

1991

Beyond the War on Drugs: Overcoming a Failed Public Policy

Kenneth R. Hillier

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Law Commons](#), [Food and Drug Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Kenneth R. Hillier, *Beyond the War on Drugs: Overcoming a Failed Public Policy*, 89 MICH. L. REV. 1809 (1991).

Available at: <https://repository.law.umich.edu/mlr/vol89/iss6/39>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY. By *Steven Wisotsky*. Buffalo: Prometheus Books. 1990. Pp. xlii, 279. \$ 16.95.

“We need, fully and completely, to marshal the nation’s energy and intelligence in a true all-out war against drugs. We can and must win that war.”

— President-elect George Bush¹

In *Beyond the War on Drugs*, Steven Wisotsky² attempts to overcome the popular conception that illegal drugs represent a menace to society against which the nation must wage “war.” This is no small task. Recent polls indicate that sixty-four percent of Americans believe drugs represent the nation’s leading problem.³ Indeed, the public sentiment in favor of a “war on drugs”⁴ has been so strong that many public candidates have made it the cornerstone of their campaigns.⁵

Despite the overwhelming support for the war on drugs, a few observers have been brave enough to oppose it. As Wisotsky points out in the preface, noted conservative William F. Buckley, Jr., has advocated legalization of drugs as the only solution to the drug problem.⁶ Aligned with this new wave of opposition to the war on drugs are the traditional proponents of legalization — groups such as the National Organization for the Reform of Marijuana Laws⁷ — that have always considered the prohibition of drugs a futile public policy. Against this backdrop Wisotsky sets out to show “why the war on drugs has failed

1. *Excerpts from News Session by Bush, Watkins and Bennett*, N.Y. Times, Jan. 13, 1989, at D16, col. 1.

2. Steven Wisotsky is Professor of Law at Nova University Law Center in Fort Lauderdale, Florida. In 1986, Wisotsky published an earlier version of this book, his first. Portions of this work also appeared as a law review article. Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305. Wisotsky has also authored Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

3. *Some War; Meanwhile, Crack Undermines America*, N.Y. Times, Sept. 24, 1989, at D24, col. 1.

4. The author refers to the federal and state governments’ antidrug efforts as “The War on Drugs,” seemingly signifying his view of the efforts as a single entity.

5. See, e.g., Decker, *Bradley Makes Drug Fight the Cornerstone of His Campaign*, L.A. Times, Sept. 14, 1986, at § 1, 3, col. 4 (California gubernatorial candidate stressing antidrug efforts); Frisby, *With Drug-Funds Idea, He’s the Great Amender: New England in Washington*, Boston Globe, Aug. 14, 1989, at 3, col. 1 (Sen. John Kerry intending to “make his Senate role as an aggressive drug fighter a cornerstone of his reelection campaign”); Roberts, *Candidates Turn to Problems of Cities in New York Race*, N.Y. Times, Apr. 17, 1988, at A1, col. 2 (Sen. Gore “has made proposals to curb drug abuse a cornerstone of his campaign.”).

6. P. xxiii; Buckley, *Drugs Drugs Everywhere — and No Solution in Sight*, NATL. REV., Aug. 9, 1985, at 54.

7. Commonly referred to as “NORML,” the National Organization for the Reform of Marijuana Laws achieved some success during the 1970s in advocating the decriminalization of marijuana.

[and] why it must fail" (p. xvii) and to "create a new paradigm for understanding and regulating what is now conceived to be the 'drug problem'" (p. 197).

Much of the book aims to shatter common myths about drugs. Wisotsky immediately challenges one commonly held misperception: that the drug problem is a recent phenomenon. In the preface to the 1990 edition, Wisotsky traces America's struggle with "dangerous" drugs from the Harrison Narcotics Act of 1914⁸ to President Nixon's "total offensive" (p. xviii) through the current war on drugs. Wisotsky successfully overcomes the assumption that the 1980s and 1990s have presented new drug problems for which study of history is useless. By beginning with this historical summary, Wisotsky compels the reader to view the drug problem as not merely the result of failings of contemporary society; rather, the reader sees the problem in a broader historical perspective.

Wisotsky then describes the structure of the illegal drug industry, both in the United States and abroad, and demonstrates why the war on drugs has not succeeded. Employing economic analysis, Wisotsky shows the perverse effects of the war: the harder the government works to eliminate the drug supply, the more attractive drug smuggling becomes. The enforcement of prohibition creates an economic incentive to supply drugs; this incentive comes in the form of a "risk premium" (p. 34). By making drugs illegal, the government makes them more expensive because suppliers demand a higher price to compensate for the risk of being caught.

Wisotsky points to several statistics to support his analysis. For example, from 1976 to 1985, the amount of imported cocaine grew six to seven times, despite "substantially increased enforcement" (p. 36). The author also demonstrates why further increased enforcement is likely to fare no better. The government, he argues, possesses a finite ability to intercept drugs as they enter the country. A Coast Guard study estimates that the government would have to seize seventy-five percent of incoming drugs to drive drug traffickers out of business (p. 97). A General Accounting Office study concludes that the government seized only ten percent of the incoming cocaine, heroin, and other dangerous drugs and twenty percent of the incoming marijuana between 1977 and 1982 (pp. 96-97). Such low levels of interdiction can never convince a sufficient percentage of suppliers to forgo the profitable drug trade. Indeed, Wisotsky believes increased interdiction would only increase the risk premium, and thus strengthen the economic incentive to suppliers.

Economic analysis also forms the core of Wisotsky's explanation for the failure of crop substitution in countries such as Peru, Bolivia,

8. Harrison Narcotics Act, Pub. L. No. 63-223, 38 Stat. 785 (1914).

and Colombia. The author points out the unlikelihood of convincing farmers in Bolivia — where \$390 constituted the annual per capita income in 1979 (p. 54) — to grow coffee instead of coca⁹, when a hectare of coffee yields \$500, compared to \$5,000 for a hectare of coca (p. 55). Similarly, Wisotsky points out that the governments of these nations are ambivalent at best with respect to cooperating with the United States in eradicating these crops. Much of this ambivalence stems from the influence drug producers and suppliers exert on these governments. Economics plays a role here too, as some of these countries refuse to forgo such a valuable source of badly needed foreign exchange to solve an American problem.

On the demand side of the drug equation, Wisotsky provides the reader with perhaps the most controversial part of his analysis as he takes issue with the popular conception of cocaine as a highly addictive drug. Although Wisotsky cites medical studies to show that the addicted cocaine user represents the exception rather than the rule (p. 22), he also attempts to redefine addiction.¹⁰ Wisotsky asserts that in the American consciousness, cocaine has become the actor, while the user has become the object (p. 17). This misperception of cocaine as a living being weakens Americans' willingness to take responsibility for their own actions (p. 17). Under Wisotsky's analysis, viewing things in proper perspective — as people using drugs, rather than drugs attacking people — will better enable Americans to handle the small percentage of people who become compulsive users.

After predicting the inevitable failure of the war on drugs, Wisotsky sets forth what he calls the "pathologies" created by the war: corruption of American institutions, instability and corruption of foreign governments, and the erosion of civil liberties (pp. 117-69). Of particular interest to the legal academic is the last of these pathologies.

To demonstrate how the war on drugs has adversely affected civil rights, Wisotsky details recent legislative initiatives that have accompanied the war (pp. 118-24). Although much of the war's legislation has represented nothing more than political posturing, Congress has also shown a willingness to make serious inroads on a citizens's civil rights if that person is suspected of illegal drug activity. For example, the Comprehensive Crime Control Act of 1984 (the CCC Act)¹¹

broke new legal ground in authorizing pretrial detention upon a judge's "finding" that a defendant's release would pose a "danger to the community." The law dispenses with pretrial bail altogether for most charges under the Controlled Substances Act if the court decides, upon "clear

9. Coca is the plant from which cocaine is made.

10. P. 26. Although one may question a law professor's qualifications to discuss the medical nature of drug addiction, Wisotsky's lack of medical training does not undercut his argument, which centers on the proposition that addiction is not, in fact, a medical problem.

11. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (1984).

and convincing" evidence, that detention is necessary to insure the appearance of the defendant *or* to protect the safety of the community, even from nonviolent crimes like drug trafficking. Furthermore, the law [can] create[] a rebuttable *presumption* of a defendant's dangerousness. . . . In other words, a (serious) drug charge *alone* can justify pretrial detention, which all authorities agree severely handicaps the preparation of an effective defense. [p. 120]

Wisotsky points out that the CCC Act is just one of several statutes demonstrating Congress' "tough on drugs" attitude (pp. 118-24).

More alarming than congressional action has been the courts' willingness to follow the lead of the other two branches in the war on drugs (pp. 124-26). For example, between October 12, 1984, and May 10, 1985, the government won 704 of 889 pretrial detention hearings under the CCC Act (pp. 120-21).

Wisotsky also chronicles the recent trend in the Supreme Court's narrowing of fourth amendment protections.¹² Wisotsky avoids addressing the merits of these cases, asserting:

The question whether the Government deserved in law to win these cases misses the point: such issues are always debatable. But the relentless drive to pursue the drug supply generates the pressure to exercise these enforcement powers and sets up these test cases. Moreover, when the Supreme Court "balances" the collective interest in "effective" law enforcement against the individual's interest in being left alone, the right of privacy must almost always lose. The net result of the war on drugs is gradually, but inexorably, to expand enforcement powers at the expense of personal freedom [p. 125].

This erosion of civil liberties has led defense lawyers to refer to the "drug exception to the Fourth Amendment" and the author to refer more broadly to the "drug exception to the criminal law" (p. 125). The discussion of this alarming side effect of the war on drugs, coupled with the examination of the shortcomings of America's drug strategy, make Wisotsky's criticism of the War a convincing one.

The ambitious author, however, does not content himself with this showing; rather, he sets out in the final chapters of the book to break the impasse in the war on drugs by "creat[ing] a new paradigm for understanding and regulating . . . the 'drug problem'" (p. 197). Wisotsky attempts to redefine the terms of the debate on drugs, reiterating his desire to cease use of terms such as "addiction" that emphasize the drug rather than the user as the active agent (p. 200). Focusing on the drug user instead of the drug would, according to Wisotsky, allow society to address the real causes of drug abuse rather than continue to fight an inert object.

12. *Florida v. Riley*, 488 U.S. 445 (1989) (authorizing warrantless searches of "open fields"); *United States v. Leon*, 468 U.S. 897 (1984) (adopting "good-faith exception" to the exclusionary rule); *Illinois v. Gates*, 462 U.S. 213 (1983) (weakening test for obtaining a search warrant based on an undisclosed informant's tip).

Although *Beyond the War on Drugs* offers convincing evidence of the war's failure and of its undesirable side effects, the book comes up short in its treatment of crack cocaine. Wisotsky makes only passing reference to crack. In the preface he cites an article contending that the development of crack was an outgrowth of the government's legal pressure on drug suppliers.¹³ In the afterword, Wisotsky states that crack emerged under the "present regime of prohibition" (pp. 257-58). This fact, he argues, offers further proof of the futility of the war on drugs. Other than these brief passages, Wisotsky ignores crack, focusing instead on powder cocaine.

As the title of the book suggests, Wisotsky is trying to "overcom[e] a failed public policy." The ultimate success or failure of this attempt lies in how effectively the author convinces Americans who currently support the war on drugs. Wisotsky's failure to confront the issues surrounding crack may doom his attempt to win over advocates of the war on drugs. Substantial evidence suggests that many view crack as qualitatively different from other drugs.¹⁴ This perception that crack confounds conventional wisdom is shared by political leaders,¹⁵ members of the judiciary,¹⁶ and the public.¹⁷ This view largely results from the fact that crack is considered to be the most addictive drug commonly available.¹⁸ Furthermore, the drug's spread from the inner cities to the suburbs and rural areas contributes to this fear of crack.¹⁹ Many people also view crack as the cause of a score of other social ills,

13. P. xxiii. Cowan, *How the Narcs Created Crack; a War Against Ourselves*, NATL. REV., Dec. 5, 1986, at 26.

14. See, e.g., *Crack: A Disaster of Historic Dimension, Still Growing*, N.Y. Times, May 28, 1989, at D14 col. 1 ("Crack poses a much greater threat than other drugs. It is reaching out to destroy the quality of life, and life itself, at all levels of American society. Crack may be to the 80's and 90's what the Great Depression was to the 30's . . .").

15. See, e.g., Berke, *Bennet Asks Tougher Drug Fight, Declaring Crack "Biggest Problem,"* N.Y. Times, Aug. 1, 1989, at A14, col. 4; Shenon, *24 Task Forces Sought by Meese to Fight Crack*, N.Y. Times, Oct. 3, 1986, at A10, col. 1.

16. See, e.g., *Quotation of the Day*, N.Y. Times, Feb. 9, 1989, at A2, col. 6 (Manhattan Family Court Judge remarking, "I look back on the good old days of heroin. Heroin didn't destroy their ability to be human the way crack does.").

17. See Kerr, *Anatomy of the Drug Issue: How, After Years, It Erupted*, N.Y. Times, Nov. 17, 1986, at A1, col. 3 (The emergence of crack caused an increase in public concern over drug use despite no corresponding rise in total drug use.).

18. See Kolata, *Drug Researchers Try To Treat a Nearly Unbreakable Habit*, N.Y. Times, June 25, 1988, at A1, col. 4 (describing extremely addicting nature of crack). For an interesting account of crack use, see Morley, *What Crack Is Like: It's Great, Unfortunately*, NEW REPUB- LIC, Oct. 2, 1989, at 12.

19. See Malcom, *Crack, Bane of Inner City, Is Now Gripping Suburbs*, N.Y. Times, Oct. 1, 1989, at A1, col. 1; Massing, *Crack's Destructive Sprint Across America*, N.Y. Times, Oct. 1, 1989, § 6 (Magazine), at 38; Johnson, *Drug Gangs and Drug Wars Move Into the Rural States, U.S. Warns*, N.Y. Times, Aug. 4, 1989, at A1, col. 2.

including increased homicide rates,²⁰ child abuse,²¹ the birth of addicted babies,²² and an increase in drug-related violence.²³

Wisotsky may have been able to overcome the arguments that crack calls for an intensification of the war on drugs. Although the highly addictive nature of crack puts some pressure on the author's call for a new definition of addiction,²⁴ Wisotsky could have countered the popular belief that crack leads to a state of instant addiction whereby the user becomes helpless. Furthermore, he could have pointed to the problems stemming from crack as further proof of the ill effects of the criminalization of drugs. Instead, Wisotsky chose to make scant reference to crack, leaving it to the reader to draw his or her own conclusions about the drug. Given the widespread fear and hysteria surrounding crack in American society, the wisdom of this decision seems dubious.

Despite this shortcoming, *Beyond the War on Drugs* offers an insightful, provocative look at an important policy issue. The book should prove to be a useful springboard to debate about assumptions that deserve scrutiny but which, as the author repeatedly points out, has been accepted unquestioningly by the American public and its public officials.

— Kenneth R. Hillier

20. See Marriott, *After 3 Years, Crack Plague in New York City Only Gets Worse*, N.Y. Times, Feb. 20, 1989, at A1, col. 2 ("Crack has contributed to the city's soaring homicide rate. [In 1988, crack] played a role in at least 38 percent of the 1,867 murders . . ."); Molotsky, *Capital's Homicide Rate Is at a Record*, N.Y. Times, Oct. 30, 1988, at A20, col. 4 (Washington, D.C. police blame increased use of crack for record homicide rate.).

21. See Marriott, *supra* note 20, at A1, col. 2 ("Crack contributed to a tripling of cases [in New York City] in which parents under the influence of drugs abused or neglected their children.").

22. See *Crack Mothers, Crack Babies and Hope*, N.Y. Times, Dec. 31, 1989, at D10, col. 1 (increase in number of babies born in New York to drug-abusing mothers from 2784 in 1987 to approximately 10,000 in 1989).

23. See Kerr, *Submachine Guns and Unpredictability Are Hallmarks of Crack's Violence*, N.Y. Times, Mar. 8, 1988, at B3, col. 1.

24. See *supra* notes 10-11 and accompanying text.