policy Effective

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RETHINKING OUR DRUG POLICY

*Jefferson M. Fish**

The time has come—some would say it is long overdue—for a comprehensive reexamination of our drug policy. We need to clarify our goals, examine our strategies, evaluate their consequences, both desirable and undesirable, and consider alternatives. Because drug policy affects so many areas of life, and because so many disciplines have important knowledge to contribute, any significant attempt to address the issue has to be broad-based.

An unprecedented collaborative effort by The Association of the Bar of the City of New York (“ABCNY”), the New York Academy of Medicine (“NYAM”), and the New York Academy of Sciences (“NYAS”) made possible the interdisciplinary conference “Is Our Drug Policy Effective? Are There Alternatives?” This two-day conference included contributions from leading experts in drug policy-related areas of the law, medicine, and science.

While the three professional organizations—the ABCNY, NYAM, and NYAS—*sponsored* the conference, the events of the two days were organized by a joint Program Committee consisting of the Executive Committees of the Partnership for Responsible Drug Information (“PRDI”)¹ and the Voluntary Committee of Lawyers (“VCL”).² PRDI is a multidisciplinary organization that provides expert information on drugs and drug policy, and encourages discussion of related issues. VCL is an association of lawyers and judges that encourages examination of the consequences of the war on drugs. It is modeled after a group of the same name that began at ABCNY and grew to play a leading role in the repeal of the Eighteenth Amendment in 1933.

The collaboration of the three renowned institutions and the contributions of the forty-two distinguished individuals on the List of Participants make clear that drug policy is an important subject that demands public discussion. The existence of the conference reflects a consensus among leading experts across a broad range of

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1. See generally <http://www.prdi.org>.

2. See generally <http://www.vcl.org>.

disciplines that our drug policy needs to be reexamined. It also indicates that relatively few believe that the current policy is working well, or that its premises are grounded in science, or that it improves public health, or that it promotes justice and respect for our legal institutions, or even that its goals are achievable.

This does not mean that there is a consensus on what to do, but rather that there is a consensus that our drug policy is an important matter urgently demanding public discussion and rethinking.

While ABCNY, NYAM, and NYAS are renowned nationally and internationally, they are also organizations that represent, reflect, and enhance life—especially intellectual life—in the greater New York metropolitan area. The way the war on drugs is being fought here engages virtually all the legal, criminal justice, public health, medical, scientific, social science, and educational issues that exist on the national and international levels. Thus, these proceedings are of both local and global import.

In organizing this conference, I wanted to make sure that, within the restrictions imposed by the two-day time limit, the spectrum of informed views that exist was represented among the speakers. In this I believe the Program Committee succeeded. On the other hand, I have to express some disappointment regarding the low number of speakers representing differing points of view. The Program Committee spent as much time in an unsuccessful attempt to get additional distinguished advocates of the current policy (or an even more punitive one) to participate as it did in recruiting all those who actually presented.

I view the final program as truly outstanding and reasonably representative of the range of viewpoints that exist, but as not having as much balance as I would have liked despite the Committee's best attempts to achieve this.

As these proceedings are being published in a law journal, I will call readers' attention to the presentations by, among others, former United States Attorney General Nicholas deB. Katzenbach, former Mayor (and former District Attorney) of Baltimore Kurt L. Schmoke, and Federal District Court Judge Robert W. Sweet. Also of note are the chairing of the opening session by the Honorable Milton Mollen, former Presiding Justice of the New York State Appellate Division and chair of the commission bearing his name that investigated corruption in the New York Police Department, and the chairing of the final session by Norman Siegel, Executive Director of the New York Civil Liberties Union.

In addition, I should mention two of the “firsts” at the conference. Edward Jurith, General Counsel to the Office of National Drug Control Policy (“ONDCP”), used his presentation to launch the administration’s Drug Control Strategy 2000. And Joel Brown, Executive Director of the Center for Educational Research and Development, gave the first public presentation of his research-based “resilience training” drug education program. Other highlights included addresses by Jeremiah Barondess, President of NYAM, and Rodney Nichols, President of NYAS.

The program itself was arranged in a sequence aimed at presenting, in something approximating a logical order, key legal, medical, and scientific issues related to drug policy. While labels are inevitably inadequate, one could say that the morning of day one at NYAM was devoted to general policy issues, and the afternoon of day one to practitioners and practice. The morning of day two at ABCNY began with former Attorney General Katzenbach’s discussion of problems created by our current policy, and was followed by a discussion of a variety of possible alternatives. The proceedings conclude with the afternoon session on international dimensions of drug policy.³

* * *

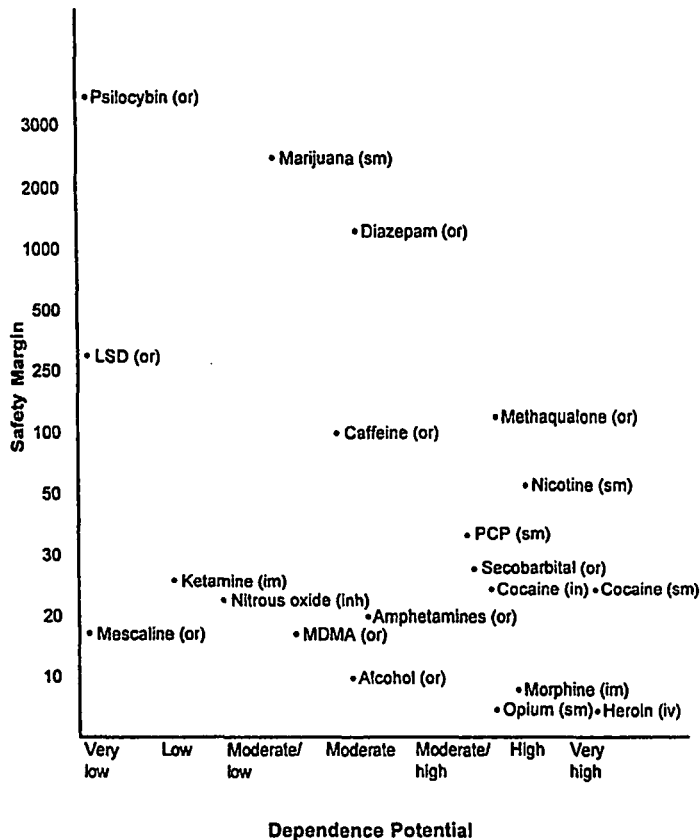
This was quite a lot of territory to cover in two days; and there were so many speakers that often they had to condense their remarks considerably to fit into the limited time available. Nevertheless, as I read over the transcript, I was impressed by how much and how clearly the speakers were able to communicate, as well as by how well the spirit of their oral presentations was captured in written form.

At the same time, only so much can be accomplished in two days. There are several topics that would have been interesting to explore, but that simply could not be accommodated. I want to call attention to two of them, briefly, so that curious readers can investigate them further on their own.

3. Omitted from the printed proceedings is a session on drug policy and the media, because it was not on the topics of law, medicine, and science that were the focus of the conference and of the three sponsoring institutions, ABCNY, NYAM, and NYAS. I would like to express my thanks to Sonya Hamlin, President, Sonya Hamlin Communications, for chairing the session, and to Peter Kerr, Vice President and Director of Communications for the Phoenix House Foundation, Dan Forbes of Salon.com, and Mimi Rosenberg, Esq. of WBAI for their presentations.

First, it would have been interesting to discuss a number of licit and illicit substances with regard both to their physiological effects and to the policies governing them.⁴

FIGURE 1: SAFETY MARGIN AND DEPENDENCE POTENTIAL OF PSYCHOACTIVE DRUGS⁵



im = intramuscular, in = intranasal, inh = inhaled, iv = intravenous, or = oral, sm = smoked

4. For those who would like to learn more about a range of substances, the history of policies toward them, and the consequences of those policies both in the United States and abroad, I recommend the classic text, *LICIT AND ILLICIT DRUGS*, (Edward M. Brecher et al. eds., 1972).

5. Robert S. Gable, *Not All Drugs Are Created Equal*, in *HOW TO LEGALIZE DRUGS* 406, 414 (Jefferson M. Fish ed., 1998). The figure was prepared by the psychologist Robert S. Gable, based on his review of approximately 350 articles and book chapters culled from 12,800 English language citations in seven on-line scientific

Figure 1 compares twenty licit and illicit substances on two key dimensions. "Safety margin" refers to the "therapeutic index," or the ratio between the "lethal dose" and the "effective dose"—it is a way of quantifying how likely overdose deaths are—and "dependence potential" refers, as the author uses the term, to the likelihood of use being, at some time, not fully under voluntary control.⁶ It is worth spending some time looking over this Figure and thinking about the various substances. One inescapable conclusion is that the penalties for the various licit and illicit substances bear no relationship to their dangerousness on these two critically important dimensions.

The second topic that there was inadequate time to discuss during the conference is the disproportionate emphasis placed by the war on drugs on combating marijuana (though Doctors Ethan Russo and Lester Grinspoon did address both research on and the clinical uses of medical marijuana). The debate over drug policy usually focuses on the dangers of heroin and cocaine. As Figure 1 demonstrates, marijuana is much less dangerous than those substances.⁷ Notably, drug warriors tend to argue for marijuana's suppression because they view it as a stepping stone or "gateway" to hard drugs.⁸ In doing so, rather than in attempting to demonstrate that marijuana is as dangerous as or more dangerous than those substances, drug warriors implicitly recognize that it is less dangerous.

Accepting, for the sake of argument, the desirability of arresting drug users, it would seem logical to spend the bulk of resources on fighting violent crime as well as arresting those who use the more dangerous substances. Amazingly, this is not the case.

As Figure 2 shows, marijuana arrests in the United States have grown from fewer than 200,000 in 1970 to nearly 700,000 in 1997.

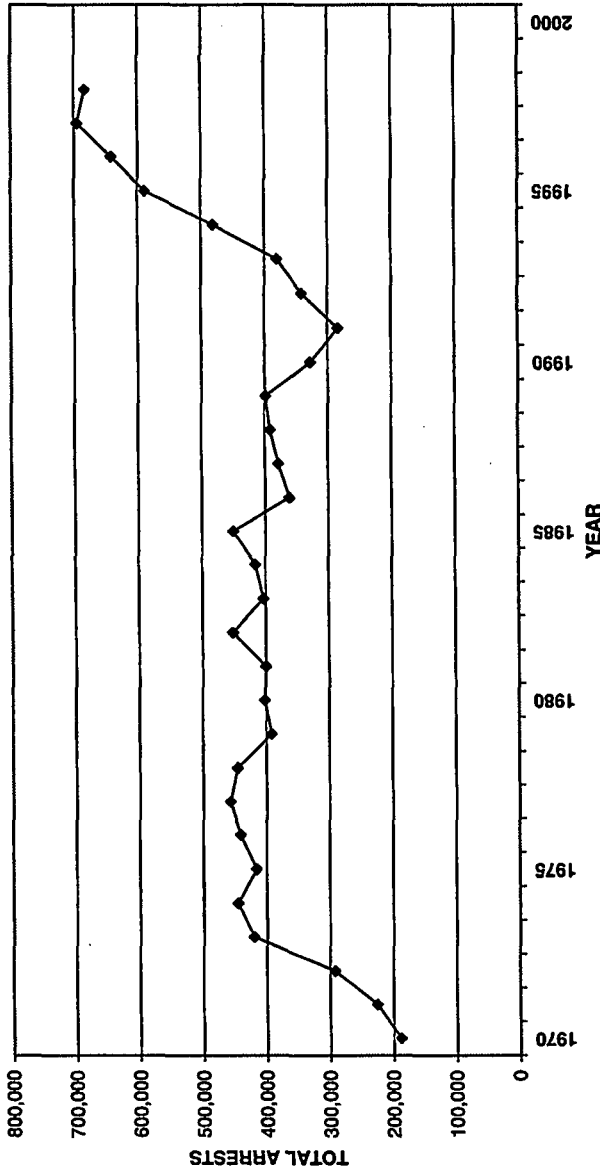
databases. Supplementary information, including the effective dose and lethal dose for each substance, is listed in Table 16-1, pp. 412-13.

6. *Id.* at 407-10.

7. *Id.* at 414.

8. *E.g.*, Medical Marijuana Referenda: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong., available in 1997 WL 606302 (statement of Barry R. McCaffrey).

FIGURE 2: MARIJUANA ARRESTS IN THE UNITED STATES (1970-1998)⁹



9. LYNN ZIMMER & JOHN P. MORGAN, LINDESMITH CTR., MARIJUANA MYTHS MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE 41 tbl.5-1 (1997) (compiling data from the FBI's Uniform Crime Reports covering the years 1970-1995); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1996 213 tbl.4.1, 214 tbl.29 (1997); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1997 221 tbl.4.1, 222 tbl.29 (1998); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1998 209 tbl.4.1, 210 tbl.29 (1999).

To get a sense of the magnitude of this number, Figure 3 shows that the number of marijuana arrests is roughly equal to the total of all arrests for violent crime—717,750 for violent crime versus 695,200 for marijuana. Furthermore, 606,520 of the marijuana arrests were for possession, and only 88,680 (13%) were for sale or manufacture.

FIGURE 3: ARRESTS IN THE UNITED STATES (1997): VIOLENT CRIME AND MARIJUANA¹⁰

Violent Crime		Marijuana	
Murder & Non-negligent manslaughter	18,290	Sale/Manufacture	88,680
Forcible rape	32,060	Possession	606,520
Robbery	132,450		
Aggravated assault	534,920		
Total Violent crime	717,750	Total Marijuana	695,200

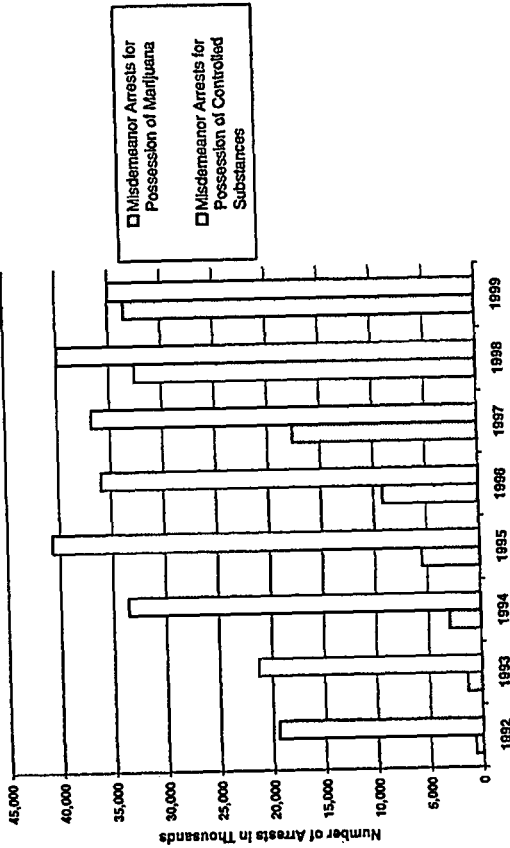
How can one make sense of these figures? There were two major escalations in marijuana arrests. The first, from fewer than 200,000 to nearly 450,000 per year was during the administration of President Richard Nixon, who launched the war on drugs.¹¹ The numbers fluctuated between roughly 300,000 and 450,000 under Presidents Ford, Carter, Reagan, and Bush. Then, under President Bill Clinton, they escalated again to nearly 700,000. Apparently, the number of arrests corresponds not to the dangerousness of a substance, but to who is in power.

In a similar way, there has been a major escalation of marijuana arrests in New York City during Mayor Rudolph Giuliani's "quality of life" policing initiative. For example, Figure 4 shows the forty-six-fold escalation, from 1992-1999, in misdemeanor arrests for possession of marijuana, while misdemeanor arrests for possession of a controlled substance increased less than two-fold. It would appear that a politician's choice of cracking down on marijuana as a symbolic way to attack "undesirables" (e.g., Nixon and Giuliani) or to dissociate him or herself from them (e.g., Clinton) is more important than marijuana's actual dangerousness.

10. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1997 222 tbl.29 (1998). The sum of the numbers of violent crimes is 717,720 (not 717,750), but the latter number is the total given in the report. *Id.* at tbl. 29.

11. For background on President Nixon's drug policy, see Peter Goldberg, *The Federal Government's Response to Illicit Drugs, 1969-1978*, in THE DRUG ABUSE COUNCIL, THE FACTS ABOUT DRUG ABUSE (1980), <http://www.druglibrary.org/schaffer/library/studies/fada/fada1.htm>.

FIGURE 4: MISDEMEANOR ARRESTS IN NEW YORK CITY 1992-1999¹²



12. E-mail from Tom Leighton, Gubernatorial Candidate, Marijuana Reform Party, to Peter A. Hatch, Editor-in-Chief, Fordham Urban Law Journal (enclosing "Adult Arrests For Misdemeanor Drug Offenses," a data spreadsheet based on unpublished statistics on file with the Marijuana Reform Party). The statistics were based on unpublished data generated by the "Criminal History System" computer database at the New York State Division of Criminal Justice Services, using the parameters year, geographic area, and offense committed. "Misdemeanor Arrests for Possession of Marijuana" represents New York City arrests for criminal possession of marijuana in the fifth degree. N.Y. PENAL LAW § 221.01 (McKinney 2000) ("A person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses: 1. marihuana in a public place . . . and such marihuana is burning or open to public view . . ."). "Misdemeanor Arrests for Possession of Controlled Substances" represents New York City arrests for criminal possession of a controlled substance in the seventh degree. *Id.* § 220.03 ("A person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance"). Save concentrated cannabis, the PENAL LAW does not include marijuana in its statutory use of controlled substances. *Id.* § 220.00(5).

Social scientists have long known that the “gateway” theory is false, and is an example of the statistical fallacy known as *selection bias*.¹³ An illustration of the fallacy would be asking a sample of heroin users how many of them tried marijuana before using heroin, and when nearly all say yes, concluding that smoking marijuana leads to using heroin. The same reasoning would imply that drinking water or breathing air leads to using heroin. The relevant question is the inverse one—what proportion of those who have tried marijuana go on to use heroin?

More than 72,000,000 Americans have used marijuana at least once and 2,400,000 have used heroin at least once.¹⁴ Thus, it is easy to see that—even if every single person who tries heroin has used marijuana first—the odds are 69.6 [i.e., $72.0 - 2.4 = 69.6$] to 2.4—that is, 97%—against someone who has used marijuana even trying heroin one time.

The probabilities are different for cocaine, since many more people have tried it. However, if we are concerned with drug *abuse* (rather than use), a relevant statistic is that, “for every one hundred people who have used marijuana, *only one* is a current regular user of cocaine.”¹⁵

* * *

Both the conference and these proceedings are the work of many people, and were made possible by grants from a number of organizations and individuals. I am deeply indebted to all of them.

I want to thank The David H. Cogan Foundation and LeBoeuf, Lamb, Greene & MacRae, LLP for the generous grants that made the conference possible. A number of individuals also contributed generously and, though they preferred not to be acknowledged publicly, I want them to know that their support is deeply appreciated. Without the financial support we received, it would have been impossible to fly participants in from locations around the country and house them in our very expensive city. Chester Salmon and Mary Cleveland deserve special thanks for their fundraising efforts, as do Henry Moss and others behind the scenes at the New York Academy of Sciences for handling the complicated logistics and making the most economical use of our resources. NYAS also put together a marvelous reception, in honor of the

13. *Id.* at 12-28.

14. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., 1998 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (1998).

15. ZIMMER & MORGAN, *supra* note 9, at 34.

Presidents of ABCNY, NYAM, and NYAS, that let the supporters and participants alike know how much their efforts were appreciated.

In addition to the three sponsoring organizations, the ABCNY, NYAM, and NYAS, a broad range of organizations co-sponsored the conference, and I want to thank them for recognizing the important contribution it would make. Co-sponsors include: All Souls Unitarian Church, Center for Community Alternatives, Continuum Health Partners (Beth Israel Medical Center, Long Island College Hospital, New York Eye and Ear Infirmary, and St. Luke's-Roosevelt Hospital), The Criminal Justice Policy Foundation, La Bodega de la Familia, New York Society for Ethical Culture, Osborne/Correctional Association, Phoenix House Foundation, Religious Leaders for a More Just and Compassionate Drug Policy, and the Voluntary Committee of Lawyers.

I am grateful especially to Michael A. Cooper, (former) president of ABCNY, Jeremiah Barondess, president of NYAM, and Rodney Nichols, president of NYAS. Their willingness to have these distinguished institutions work together, so this conference could take place, gave it a special distinction. A number of eminent speakers participated because they recognized that the backing of these three institutions was an extraordinary imprimatur.

All participants generously contributed their time—the conference could not have taken place, had they not done so—and I appreciate their involvement not only before and during the conference, but also afterwards, in correcting and helping to footnote the transcripts of their remarks.

Special thanks go to the hardworking Program Committee. The Program Committee, which included representatives of ABCNY, NYAM, NYAS, PRDI, and VCL, and which I chaired, consisted of Charles D. Adler, Mary Cleveland, Thomas Haines, Henry Moss, Alan Rothstein, Chester Salomon, John Speyer, and David Vlahov. In addition to their excellent work, a number of them made an additional contribution by participating in the program. The Program Committee staff were Valerie Vande Panne, Paul Bennett, Lily Hung, and Megan Saynisch. Ms. Vande Panne not only gave the appearance of making calls to participants in excess of twenty-four hours a day, but also managed to maintain a cheerful disposition that kept us all going at times when things looked bleak.

Finally I want to thank the *Fordham Urban Law Journal* for producing these proceedings in record time. It took long hours of hard work by many people. The contributions made by this conference

were both important and timely; and the *Journal's* rapid response will enable them to have the impact they deserve. I want to thank Robert W. Schumacher II, the *Journal's* Editor-in-Chief at the time of the conference, for his willingness to get involved in the project. But the highest praise and greatest thanks go to Peter A. Hatch, the current Editor-in-Chief, members of the editorial board (Erica Edelstein, A.J. Balbo, Suzanne D'Amico, Joy Fallek, Jessica Golden, Kirk Hoffman, Mary Ellen Liddy, Shannon McManus, Kevin McNamee, and Peter Scheidt), and staff, who did the work. It has been a pleasure to collaborate with him and them. I also want to thank Yocheved Amrami for her assistance with my work on these proceedings.

As these proceedings go to print, and play their role in stimulating thoughtful discussion of our drug policy, I have a feeling of profound satisfaction that the work of so many people and organizations has made this volume possible. We have done good.