

# OREGON LAW REVIEW

---

2013

VOLUME 91

NUMBER 4

---

## *Foreword*

ADAM LIPTAK\*

The United States has by international standards an exceptionally harsh criminal justice system. We have less than five percent of the world's population but a quarter of its prisoners.<sup>1</sup> Indeed, we have more criminals in our prisons and jails than does any other nation.<sup>2</sup>

Two things primarily account for this questionable distinction: we criminalize more conduct and we impose longer sentences. As the timely and provocative set of essays collected here demonstrate, the collision of those factors is explosive in the area of drug policy.

The American approach appalls some foreign observers. "The U.S. pursues the war on drugs with an ignorant fanaticism," Vivien Stern of the International Center for Prison Studies at King's College London told me in 2008.<sup>3</sup>

The war on drugs has not always been with us. In 1980, there were about 40,000 people in American jails and prisons for drug crimes.<sup>4</sup> Four decades later, there were almost 500,000.<sup>5</sup>

---

\* Supreme Court correspondent, *The New York Times*; J.D., Yale Law School, 1988.

<sup>1</sup> Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

But there are signs, as some of the articles that follow demonstrate, that lawmakers, judges and prosecutors may be starting to reconsider—if only tentatively and only at the margins—aspects of the two major factors that have led to that vast incarceration.

Last year, Colorado and Washington State made it legal to smoke marijuana recreationally.<sup>6</sup> To be sure, there are countless details to work out and questions about how the federal government will respond. As Governor John Hickenlooper of Colorado said in November, “Don’t break out the Cheetos or the Goldfish too quickly.”<sup>7</sup>

In the courts, too, there is a new skepticism. Judge John Gleeson, a former federal prosecutor in Brooklyn, wrote in a 2010 decision: “Most people, including me, agree that the kingpins, masterminds, and mid-level managers of drug trafficking enterprises deserve severe punishment.”<sup>8</sup> But the foot soldiers in the war are another matter. In sentencing a struggling thirty-six-year-old “street-level distributor” to the mandatory minimum five-year sentence, Judge Gleeson noted, the “absence of fit between the crude method of punishment and the particular set of circumstances . . . was conspicuous.”<sup>9</sup>

Consider Jamel Dossie, whom Judge Gleeson, in a more recent decision, called “a young, small-time, street-level drug dealer’s assistant.”<sup>10</sup> Mr. Dossie was an intermediary in four hand-to-hand crack sales, for which he made a total of about \$140.<sup>11</sup> Two of the sales exceeded, barely, the twenty-eight-gram threshold that allows prosecutors to call for a mandatory five-year sentence.<sup>12</sup> “[J]ust as baseball is a game of inches,” Judge Gleeson wrote, “our drug-offense mandatory minimum provisions create a deadly serious game of grams.”<sup>13</sup>

---

<sup>6</sup> Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2010), [http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?\\_r=0](http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?_r=0).

<sup>7</sup> *Id.*

<sup>8</sup> *United States v. Vasquez*, 09-CR-259 (JG), 2010 WL 1257359, at \*2 (E.D.N.Y. Mar. 30, 2010).

<sup>9</sup> *Id.* at \*5.

<sup>10</sup> *United States v. Dossie*, 851 F. Supp. 2d 478, 481 (E.D.N.Y. 2012).

<sup>11</sup> *Id.* at 482.

<sup>12</sup> *Id.* at 483, *see also* Adam Liptak, *A Tough Judges Proposal for Fairer Sentencing*, N.Y. TIMES (May 28, 2012), <http://www.nytimes.com/2012/05/29/us/sidebar-a-judges-proposal-to-curb-prosecutors-sentencing-power.html>.

<sup>13</sup> *Dossie*, 851 F. Supp. 2d at 483.

Prosecutors chose to insist on a mandatory five-year sentence, and Judge Gleeson had no choice to impose it.<sup>14</sup> “[W]e had a ‘sentencing proceeding’ that involved no written submissions, no oral advocacy, and no judging,” he wrote.<sup>15</sup> “The proceeding had all the solemnity of a driver’s license renewal and took a small fraction of the time.”<sup>16</sup>

Urgent though a careful fresh look at drug policies is, public attention these days has been diverted by the equally pressing question of whether we need additional regulation of guns after the massacres in Colorado and Connecticut.<sup>17</sup> The two topics are at first blush distinct, but Professor Dan Kahan at Yale Law School recently pointed out a powerful connection between them:

[W]hile the empirical evidence on the relationship between gun control and homicide is (at this time at least) utterly inconclusive, there certainly are policies out there that we have very solid evidence to believe would reduce gun-related homicides *very substantially*.

The one at the top of the list, in my view, is to legalize recreational drugs such as marijuana and cocaine.

The theory behind this policy prescription is that illegal markets breed competition-driven violence among suppliers by offering the prospect of monopoly profits and by denying them lawful means for enforcing commercial obligations.

The evidence is ample. In addition to empirical studies of drug-law enforcement and crime rates, it includes the marked increase in homicide rates that attended alcohol prohibition and the subsequent, dramatic decline of it after repeal of the 18th Amendment.<sup>18</sup>

It is such fresh thinking, and the valuable perspectives in the articles assembled here, that may produce a reevaluation of a war that produces so few gains and so many casualties at such crushing financial and human cost.

---

<sup>14</sup> *Id.* at 489.

<sup>15</sup> *Id.* at 484.

<sup>16</sup> *Id.*

<sup>17</sup> Dan Kahan, *Actually, Empirical Evidence Suggests a Sure Fire Way to Dramatically Lower Gun Homicides: Repeal Drug Laws*, CULTURAL COGNITION PROJECT (Dec. 18, 2012, 9:58 AM), <http://www.culturalcognition.net/blog/2012/12/18/actually-empirical-evidence-suggests-a-sure-fire-way-to-dram.html>.

<sup>18</sup> *Id.*

