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**DRUG PANICS IN THE TWENTY-FIRST
CENTURY:
ECSTASY, PRESCRIPTION DRUGS, AND
THE REFRAMING OF THE WAR ON DRUGS**

*Deborah Ahrens**

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INTRODUCTION

In November of 2012, two states voted to permit their residents to use marijuana recreationally.¹ These votes are the highest profile events in a series of developments related to drug policy that stand in direct contradiction of what historically has been referred to as the “one-way ratchet”²: the idea that criminal law moves only in the direction of criminalizing more behavior and punishing what is already criminalized more severely. This narrative has been supported by decades of law-and-order reforms in criminal law, ranging from mandatory minimum sentences to three-strikes policies, and has driven the incarceration rate in the United States to become the highest in the world.³ Much of the increase in incarceration has derived

* I would like to thank the 2009 Southeastern Association of Law Schools Conference for providing me with a forum in which to test some of the ideas I present in this article, as well as the Seattle University Law Review, which invited me to present part of this piece at its 2012 Symposium on Racial Bias in the Criminal Justice System. I would also like to thank past and present research assistants Andrew Tsoming, Adam Vanderlaarschot, and John Madsen for their work and feedback, as well as Andrew Siegel, for his help and support.

¹ See Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 7, 2012, at P15 (reporting on election results in Colorado and Washington); see also Tim Dickinson, *The Next Seven States to Legalize Pot*, ROLLINGSTONE.COM (Dec. 18, 2012), <http://www.rollingstone.com/politics/news/the-next-seven-states-to-legalize-pot-20121218> (reporting on efforts to legalize marijuana in other states); Lucy Madison, *Voters Support Pot Legalization, Split on Same-Sex Marriage*, CBSNEWS.COM (Dec. 5, 2012), http://www.cbsnews.com/8301-34222_162-57557257-10391739/voters-support-pot-legalization-split-on-same-sex-marriage/ (reporting on poll showing voters nationally support marijuana legalization by a 51% to 44% margin).

² For interesting discussions of the “one-way ratchet,” see, e.g., Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719–20 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509, 547–49 (2001).

³ The Pew Foundation published a pair of reports in 2009 that are generally taken as the starting point for assessing the scope of incarceration; the reports show that, as of the end of 2008, one in one hundred adult Americans were incarcerated, and one in 31 adult Americans were under some form of correctional supervision (including probation and parole). See THE PEW CENTER ON THE STATES, 1 IN 100: BEHIND BARS IN AMERICA IN 2008, at 5 (2009) (calculating that 2,319,258 people were behind bars in the United States at the beginning of 2008, one out of every 99.1 adults); THE PEW CENTER ON THE STATES, 1 IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4–5 (2009) (calculating that over seven million people were under correctional control at the beginning of 2008—including those incarcerated, on probation, on parole, and out on bail—one out of every thirty-one adult Americans). In the years since those reports, the number of Americans incarcerated or under correctional

from what we referred to until recently as the War on Drugs; as students of criminal justice have documented, the criminal law response to drug use historically has been swift and sure, and, never more so than the response to a perceived epidemic of crack cocaine use in the 1980s.⁴

A few years ago, I documented that the policy response to a perceived epidemic of methamphetamine use was not consistent with the drug-panic narrative.⁵ While some jurisdictions did introduce new methamphetamine-related criminal laws,⁶ and while people certainly were and continue to be prosecuted for using and manufacturing methamphetamine,⁷ the primary new public policy approaches to dealing with methamphetamine were civil and regulatory in nature.⁸ This was a conclusion reached with some surprise—the history of drug eradication efforts in this country had led me to expect a draconian criminal justice response. The response to other recent perceived drug epidemics, however, has followed a similar pattern—widespread press coverage of what is constructed as the most ominous drug scourge to face America, followed by a tempered policy response that focuses primarily on regulation, education, and alternatives to incarceration.

In Part I of this Article, I offer a concise overview of the history of drug policy in the United States and the common narratives offered to explain its arc. In Part II, I describe the portrayal of a perceived epidemic of Ecstasy⁹ use at the beginning of the twenty-

supervision has declined by very small amounts. See , at 3 (2012) (providing annual figures and showing 6,977,700 adult Americans under correctional supervision and 2,239,800 adult Americans incarcerated at the end of 2011).

⁴ See Deborah Ahrens, *Methademic: Drug Policy in an Age of Ambivalence*, 37 FLA. ST. L. REV. 841, 852–59 (2010) (summarizing the incarceration-centered response to the perceived crack cocaine epidemic of the 1980s).

⁵ See generally *id.*

⁶ See *id.* at 870 & accompanying notes (documenting state laws criminalizing possession of particular quantities of ephedrine and pseudoephedrine, essential methamphetamine “precursors”); *id.* at 879 & accompanying notes (noting examples of state laws raising penalties for possessing or manufacturing meth).

⁷ See, e.g., DUREN BANKS & STEVEN W. PERRY, U.S. DEP’T JUSTICE, PROSECUTORS IN STATES COURTS 2007-STATISTICAL TABLES, at 7 (2011) (showing that 71.1% of local prosecutors’ offices prosecuted cases involving “methamphetamine production” in 2007).

⁸ See generally Ahrens, *supra* note 4, at 865–79.

⁹ Ecstasy, also often referred to by the abbreviation MDMA, is the common-usage name for the drug methylenedioxymethamphetamine. For purposes of this article, I use “Ecstasy” as the name for the drug, as it is the most common way in which the media and commentators refer to the drug. The drug is sometimes also referred to as XTC, Adam, “the love drug,” skittles, and a variety

first century and the current portrayal of a similarly perceived epidemic of prescription drug abuse. In Part III, I document the policy responses to these perceived epidemics and demonstrate that the policy responses were tempered as compared with our responses to similar perceived epidemics in the twentieth century. In Part IV, I argue that this tempered response may be explained in part by how persons linked to these drug epidemics have been portrayed, but that the tempered response—and, perhaps, the more sympathetic portrayals themselves—are likely better explained by growing American ambivalence about the ability of expensive criminal justice measures to combat the problems associated with illicit drug use. I conclude that the shift in response to drug panic stems less from a lack of belief that drugs are a problem and more from weariness brought on by the mounting the costs and consequences of the War on Drugs.

I. A BRIEF HISTORY OF DRUG PANIC¹⁰

The application of criminal sanctions to the use, sale, and manufacture of various drugs is a relatively modern phenomenon. Until the twentieth century, American criminal law did not seek to delineate or impose sanctions for the use of illicit drugs; substances such as opium and cocaine were in fact commonly available in products manufactured legally and designed for mass consumption.¹¹ Beginning in the late nineteenth century, American legislatures began utilizing the law as an affirmative tool of public policy aimed at reducing the use of allegedly dangerous drugs.¹² As described below, many of the initial efforts in this direction were civil or regulatory. However, by the middle

of other colorful, shifting nicknames.

¹⁰ The account in this Part draws heavily on my earlier work. See Ahrens, *supra* note 4, at 846–59. For a similar account of the history of American drug policy, see Eric Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 486–512 (1997). My take on these issues draws, in turn, on the works of a diverse set of historians, sociologists, and policy experts who have focused on different aspects of the story. See, e.g., TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT* (1970); JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963); DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL* (3d ed. 1999); and the works appearing in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* (Craig Reinerman & Harry G. Levine eds., 1997).

¹¹ See Ahrens, *supra* note 4, at 846.

¹² *Id.* at 849–50.

of the twentieth century, the criminal law had become the preferred tool for enforcing the legislatures' drug policy goals.¹³

Drug laws have not, however, developed along an orderly path. Nor, for the most part, have they been the result of serious, evidence-based debates. Rather, drug laws have emerged in fits and starts in response to episodes of panic about particular drugs and the populations associated with those drugs.¹⁴ According to the historians and social scientists who have most extensively studied the subject, new laws criminalizing particular drugs or increasing the penalties for their use, sale, or manufacture rarely reflect increases in the use of those drugs or in social problems related to them but, instead, tend to emerge at moments of great cultural anxiety about particular disfavored social groups.¹⁵ A panicking public develops a cultural narrative that focuses undue attention on the powers of drugs stereotypically associated with the disfavored group and adopts new laws to regulate and punish their use and sale.

These dynamics have played themselves out many times in American history. During the nineteenth century, temperance advocates—motivated both by genuine concerns about some of the ills of alcohol consumption and panic about the rising tide of Irish and Italian immigrants and the perceived decline of an orderly colonial world—fought a decades-long battle against “Demon rum.”¹⁶ During the late nineteenth and early twentieth century, reformers turned their attention to opium, marijuana, and cocaine, imposing new and intrusive forms of regulation on those drugs, spurred on in part by media and literary accounts associating those drugs with racially marginalized groups such as Chinese immigrants and urban African-Americans.¹⁷ Though these campaigns were often shrill and the regulation they produced extensive, most of the new rules were civil or administrative in nature—for example, limiting sales, imposing prescription requirements, or taxing transactions.¹⁸

The next wave of drug panics, beginning in the 1920s or 1930s

¹³ *Id.* at 850.

¹⁴ *Id.* at 849–51.

¹⁵ *See generally* works cited *supra* note 10.

¹⁶ On the ethnic and status politics at the heart of the Temperance Movement, *see generally* GUSFIELD, *supra* note 10.

¹⁷ *See* Ahrens, *supra* note 4, at 849–51.

¹⁸ On the use of tariffs, prescriptions, and licensing regimes, *see, e.g.*, LESTER GRINSPOON & JAMES B. BAKALAR, COCAINE: A DRUG AND ITS SOCIAL EVOLUTION 41 (1975); MUSTO, *supra* note 10, at 1–2.

and picking up steam after World War II, were similar in their dynamics but somewhat different in their consequences. One after another, opium, heroin, cocaine, marijuana, and LSD took turns as the focal point of public anti-drug hysteria, ebbing and flowing as social concern shifted from Chinese immigrants to Mexican Americans to cultural and political dissenters, while consistently focusing disproportionate fear and attention on urban African-Americans.¹⁹ For reasons that have never been fully explained by historians of drug policy, but which may have had something to do with trends such as the Great Migration, the Great Depression, and the dislocation accompanying World War II, these panics increasingly produced new criminal offenses and sanctioning regimes.²⁰

The anti-drug campaigns of the 1960s and early 1970s represented an intriguing variation on the traditional narrative, as older and more traditional Americans channeled their anxieties about a rapidly changing society and their visceral disdain for hippies, other dissenters, and youth culture more generally into a strident law and order orientation.²¹ Like in earlier epochs, drug use and drug policy became an arena of contention among competing social groups, with the majority using strident anti-drug imagery to reinforce its status as the embodiment of moral norms.²² Unlike in earlier eras, the dividing line that the majority drew between its sober self and the drug-addled other did not run primarily along racial lines.²³

The panic over crack cocaine²⁴ that occurred during the mid-to-

¹⁹ On the linkage between opium and Chinese immigrants, *see, e.g.*, LESTER GRINSPOON & PETER HEDBLUM, *THE SPEED CULTURE: AMPHETAMINE USE AND ABUSE IN AMERICA* 185 (1975). On the linkage between cocaine and African-Americans, *see, e.g.*, GRINSPOON & BAKALAR, *supra* note 18, at 39; MUSTO, *supra* note 10, at 43–44. On the linkage between Mexican-Americans and marijuana, *see, e.g.*, H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980*, at 138–139 (1981). On the linkage between cultural dissenters and both marijuana and LSD, *see, e.g.*, HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1973); *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE*, *supra* note 10, at 7–8.

²⁰ *See* Ahrens, *supra* note 4, at 849–51.

²¹ *See generally* BECKER, *supra* note 19.

²² Ahrens, *supra* note 4, at 851–52.

²³ *Id.* at 851.

²⁴ *See* Ahrens, *supra* note 4, at 852–53, n.53

Crack cocaine is a smokeable form of cocaine produced by ‘cooking down’ a mixture of powder cocaine, water, and baking powder. Cocaine and its consumption through smoking long predate the so-called crack “epidemic” of the 1980s. However, the name “crack” and

late 1980s took all of the imagery, emotions, and predictable policy responses of prior panics and ratcheted them up a notch. As scholars have demonstrated in extensive detail, a series of high profile incidents—most notably the death of basketball star Len Bias and a handful of horrific murders including the execution of an on-duty New York City police officer—combined with some alarmist medical reports about a potential epidemic of “crack babies” to draw public attention to an allegedly much more dangerous form of cocaine used primarily by urban African-Americans and known as “crack.”²⁵ Concerns about crack dovetailed with an underlying climate of racialized anxiety that permeated the 1980s in response to the accelerating effects of deindustrialization, white urban exodus, and shifting family patterns.²⁶ An expansive and sophisticated modern media fed the fire, offering hundreds of stories portraying crack as the most addictive, deadly drug of all time.²⁷ Legislative response to the perceived epidemic was stern and swift; law makers drastically increased the penalties for drug crimes, imposed draconian mandatory minimum sentences, and adopted the now-infamous 100:1 ratio that treated crack cocaine much more harshly than powdered forms of the drug for federal sentencing purposes.²⁸ While later evidence debunked or deflated most of the claims about the harms associated with crack cocaine—including both concerns over a particular “crack baby” syndrome and worries that crack was particularly responsible for an uptick in the urban homicide rate²⁹—the legacy of the crack panic lives on in criminal codes.

the particular diluted formulas that go by that name emerged in urban areas in 1984 and 1985.

²⁵ I narrate these events in moderate detail. *Id.* at 852–59. For the story in full detail, see generally the works of Craig Reinerman and Harry Levine, especially the essays appearing in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE*, *supra* note 10; Craig Reinerman & Harry G. Levine, *Crack in the Rearview Mirror: Deconstructing Drug War Mythology*, 31 SOC. JUST. 182 (2004).

²⁶ Ahrens, *supra* note 4, at 857.

²⁷ See *id.* at 856–57.

²⁸ *Id.*; see also JIMMIE L. REEVES & RICHARD CAMPBELL, *CRACKED COVERAGE: TELEVISION NEWS, THE ANTI-COCAINE CRUSADE, AND THE REAGAN LEGACY* 3 (1994) (arguing that media coverage, in large part, altered the government’s response to the perceived crack epidemic).

²⁹ See Ahrens, *supra* note 4, at 853–55.

II. DRUG PANIC IN THE TWENTY-FIRST CENTURY

While crack cocaine probably has been the best-documented drug panic in recent history, it was scarcely the last. In the late 1990s and early 2000s, a new public panic emerged about a drug that previously had received modest attention, as news sources began running prolific numbers of articles about the perceived new scourge of Ecstasy.³⁰ Ecstasy, or MDMA, is a synthetic drug that can act as a stimulant and psychoactive.³¹ At the time that it

³⁰ The following charts list the number of articles that have “ecstasy” in the title and “drug” in the body of the article appearing in the Westlaw “US Newspapers” library for every year since 1984:

Year	Articles	Year	Articles	Year	Articles
2012	138	2002	457	1992	24
2011	150	2001	725	1991	10
2010	143	2000	554	1990	22
2009	137	1999	117	1989	37
2008	160	1998	35	1988	14
2007	130	1997	24	1987	14
2006	124	1996	38	1986	5
2005	162	1995	32	1985	44
2004	276	1994	15	1984	0
2003	210	1993	8		

These numbers are not a perfect apples-to-apples comparison by year, as more newspapers appear in the database for the later years. However, a search of the “major newspapers” database—which contains a more consistent set of sources—confirms the major conclusions of the above search: coverage increased substantially in 1999, exploded in 2000, peaked in 2001, and then gradually receded to a level higher than it was before 2000 but several multiples smaller than it was during the 2000–2002 peak coverage. The smaller data set additionally suggests that there may have been minor spikes of interest in the drug in 1985, 1989–1990, 1992, and 1995–1996, all of which correspond to moderately high-profile regulatory or criminal law matters related to the drug. As further evidence of the new notoriety the drug reached in the first years of the new millennium, the bulk of headlines referring to ecstasy in the years preceding 1999 put the drug’s name in quotation marks; by late 2000 or early 2001, virtually none did so.

³¹ See *MDMA (Ecstasy)*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/drugs-abuse/mdma-ecstasy> (last visited June 9, 2013). Ecstasy, which is generally consumed in tablet form, can enhance emotional warmth, physical energy, and sensory perception, and can also stimulate mental activity; it can also affect temperature regulation and cause nausea, muscle cramping, and teeth clenching. See *id.* Prolonged use of the drug may cause depletion of serotonin and related behavioral effects. See *Ecstasy Use Depletes Brain’s Serotonin Levels*, SCI. DAILY (July 28, 2000), <http://www.sciencedaily.com/releases/2000/07/000727081324.htm>; see also *Ecstasy Abuse and Control: Hearing Before the S. Subcomm. on Governmental Affairs*, 107th Cong. (2001) (statement of Alan I. Leshner, Dir., Nat’l Inst. on Drug Abuse), available at <https://archives.drugabuse.gov/Testimony/7-30->

began to enjoy wide coverage, Ecstasy was not a new substance – it was created and patented in the early part of the twentieth century.³² By the 1980s, it was being used legally in therapy provided by licensed psychiatrists³³ and was still an unscheduled drug. The status of Ecstasy as a completely licit drug changed quickly and dramatically in the 1980s, evidently in response to law enforcement reports that recreational use of the drug was rising, as well as to laboratory research suggesting that use of the drug risks permanent brain damage.³⁴ In 1985, the DEA used its emergency-scheduling powers for the second time to put Ecstasy on Schedule I.³⁵ Ecstasy subsequently was briefly rescheduled to Schedule III in 1988, which would permit therapeutic use, but quickly was returned to Schedule I, permanently, where it remains.³⁶

While use of Ecstasy in any context was rare or nonexistent for

01Testimony.html (offering a description of possible effects of Ecstasy).

³² The German pharmaceutical company Merck patented Ecstasy in 1914. See, e.g., Robert P. Climko et al., *Ecstasy: A review of MDMA and MDA*, 16 INT'L J. PSYCH. MED. 359, 360, 364 (1986). Ecstasy appears to have been studied intermittently by Merck chemists over the next fifty years; while literature about Ecstasy often suggests that it was intended by Merck for use as an appetite suppressant, archival research suggests that it was not tested for that purpose in 1912 and was not tested on humans at all until 1960. See ROLAND W. FREUDENMAN ET AL., THE ORIGIN OF MDMA (ECSTASY) REVISITED: THE TRUE STORY RECONSTRUCTED FROM THE ORIGINAL DOCUMENTS (2006), http://neurosoup.org/pdf/mdma_history_merck.pdf (arguing that Ecstasy originally was patented inadvertently as Merck sought to avoid an existing patent for a clotting agent).

³³ Some psychiatrists believe that Ecstasy is useful in psychotherapy by permitting patients to be more open and trusting. See, e.g., Erika Check, *The Ups and Downs of Ecstasy*, 429 NATURE 126 (2004).

³⁴ For fuller discussion of these issues, see *infra* notes 38, 43 and accompanying sources.

³⁵ The DEA had been granted these powers in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, § 1762, 98 Stat. 1976 (1984). Schedule I drugs are those that, at law, have no safe, medical, or therapeutic use; drugs on this schedule are more restricted than those on the other four available classification schedules. In May of 1985, the DEA announced that, as of July 1, Ecstasy would be on Schedule I, and that hearings to determine whether or not to make that classification permanent would follow. See *U.S. Will Ban 'Ecstasy,' A Hallucinogenic Drug*, N.Y. TIMES, June 1, 1985, at 16, available at 1985 WLNR 634746. John C. Lawn, who was then Acting Administrator of the DEA, released a press statement in conjunction with the emergency scheduling that announced that “[a]ll of the evidence D.E.A. has received shows that MDMA abuse has become a nationwide problem and that it poses a serious health threat This emergency action is a stopgap measure to curb MDMA abuse until the administrative process can be completed.” *Id.*

³⁶ *In the Beginning*, THEDEA.ORG, <http://thedeo.org/drughistory.html> (last visited June 9, 2013).

the first seventy years of the drug's existence, during the early 1980s, patrons of urban dance clubs—particularly gay dance clubs—and young professionals, often with ties to the counterculture movement of the 1960s and early 1970s, began using MDMA in significant numbers.³⁷ Though the drug initially went by a variety of names among users and in media coverage, by 1985, it was primarily being marketed and referred to as “Ecstasy.” Major news organizations first began covering Ecstasy extensively in 1985, in large measure in response to the DEA's efforts to ban the drug.³⁸ This first round of press coverage was sensationalist but also whimsical, mixing articles about the purported dangers of the drug with articles about its alleged benefits.³⁹ Some of the more positive coverage extensively quoted therapists and new age healers who had been using the drug themselves or prescribing it for patients since the 1960s.⁴⁰ The

³⁷ See David M. McDowell, *Ecstasy and Club Drugs: Established and Possible Dangers*, <http://judiciary.house.gov/legacy/mcdow0615.htm> (last visited June 9, 2013).

³⁸ In 1984, the DEA published notice in the Federal Register that it intended to place MDMA on “Schedule I”, treating it as an illegal drug with no accepted medical purposes. An ad hoc group of therapists, drug researchers, and lawyers objected, arguing that the drug had legitimate therapeutic uses whose continued study required placement of the drug on the less restrictive “Schedule III” or its continued legality. They made a formal request to the DEA for hearings on this matter and such hearings were convened in early 1985. Upset with the pace of change, the DEA utilized new legislative authority to short-circuit the process, declaring an emergency and placing the drug on Schedule I effective July 1, 1985. The scheduled hearings continued (now focused on the drug's permanent classification), leading to a recommendation by an administrative law judge that the drug should more properly be listed on Schedule III. The DEA ignored the ALJ's recommendation and permanently listed the drug on Schedule I in November 1986. Subsequent legal challenges established that the DEA actually did not have proper authority to schedule the drug on an emergency basis (as that authority belonged to the Attorney General and had never been delegated) and that the permanent scheduling decision had erroneously failed to consider some of the possible affirmative uses for the drug. As a result of the second of those conclusions, the First Circuit ordered that MDMA be removed from Schedule I effective December 22, 1987 and that the DEA reconsider its decision using the proper standards. *Grinspoon v. DEA*, 828 F.2d 881 (1st Cir. 1987). The DEA promptly completed the reconsideration process, affirmed its decision to place MDMA on Schedule I, and returned it to that list effective March 23, 1987. This story is narrated in BRUCE EISNER, *ECSTASY, THE MDMA STORY* 7–10, 13, 15, 19 (1994), and ALEXANDER T. SHULGIN, *History of MDMA*, in *ECSTASY: THE CLINICAL, PHARMACOLOGICAL AND NEUROTOXICOLOGICAL EFFECTS OF THE DRUG MDMA* 1, 8–9 (Stephen J. Peroutka ed., 1990).

³⁹ See, e.g., Karim Murji, *The Agony and the Ecstasy: Drugs, Media and Mortality*, *Schaffer Library of Drug Policy*, <http://www.druglibrary.org/schaffer/lsd/murji.htm> (last visited June 9, 2013).

⁴⁰ See, e.g., Jerry Adler, *Getting High on Ecstasy*, *NEWSWEEK*, Apr. 15, 1985,

most positive coverage claimed that the drug was fulfilling the hopes that many originally had for LSD, providing an extraordinary consciousness-raising experience with limited side effects.⁴¹ A series of Doonesbury comics epitomized this side of the coverage by casually referring to the long experience with MDMA that veterans of the sixties counterculture shared, making fun of young people for only recently discovering the drug, then sardonically noting that the kids had ruined everything by getting the drug banned.⁴² On the flip side, some articles, relying heavily on the claims of law enforcement officials and of a team of scientists whose research allegedly showed that MDMA caused long-term brain damage in rats,⁴³ began to stress the dangers of the drug.⁴⁴ These articles followed the normal

at 96 (quoting, among others, therapists and monks and recounting the author's experience with the drug whose consciousness-raising effects he compares to two years of therapy); Bill Mandel, *The Yuppie Psychedelic*, S.F. CHRON., June 10, 1994 (discussing new drug, then still called "Adam," in flippant terms, with many analogies to 1960s-era drug use and speculating as to whether MDMA might be the sedate psychedelic that "non-kooky baby boomers" have been searching for); see also Joe Klein, *The New Drug They Call "Ecstasy"*, N.Y. MAG., May 25, 1985, at 38.

⁴¹ See, e.g., Adler, *supra* note 40 ("This is the drug that LSD was supposed to be, coming 20 years too late to change the world"); Mandel, *supra* note 40 ("Shades of Timothy Leary!").

⁴² Some of the Doonesbury comics are reprinted in EISNER, *supra* note 38, at 12, 13.

⁴³ The main researcher Charles Schuster of the University of Chicago initially made some broad claims about the results of experiments assessing the effect of MDMA on the brains of rats. His comments—made originally on the Phil Donahue show, see EISNER, *supra* note 38, at 11—were cited by DEA officials as the primary reason for the decision to schedule the drug on an emergency basis. As it turns out, the research actually utilized MDA, a related drug that was already illegal, not MDMA; moreover, the authors' claims were much more modest than their initial public statements suggested. For contemporaneous coverage of the studies, see E.S. Corwin, *One Similar Found to Cause Brain Damage in Rats; Drug MDMA Formally Banned Effective July 1*, L.A. TIMES, June 1, 1985, at 5, available at 1985 WLNR 968471; *Tests Indicate that "Ecstasy"-Like Drug Harms Animals*, HOUST. CHRON., Aug. 30, 1985, at 18, available at 1985 WLNR 1268618.

⁴⁴ For a cross section of the articles focusing on the dangers of the drug, see, e.g., Corwin, *supra* note 43; Kim Pierce, *"Ecstasy" Goes Under Ground: Mood Drug Used in Dallas Area Outlawed Today*, DALLAS MORN. NEWS, July 1, 1985, at 1c, available at 1985 WLNR 1327475 ("The drug once hailed by a small group of spiritual seekers around the country as a way to experience oneness with higher consciousness has become a problem on the street. . . The good-vibrations Ecstasy experience has begun to look like a bad trip."); Editorial, *Designer Drugs: 'High on Ecstasy'*, DALLAS MORN. NEWS, Apr. 18, 1985, at 30A, available at 1985 WLNR 1328711. Advocating criminalization in light of the fact that

illegal traffickers are shipping more than 50,000 to 100,000 tablets at

cause of media coverage in a drug panic by: (1) sensationalizing the effects of the drug; (2) mobilizing loaded language and catch phrases to draw public attention; and (3) portraying the users of the drug—in this case, gay men, disaffected urban youth, and the remnants of the sixties counterculture movement—as dangerous “others” who posed a threat to mainstream culture and security. The two strands of the media coverage often converged in amusing ways, most notably during a 1985 episode of the Phil Donahue show that evolved into a spirited debate between advocates of the drug and the scientists who had completed the rat research, each side making increasingly outlandish claims about the drug.⁴⁵

Over the next decade, there were sporadic spikes of attention paid to “Ecstasy,” most notably when courts issued decisions in the protracted battle over the legal status of the drug or when the police made significant arrests, but there was no concerted press campaign to cover the drug, sensationally or otherwise.⁴⁶ Despite its new illegal status, Ecstasy use continued to grow during the late 1980s and early 1990s, particularly amid young people and often in tandem with the broader “rave” scene.⁴⁷ During 1995 and 1996, several young people in England, Australia, and the United States died, allegedly as the result of Ecstasy use.⁴⁸ These deaths

a time into the Dallas area, according to law-enforcement officials, . . . [o]fficials at Parkland Hospital say they are already beginning to treat disoriented and ill youngsters who have overdosed on Ecstasy[, and] [s]tudents who may shy away from other drugs are sampling Ecstasy because it is being marketed as a safe, legal drug for \$20 a trip.

Id.; “Ecstasy” Drug is Banned; May Damage User’s Brain, MIAMI HERALD, June 1, 1985, at 10A (reporting on DEA action and explaining decision in short article that claims use has “skyrocketed,” cites to reports of two ecstasy-related deaths, and relies heavily on University of Chicago brain damage study).

⁴⁵ The episode is recounted in countless sources, including EISNER, *supra* note 38, at 11–12; see also Klein, *supra* note 40, at 39 (offering similarly amusing mixed accounting of the new drug).

⁴⁶ See, e.g., *Rave’s Relationship to the Media*, FANTAZIA.ORG, <http://www.fantazia.org.uk/Scene/press/magazines.htm> (last visited May 10, 2013).

⁴⁷ See McDowell, *supra* note 37.

⁴⁸ Lea Betts was an 18-year-old from Essex, England, who died of water intoxication in 1995 after consuming MDMA and became the subject of a poster war between anti-drug groups and their opponents as to whether MDMA was to blame for her death. Anna Wood was a 15-year-old Australian, who also died of water intoxication in 1995 after consuming MDMA at a rave; her death spurred a moral panic against Ecstasy and club drugs more generally in Australia. In the United States, coverage of MDMA-related deaths tended to be more localized. For one death that drew a great deal of attention in part because of the prosecutorial response that it spurred, see John Cloud, *Ecstasy Crackdown*, TIME, Apr. 1, 2001 (reporting on 1998 death of Jillian Kirkland in New Orleans

drew another, still relatively moderately scaled round of coverage, this time focusing in on the potential threat the drug posed to young people.⁴⁹ The “agony of Ecstasy” became a popular news writer’s refrain,⁵⁰ as commentators openly speculated about a new drug “epidemic.”⁵¹ During the mid-to-late 1990s, the coverage tended to portray the young people who were using the drug as misguided youth, certainly outside the cultural mainstream but more victim than danger.⁵² Sharp moral antipathy was reserved for those who provided the drug and organized the raves at which it was vended and consumed; such individuals were portrayed as cynical adults preying on vulnerable young people.⁵³ News coverage treated as “other” both the drug “pushers” who sold the drugs and the electronic music organizers who facilitated the

and its consequences).

⁴⁹ See, e.g., Murji, *supra* note 39 (noting that “[i]n the aftermath of two deaths and one temporary coma all linked to ecstasy it is hardly surprising that there was a strong emotional response from the parents of the young people concerned”).

⁵⁰ See, e.g., Margot Cohen, *The Agony of Ecstasy*, WALL ST. J., January 29, 1997, at A9, available at 1997 WL 2097931; Tom Leithauser, *Drugs: Facing Agony of Ecstasy*, ORLANDO SENT., June 18, 1995, at K1.

⁵¹ See, e.g., Elizabeth Fullerton, *Designer Drug Use ‘Epidemic’ ‘Ecstasy’ One of the Quickest Movers in Drug Industry*, DENVER ROCKY MT. NEWS, June 29, 1997, at 54A, available at 1997 WLNR 768142; *WHO Cites Surges in Stimulant Abuse*, BOSTON GLOBE, Nov. 16, 1996, at A9, available at 1996 WLNR 2214434 (“The world is witnessing an epidemic in the use of stimulants such as speed and ecstasy, and little is being done about it.”).

⁵² See, e.g., Sharon Cotliar, *Drug Has Designs on Suburbs: ‘Ecstasy’ Lures Young, Affluent*, CHIC. SUN TIMES, Mar. 21, 1997, at 3, available at 1997 WLNR 7178583 (portraying teens and young adults in affluent suburbs as targets for drug dealers seeking to expand their markets); Donna Cato, *Peers Say Young Ecstasy Users Were Mimicking Older Teens*, CONTRA COSTA TIMES, Nov. 19, 1999 (sympathetically portraying middle school students hospitalized after consuming ecstasy as insecure young folk mimicking their older peers); Gary Fields, *Ecstasy Drug Seizures Multiplying*, USA TODAY, June 7, 1999, at A1, available at 1999 WLNR 3310051 (“Ecstasy users primarily are affluent teenagers who frequent all-night dance parties called raves, which are increasingly popular in suburbs and cities such as Austin, Texas; Miami; San Francisco; Washington, D.C.; and New York.”); Cheryl Weitzstein, *Ecstasy, Other “Club Drugs” Called Unsafe, “Insidious” in New Report*, WASH. TIMES, Dec. 3, 1999, at A8, available at 1999 WLNR 381967 (portraying ecstasy as “an insidious epidemic” that lures in naïve kids who are seeking a little fun and erroneously believe that the drug is safe); see also Michelle Gourley, *A Subcultural Study of Recreational Ecstasy Use*, 40 J. OF SOC. 59, 69 (2004) (showing that young people justify their Ecstasy use by believing that it is a commonplace among others their age).

⁵³ See, e.g., Press Release, U.S. Dep’t of Justice, *Lead Defendant Sentenced in Largest Ecstasy Ring in S.E.* (Jan. 4, 2006) (available at <http://www.justice.gov/usao/gan/press/2006/01-04-06.pdf>).

culture in complicated ways, drawing on stereotypes about cultural dissenters, urbanites, foreign nationals, and gay men.⁵⁴

Coverage of Ecstasy use began to take off in 1999 and peaked in the years 2000-2002.⁵⁵ During those years, Ecstasy graduated to the big leagues in terms of media coverage, appearing on the cover of major news magazines⁵⁶ and earning long investigative features in the nation's leading newspapers.⁵⁷ This coverage bore some significant similarities to the earlier coverage, emphasizing the drug's history as an urban club drug, its particular allure to young people, and its growing popularity.⁵⁸ Its main thrust was critical—even sensationalist—but it retained an undercurrent of lightheartedness that was absent from, for example, the coverage of crack cocaine.⁵⁹ What was different in 2000-2002, however, was the coverage's assessment of the scale of the crisis and its portrayal of the average user. Ecstasy was not a coming threat, but a current "epidemic."⁶⁰ The drug's allure was, allegedly, spreading fast, breaking out from the cities to invade suburbia and the rural heartland.⁶¹ The typical user was not necessarily

⁵⁴ See, e.g., Doris Bloodsworth, *Drug Ring Suspect Caught in Seminole: 25-Year-Old is Accused of Importing Large Amounts of the Designer Drug Ecstasy*, ORLANDO SENT., Nov. 18, 1999, at D1, available at 1999 WLNR 7000987 (emphasizing ethnic Eastern European last name, older age, scale of distribution, and ties to "international drug cartel"); *Club Owner Accused of Selling Ecstasy*, CHIC. TRIB., May 16, 1996, at 2, available at 1999 WLNR 5190764 (reporting on arrest of noted New York nightclub owner Peter Gatten and 21 other men for allegedly turning two of his clubs into drug "supermarkets"); Cotliar, *supra* note 52 (portraying ecstasy manufacturers as stunted young men in their 20's living and cooking their drugs in their parents' basements and emphasizing sexual side of Ecstasy culture); Frank Main, *10 in S. Suburbs Charged with Selling the Drug Ecstasy*, CHIC. SUN TIMES, Aug. 11, 1999, at 16, available at 1999 WLNR 8624087 (emphasizing, in story about adults arrested for selling Ecstasy, that teens are the many main buyers and that the drug "can be used to sexually victimize people"); Lacy McCrary, *Man Accused of Corrupting Minors: The Perkasi Man Was Charged After a Raid of His Home*, PHIL. INQ., May 11, 1999, at B2.

⁵⁵ For the year-by-year data, see *supra* note 30.

⁵⁶ See, e.g., *What Ecstasy Does to Your Brain*, TIME, June 5, 2000 (cover photo and package of stories on "The Science," "The Rave Scene," and a "Crime Ring").

⁵⁷ See, e.g., Matthew Klam, *Experiencing Ecstasy*, N.Y. TIMES, Jan. 21, 2001, at § 6 col. 1.

⁵⁸ See generally John Cloud, *The Lure of Ecstasy*, TIME, May 28, 2000.

⁵⁹ See generally *id.*

⁶⁰ See, e.g., Patrick Olsen & Kris Karnopp, *DEA to Target Ecstasy Rings*, CHI. TRIB., Nov. 22, 2002, at 8 ("[T]eenage use of Ecstasy is reaching 'epidemic' levels.").

⁶¹ See, e.g., Michael Amon, *Ecstasy Reaches Rural Areas; Bust in St. Mary's Highlights Spread of "Love Drug" Use*, WASH. POST, Aug. 12, 2001, at C1; Fox Butterfield, *Violence Rises as Club Drug Spreads Out Into the Streets*, N.Y.

ingesting the drug at an urban rave but instead popping his or her pill in a suburban living room, along with or instead of vodka or marijuana.⁶²

The description and iconography of the Ecstasy coverage provides an interesting contrast with that of other recent drug panics. The stories of suburban teenagers were full of concern about the potential for overdose and the long term consequences of regularly frying their brains, but lacked images of marauding teenagers holding up liquor stores in the thrall of—or to pay for—drugs.⁶³ In some ways, the coverage was even more benign than the coverage of methamphetamine that would spike just a few years later. While meth users were not portrayed as viciously as crack users, meth coverage placed a secondary emphasis on harm to others (through the dangerous manufacture of the drug and the neglect of children) and a primary emphasis on the pathetic deterioration that meth use imposed on the user.⁶⁴ The coverage of Ecstasy was largely devoid of the former⁶⁵ and significantly played down the latter. Whereas the dominant image of the crack cocaine era was a menacing black man and the dominant image of the methamphetamine era was a toothless and bedraggled rural white person,⁶⁶ the dominant image of the Ecstasy coverage—as reflected in particular in *Time Magazine*'s widely disseminated cover image—was a slightly spacy-looking but otherwise healthy suburban teenager half illuminated in

TIMES, June 24, 2001, at A1; Benjamin Wallace-Wells, *Suburbs Become Drug Markets: Police Forces Find a Growing Problem with Sales of "Club Drugs"*, PHILLY.COM (July 22, 2002), http://articles.philly.com/2002-07-22/news/25356271_1_club-drugs-drug-gangs-drug-czar.

⁶² See, e.g., Gregory Seay, *Still No Charges in Ecstasy Death of Local Teenage Girl*, HARTFORD COURANT, Dec. 24, 2002, at B3 (discussing death of suburban Connecticut girl who ingested drug "at a house party"); Jamie Stockwell, *Report: Md. Teens Using More Ecstasy; But Tobacco, Alcohol Consumption Drops*, WASH. POST., Oct. 4, 2001, at T02 (discussing increasing use of ecstasy by suburban teenagers); cf. Jimmy Greenfield, *Ecstasy's Danger Clear; DEA Launches a Crackdown on Club Drugs as Millions More Try Them*, CHI. TRIB., Nov. 27, 2002, at 6 (describing "ecstasy" as a club drug but then quoting an expert calling it a "misconception" that most Ecstasy use by young people is in the clubs as "the majority of use is in the home").

⁶³ See, e.g., Greenfield, *supra* note 62; Stockwell, *supra* note 62.

⁶⁴ Ahrens, *supra* note 4, at 895.

⁶⁵ But see Dan Gross, *Actors' Tot Takes a Taste of Ecstasy*, PHILA. DAILY NEWS, Oct. 8, 2002, at 37 (reporting on accidental drug use by 2-year-old daughter of actors Sadie Frost and Jude Law); Patrick Olsen & Mike Morgan, *State Says Ecstasy Lab Found Under Driveway*, CHI. TRIB., Dec. 20, 2002, at 8 (discussing construction of elaborate Ecstasy lab known as "the Citadel").

⁶⁶ See Ahrens, *supra* note 4, at 895.

psychedelic colors.⁶⁷

In the fall of 2002, George Ricaurte published a paper in *Science*, describing an experiment on monkeys that allegedly showed that even a single dose of Ecstasy can cause damage akin to Parkinson's Disease.⁶⁸ The article received broad and sensationalized press coverage,⁶⁹ driven in part by a press kit that exaggerated the paper's findings.⁷⁰ From the onset, critics raised questions about the study's conclusions (which seemed inconsistent with prior research);⁷¹ but news writers and politicians continued to spread the story, sometimes in evenhanded articles offering equal time to the skeptics⁷² and sometimes in breathless one-sided accounts.⁷³ As recounted below,⁷⁴ Ricaurte was forced to withdraw the paper less than a year later after it was discovered that he had not in fact injected the monkeys with MDMA but instead had given them a nearly lethal dose of methamphetamine, a very different drug.⁷⁵

Like LSD before it, Ecstasy was associated with a deviant youth subculture with counter-majoritarian values.⁷⁶ The paraphernalia associated with rave culture were unusual and also made for colorful and somewhat anthropological press. Pacifiers were supposed to help Ecstasy users deal with tooth grinding associated with Ecstasy use; glow sticks were supposed to enhance the effects of an Ecstasy high; and even water bottles were characterized as rave paraphernalia, as people were said to

⁶⁷ *What Ecstasy Does to Your Brain*, *supra* note 56.

⁶⁸ George A. Ricaurte et al., *Severe Dopaminergic Neurotoxicity in Primates After a Common Recreational Dose Regimen of MDMA ("Ecstasy")*, 297 *SCI.* 2260 (2002) (retracted Sep. 12, 2003).

⁶⁹ See, e.g., Linda Marsa, *The Nation*; *Study Links Ecstasy's Effects to Parkinson's; Health: Animal Tests Show the Party Drug can Lead to Severe Brain Damage and Disease Symptoms Such as Loss of Motor Skills*, *L.A. TIMES*, Sept. 27, 2002, at 24; Donald G. McNeil, Jr., *Research on Ecstasy is Clouded by Errors*, *N.Y. TIMES*, Dec. 2, 2003, at F1.

⁷⁰ See generally Carla Spartos, *The Ecstasy Factor: Bad Science Slandered a Generation's Favorite Drug*, *VILLAGE VOICE* (Mar. 2, 2004), <http://www.villagevoice.com/2004-03-02/news/the-ecstasy-factor/1/> (recounting Ricaurte scandal in detail and spelling out exaggerations in press releases).

⁷¹ McNeil, *supra* note 69; Rick Weiss, *On Ecstasy, Consensus is Elusive; Study Suggesting Risk of Brain Damage Questioned by Critics of Methodology*, *WASH. POST*, Sept. 30, 2002, at A7 (offering arguments of skeptics).

⁷² See, e.g., Weiss, *supra* note 71.

⁷³ See, e.g., Spartos, *supra* note 70.

⁷⁴ See *infra* note 84.

⁷⁵ *Id.*

⁷⁶ See, e.g., *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL*, *supra* note 10, at 7-8 (discussing LSD); Gourley, *supra* note 52 (discussing Ecstasy).

carry water to alleviate the effects of Ecstasy-associated dehydration.⁷⁷ It is unclear to what extent these items of paraphernalia actually are drug-connected,⁷⁸ but the depiction of such paraphernalia to some extent enhanced the whimsical, “isn’t this odd?” nature of the media coverage in general.

Did the glut of media articles accurately describe an actual epidemic of dangerous drug use? To some extent, the surge in articles indeed accurately mirrored a surge in use. Usage figures do suggest that, at the time of media coverage, Ecstasy use had risen considerably, particularly among young people.⁷⁹ Still, most people were not using Ecstasy—unlike marijuana, for example, it was never a particularly popular substance for recreational use in terms of the sheer number of actual users.⁸⁰ Was the drug as dangerous as wide coverage might suggest? Emergency-room reports associated with Ecstasy rose during this period,⁸¹ as did

⁷⁷ See, e.g., Geraldine Sealey, *Can Congress Kill the Rave*, ABCNEWS, Aug. 16, 2002, <http://abcnews.go.com/US/story?id=91376&page=1> (noting that supporters of the RAVE act believed that rave promoters “sell items believed to enhance the effects of drugs, such as neon glow sticks, massage oils, menthol nasal inhalers, and pacifiers”).

⁷⁸ It is unclear to what extent rave paraphernalia actually is associated with drug use, or how much of the paraphernalia is specific to raves in the first place. Clearly, water bottles are toted by people who attend a broad spectrum of public events, and wearing pacifiers may be, for many rave attendees, more of a statement of allegiance to youth culture or simply fashion. See Sealey, *supra* note 77 (noting that rave attendees and electronic music advocates interviewed for the article argued that items such as glow sticks and pacifiers are used for entertainment purposes, and that marked-up bottled water is common to most concerts and sports venues).

⁷⁹ High school user figures can be a reasonable way to chart drug trends, as new users tend to illustrate what drugs are gaining popularity. The Institute for Social Research, with sponsorship from the National Institute on Drug Abuse and the National Institutes of Health, began surveying self-reported Ecstasy use among high school students in 1996. Per their research, use among high school students dropped from 1996 to 1998, began rising in 1999, continued to rise into 2001, and declined significantly between 2001 and 2002. In 2001, at its apex in this interval, 9.2% of high school seniors; 6.2% of tenth-graders; and 3.5% of eighth-graders reported that they had at some point tried Ecstasy. The report noted that reported Ecstasy use was higher among high school students than among college students or young adults at the time of the surveys. See LLOYD D. JOHNSTON ET AL., *MONITORING THE FUTURE: NATIONAL RESULTS ON DRUG USE: 2012 OVERVIEW: KEY FINDINGS ON ADOLESCENT DRUG USE* 36 (2013), <http://www.monitoringthefuture.org/pubs/monographs/mtf-overview2012.pdf>.

⁸⁰ *Id.* at 12 (noting that self-reported marijuana use peaked among surveyed high school seniors in 1979, when 51% of high school seniors reported use within the past year, more than five times as many as ever reported using Ecstasy).

⁸¹ One drug regulation skeptic who blogs on these issues has charted emergency room admissions and MDMA-related deaths, utilizing statistics from the United States Substance Abuse and Mental Health Services Administration.

overdoses attributed in some way to Ecstasy use.⁸² Emergency room visits and overdoses are difficult to attribute cleanly to Ecstasy, as many involved use of multiple drugs, and some stemmed from over-hydration rather than drug consumption.⁸³ Further, to the extent that Ecstasy represented or represents an ongoing, serious public health threat, some of the most widely-covered research turned out to be faulty in ways that at best prompted critique and at worst required the fairly unusual action of withdrawing a published piece of scholarship from a reputable academic journal.⁸⁴

Ecstasy was hardly the final illicit substance subject to public panic about abuse. I have documented that we have experienced a similar panic regarding methamphetamine,⁸⁵ and we appear at

His figures suggest that emergency room visits related to ecstasy numbered less than 1,000 per year until 1998, grew rapidly to about 5,500 in 2001, and then declined precipitously in 2002. *Statistics*, THEDEA.ORG, <http://thedeas.org/statistics.html> (last visited June 9, 2013). More recent statistics published directly by the organization claim substantially higher figures and also claim that such visits have increased 75% between 2004 and 2011. See SUBSTANCE ABUSE AND MENTAL HEALTH NETWORK, THE DAWN REPORT: EMERGENCY DEPARTMENT VISITS INVOLVING ECSTASY (2011). It is unclear why the scale of the numbers is so much higher in recent years given the substantially lower usage rates. It is likely that the absolute numbers recount differences in reporting practices or medical care rather than a much a higher rate of Ecstasy abuse in recent years, which would be contrary to all other evidence.

⁸² See *Statistics*, *supra* note 81 (showing a data spike in MDMA-related deaths between 1998 and 2001).

⁸³ SUBSTANCE ABUSE AND MENTAL HEALTH NETWORK, *supra* note 81; Lisa Sanders, *Unresponsive*, N.Y. TIMES, Oct. 14, 2012, § MM34.

⁸⁴ The most famous and widely-reported studies on the negative health effects of Ecstasy have been conducted by George Ricaurte, whose article, Ricaurte et al., *supra* note 68, initially reported that monkeys injected with even a single dose of Ecstasy demonstrated neurotoxicity and behaved as if they were developing Parkinson's Disease. As discussed *supra* notes 68–74 and accompanying text, the paper initially met skepticism from other researchers who had not reached similar results. Ricaurte withdrew the published article after it was revealed that the monkeys in the study had evidently inadvertently been injected with methamphetamine rather than Ecstasy. See Constance Holden, *Paper on Toxic Party Drug Is Pulled Over Vial Mix-Up*, 301 SCI. 1431, 1454 (2003). The episode caused some researchers to speculate that government funding used to support research on illicit drugs created the risk of biased results. See Robert Walgate, *Retracted Ecstasy Paper 'An Outrageous Scandal'*, SCIENTIST (Sept. 16, 2003), <http://www.the-scientist.com/?articles.view/articleNo/22453/title/Retracted-Ecstasy-paper--an-outrageous-scandal/> (quoting a critic of the study as lamenting that the incident represented “another example of a certain breed of scientist who appear to do research on illegal drugs mainly to show what the governments want them to show. They extract large amounts of grant money from the government to do this sort of biased work . . .”).

⁸⁵ Ahrens, *supra* note 4, at 859–60.

this writing to be in the midst of a similar spike in media coverage of prescription drug abuse.⁸⁶ Prescription drugs, unlike Schedule I drugs such as Ecstasy that are not authorized for any purposes, have been determined to have legitimate applications for which they can be lawfully prescribed.⁸⁷ The problems to which media articles increasingly have drawn attention is that individuals often do not use prescribed drugs in ways permitted by law, may develop addiction and dependency on those drugs, and may use them on occasion for recreational purposes.⁸⁸ Some abuse occurs when people originally are legitimately prescribed drugs, but take higher doses than recommended or take them once they no longer are recommended. Other abuse occurs when people use drugs prescribed to others either to self-medicate or recreationally. Still other abuse occurs when people take prescription drugs in combinations that are not recommended by physicians.⁸⁹ Publicity about the problem of prescription drug

⁸⁶ A search of Westlaw's U.S. Newspapers database for articles that have "prescription" within two words of "drugs" in their titles and "abuse" in their bodies reveals the following numbers for each of the last twenty years. Though anomalies in the data base's coverage and shifting terminology obviously influence the numbers, and while I did not search by specific drugs that often are described as subject to widespread abuse (oxycodone and methadone, for example), the trend is clear: the attention paid to prescription drug abuse gradually increased in the first half of the 2000's, began to increase more quickly in the second half of that decade, and has exploded over the last few years. Initial data from 2013 suggests that we have not yet reached the apex of this trend.

Articles		Articles		Articles	
2012	718	2005	91	1998	17
2011	648	2004	68	1997	19
2010	441	2003	73	1996	19
2009	191	2002	43	1995	9
2008	142	2001	47	1994	12
2007	105	2000	26	1993	12
2006	89	1999	10		

⁸⁷ See *Drug Schedules*, DRUG ENFORCEMENT AGENCY, <http://www.justice.gov/dea/druginf/ds.shtml> (last visited June 9, 2013).

⁸⁸ See, e.g., Barry Meier, *Tightening the Lid on Pain Prescriptions*, N.Y. TIMES, Apr. 9, 2012, at A1.

⁸⁹ See, e.g., Abby Goodnough, *Abuse of Xanax Leads a Clinic to Halt Supply*, N.Y. TIMES, Sept. 14, 2011, at A1.

abuse is nothing new,⁹⁰ but the intensity of coverage demonstrably has grown in the past several years.

The coverage of prescription drug abuse echoes themes by now familiar. Prescription drug abuse, of course, is once again the fastest growing drug problem facing our nation and described in the disease language of epidemic.⁹¹ It is of epic proportion, “a problem unlike any other problem we’ve faced.”⁹² The number of persons abusing drugs is huge,⁹³ and the number of deaths attributable to prescription drug abuse is impressive.⁹⁴ High-

⁹⁰ As my article count demonstrates, in the past two decades, there has been constant coverage of prescription drug abuse, even if it has not until recently commanded the attention of hundreds of media articles. *See supra* note 86. Past perceived epidemics of prescription drug addiction have been the subject of serious historical research as well as cultural attention. In particular, the use by women of various tranquilizers in the 1950s and 1960s has been the subject both of scholarship and popular cultural works. *See, e.g.,* ANDREA TONE, *THE AGE OF ANXIETY: A HISTORY OF AMERICA’S TURBULENT AFFAIR WITH TRANQUILIZERS* 176–77 (2009) (documenting a 1950s and 1960s craze for antianxiety and depressant medications). The Rolling Stones song, *Mother’s Little Helper*, released in 1966, is probably the most familiar popular culture representation of prescription drug dependency in the era, with its lyrics, “Mother needs something today to calm her down/And though she’s not really ill, there’s a little yellow pill/She goes running for the shelter of her mother’s little helper/And it helps her on her way, gets her through her busy day.” THE ROLLING STONES, *MOTHER’S LITTLE HELPER* (Decca Records 1966).

⁹¹ *See, e.g.,* Kate Thayer, *Parents Hear of Prescription Drug Threat*, CHI. TRIBUNE, Feb. 21, 2013, at 4, available at 2013 WLNR 4372088 (quoting a DEA agent as describing prescription drug abuse as “everywhere”); *U.S. Attorney Sponsors Prescription Drug Summit in Rochester*, DAILY REC. (Rochester, N.Y.), Oct. 31, 2012, available at 2012 WLNR 23650273 (describing prescription drug abuse as “epidemic”). Newspaper editorials addressing the issue of prescription drug abuse similarly use “epidemic” to describe the abuse in nearly every piece. *See, e.g.,* *How Prescription Drug Abuse Affects Your Community*, PIONEER (Grand Rapids, Mich.), Dec. 5, 2012, at 4A, available at 2012 WLNR 26058831 (describing that “[o]ver the past decade, Northern Michigan has seen what can only be called an epidemic of prescription drug abuse . . .”).

⁹² Dan Sullivan, *Hundreds Remember Loved Ones Lost to Prescription Drugs*, TAMPA BAY TIMES, Oct. 26, 2012, at 1B, available at 2012 WLNR 22759798 (quoting Pinellas County Sheriff Bob Gualtieri); *see also* Jim Anderson, *County Expands Prescription Drug Collections*, STAR TRIBUNE (Minneapolis, Minn.), Jan. 27, 2013, at 01N, available at 2013 WLNR 2196738 (positing that “[t]eens and young adults are abusing prescription drugs as never before”).

⁹³ *See, e.g.,* *Kentuckians Affected by Prescription Drug Abuse Share Their Stories Online*, MESSENGER (Madisonville, Ky.), Feb. 13, 2013, available at 2013 WLNR 3623361 (citing a Kentucky Health Issues Poll indicating that one in three persons in Kentucky has a friend or family member who has abused prescription pain medication).

⁹⁴ *See, e.g.,* Will Doran, *School Presentation Details Dangers of Prescription Drugs*, SANFORD HERALD (Sanford, N.C.), Feb. 28, 2013, available at 2013 WLNR 5008451 (noting that the North Carolina Department of Justice reports that drug overdoses are the state’s second leading cause of death, and that

profile, celebrity deaths bring attention to the newly-highlighted drug problem and open public discussion of abuse.⁹⁵ Journalist pay particular attention to the effects of drug use on the young, whom they portray as more vulnerable to the harms of abuse than the general population.⁹⁶ Exotic aspects of prescription drug use receive special attention, such as the possibly-mythical “pharm parties” where teenagers allegedly throw medications into a bowl, mix them, and take a selection of unknown prescription medications at random.⁹⁷ These have been the

prescription medication is involved in eighty percent of fatal overdoses); Sullivan, *supra* note 92 (attributing 181 of 217 accidental drug overdose deaths in Pinellas County, Florida to prescription drugs); Adam Swift, *Derry Police Unveil Prescription Drug Take-Back Box*, N.H. UNION LEADER (Manchester), Feb. 21, 2013, at 3, available at 2013 WLNR 4413234 (citing Police Chief Ed Garone for the proposition that prescription drug abuse is the number one cause of death among young people in New Hampshire).

⁹⁵ Two of the highest-profile pop singers in modern history died in the past few years as a result of confirmed or widely-specified prescription drug abuse. Michael Jackson died from a lethal combination of prescription drugs. Russel Goldman & Sheila Marikar, *Michael Jackson's Death Ruled a Homicide, Caused by Lethal Drug Cocktail*, ABC NEWS (Aug. 28, 2009), <http://abcnews.go.com/Entertainment/MichaelJackson/story?id=8433380>. The high-profile death was followed by an equally high-profile trial for Jackson's physician, Dr. Conrad Murray, whose televised and heavily-reported proceedings ended in an involuntary manslaughter verdict. Alan Duke, *Conrad Murray Found Guilty in Michael Jackson Trial*, CNN, <http://www.cnn.com/2011/11/07/justice/california-conrad-murray-trial> (last updated Nov. 8, 2011). While, as of this writing, no official findings have been released as to the cause of Whitney Houston's death, it has been widely reported as attributable at least in part to prescription drug use, and recent media articles have cited law enforcement sources as confirming that prescription drugs were found in her hotel room at the time of her death. See, e.g., Richard Winton & Andrew Blankstein, *Whitney Houston Death: Prescription Drugs Found in Hotel Room*, L.A. TIMES BLOG (Feb. 13, 2012, 10:15 AM), <http://latimesblogs.latimes.com/lanow/2012/02/whitney-houston-death-prescription-drugs-hotel-room.html>.

⁹⁶ See, e.g., Ida Brown, *Parenting Seminar to Discuss Prescription Drug Abuse*, MERIDIAN STAR (Meridian, Miss.), Feb. 10, 2013, available at 2013 WLNR 3334675 (describing young people as “prominent” among prescription drug users and as having easy access to prescription drugs from the home medicine cabinet); Canyon County Not Immune to Prescription Drug Abuse, IDAHO PRESS-TRIBUNE (Nampa), Jan. 27, 2013, at 5, available at 2013 WLNR 2086778 (“Juveniles are leaning more towards using prescription drugs instead of methamphetamine.”); Kim Morava, *Prescription Drug Take-back Box Now In Tecumseh*, SHAWNEE NEWS-STAR (Shawnee, Okla.), Jan. 25, 2013, at A1, available at 2013 WLNR 2037616 (referring to a spokesman for the Oklahoma Bureau of Narcotics who says that “[t]eenagers . . . target their parent's current or expired prescription drugs . . .”).

⁹⁷ See, e.g., Canyon County Not Immune to Prescription Drug Abuse, *supra* note 96 (describing that such “pharm parties” occur in Canyon County). Jack Shafer, who has made a cottage industry of debunking media mythology attendant to drug panics, reports that while many second-hand accounts of such

hallmarks of media coverage of perceived epidemics of drug use past, and the present dominance of these narratives is unsurprising.

As was the case with both ecstasy and methamphetamine abuse, however, the portrayal of persons using the drug seems to have shifted from “dangerous” to “relatable.”⁹⁸ The abusers of prescription drugs enjoy perhaps the most sympathetic media portrayal afforded any drug users to date. Addictions often start innocently and unintentionally,⁹⁹ and the persons who intentionally use prescription drugs often are described as having done so under the erroneous impression that doing so is safe because the drugs can lawfully be prescribed.¹⁰⁰ While there is some coverage of collateral crime associated with prescription drug abuse,¹⁰¹ that coverage is not dominant. Prescription drug addiction is portrayed as tragic,¹⁰² and overdoses result in heartrending deaths.¹⁰³

Is there actually an epidemic of prescription drug abuse? Usage figures are difficult to untangle, in part because surveys of use often break out usage by individual prescription drugs or

parties exist, none of them appear to have first-hand sourcing, and that there was supposedly a rash of similar parties in the 1960s with a similar dearth of first-hand evidence of existence. See Jack Shafer, *The ‘60s Version of a Pharm Party*, SLATE (Mar. 26, 2008), http://www.slate.com/articles/news_and_politics/press_box/2008/03/the_60s_version_of_a_pharm_party.html.

⁹⁸ See, e.g., *Kentuckians Affected*, *supra* note 93, Sullivan, *supra* note 92.

⁹⁹ See, e.g., Sullivan, *supra* note 92 (quoting a local sheriff as saying that many people addicted to prescription drugs became addicted unintentionally).

¹⁰⁰ See, e.g., Linda Girardi, *Cops Warn of Rising Prescription Drug Abuse*, BEACON NEWS (Aurora, Ill.), Feb. 18, 2013, at 2, available at 2013 WLNR 3999142 (reporting local law enforcement officers observe that people, particularly young people, think that prescription drugs are safe because they originally were legitimately obtained).

¹⁰¹ See, e.g., Robbie Ward, *Prescription Drug Abuse Destroys Lives with Death and Crime*, TIMES-TRIBUNE (Scranton, Pa.), Feb. 10, 2013, available at 2013 WLNR 3334651 (describing crimes collateral to prescription drug abuse, such as selling prescription drugs, stealing drugs and prescription pads, and committing robberies).

¹⁰² See, e.g., *Canyon County Not Immune to Prescription Drug Abuse*, *supra* note 96 (describing the “tragic story” of someone whose addiction led her to lose her job and family).

¹⁰³ See, e.g., Staasi Heropoulos, *Prescription Drugs Lure Teens*, REPUBLICAN (Springfield, Mass.), Nov. 11, 2012, at A01, available at 2012 WLNR 25775007 (describing a young man who had graduated third in his high school class and dropped out of Northeastern University after one semester, and committed suicide, according to his mother, “because of a combination of prescription pills and steroids”).

different subcategories of prescription drugs.¹⁰⁴ It does appear that prescription drug abuse has been on the rise in the past decade, although the majority of Americans are not abusing prescription drugs.¹⁰⁵ How we respond to this newly portrayed panic may tell us a great deal about where we are at this point, politically and culturally, with respect to our attitudes towards drug abuse and the role of criminal justice narrowly and the government more broadly in combatting it.

III. INCREASINGLY MUTED RESPONSES TO NEW PERCEIVED PANICS

As I previously have documented, the policy response to a perceived epidemic of methamphetamine abuse demonstrated that these attitudes have indeed begun to shift. When faced with a perceived scourge of methamphetamine use and production, governments focused on non-criminal-justice strategies to contain the problem that they had identified.¹⁰⁶ Most commonly, states turned to strategies that would leverage legitimate business owners to curtail methamphetamine production by requiring vendors of products that contained pseudoephedrine to restrict and monitor the sale of those products, which were identified as necessary ingredients for the manufacture of methamphetamine.¹⁰⁷ Americans rapidly grew accustomed to the fact that, if they suffered from cold symptoms, obtaining a remedy would require them to show identification; limit the number of medication boxes purchased; sign log books to record the dates and amounts of purchases; and, in some locations, request that store personnel unlock cabinets in order to access their non-prescription medications.¹⁰⁸ Such an approach, I have argued, in part reflected the desire to spend less money publicly to combat the perceived methamphetamine epidemic.¹⁰⁹ State governments

¹⁰⁴ For example, the yearly national study of high school drug abuse cited above groups "other narcotic drugs, including OxyContin and Vicodin" into one category, and has additional separate categories for "sedatives," "Tranquilizers," and "Steroids." JOHNSTON ET AL., *supra* note 79, at 30, 32, 34, 46.

¹⁰⁵ The high school study shows a fairly significant uptick in the recreational use of most categories of prescription drugs, particularly "other narcotic drugs" about five to ten years ago and then a leveling off over the last few years. *Id.* at 31. Overall usage figures, however, continue to remain lower than 10% in each category. *See id.*

¹⁰⁶ *See* Ahrens, *supra* note 4, at 867–71.

¹⁰⁷ *Id.* (describing laws regulating such "precursors").

¹⁰⁸ *See id.* at 867.

¹⁰⁹ *See id.* at 898.

put effort into education and other alternatives to incarceration.¹¹⁰ While there were some substantive changes in criminal law to permit additional methamphetamine prosecutions,¹¹¹ and while, clearly, prosecutions of persons for production, sale, and use of methamphetamine have continued, the focus of both the policy response to methamphetamine and the rhetoric surrounding the problem was, as compared to that surrounding other epidemics, muted, and represented what appeared to be a shift in focus away from criminal justice and incarcerative solutions to drug problems.

The policy response to Ecstasy preceded the response to methamphetamine that I have documented, and the response to Ecstasy provided an indication that the desire to develop broad new criminal law initiatives targeted towards illicit drugs already was softening by the early 2000s.¹¹² As we later saw with respect to methamphetamine, a softening of approach hardly meant an elimination of prosecution and incarceration.¹¹³ In fact, some aspects of the response to the perceived Ecstasy epidemic were predictable based on how we have responded to such epidemics for a century: by applying old criminal law in creative new ways and by creating new criminal law and/or new sentences in order to combat the evils of a specific, newly identified epidemic of drug use.

In the latter vein, in the midst of the broad coverage of Ecstasy use that I have described,¹¹⁴ and in response to related DEA concerns that Ecstasy use was on the rise and that the drug was particularly dangerous,¹¹⁵ Congress passed the Ecstasy Anti-Proliferation Act of 2000. It directed the Sentencing Commission to both review penalties for Ecstasy manufacture and trafficking, and to submit to Congress a report on any resulting

¹¹⁰ See *id.* at 866–67, 878–79.

¹¹¹ In particular, states adopted new criminal laws that permitted persons to be prosecuted for exposing vulnerable persons, particularly children, to the manufacture of methamphetamine. See *id.* at 882 (discussing these developments).

¹¹² *Id.* at 844, 898.

¹¹³ *Id.* at 898.

¹¹⁴ See *supra* text accompanying notes 30–54.

¹¹⁵ The DEA made Ecstasy and other “club drugs” a major priority in 2000, as evidenced, among other things, by the major “National Conference on Ecstasy and Other Club Drugs” that the Agency hosted from July 31–August 2. *Ecstasy and Club Drugs Conference*, C-SPAN (Jul. 31, 2000), <http://www.c-spanvideo.org/program/158510-1>.

amendments.¹¹⁶ In response to that directive, when the sentencing guidelines for Ecstasy were revamped in 2001, the penalties for Ecstasy were increased substantially. While, prior to the revision, the Ecstasy-to-marijuana equivalence ratio was 35:1,¹¹⁷ in 2001 the guidelines ratio increased to 500:1.¹¹⁸ In other words, just as the crack cocaine: powder cocaine ratio represented a vigorous criminal law response to the perceived epidemic of crack cocaine use,¹¹⁹ the new sentencing ratio implemented federally during the perceived epidemic of Ecstasy use was consistent with historical efforts to treat drug problems seriously by applying serious criminal law. Proponents of the change in fact explicitly invoked the prior crack cocaine “epidemic” as a reason to treat Ecstasy sentencing seriously and to implement stiffer penalties promptly.¹²⁰ Interestingly, however, while states generally had followed the federal government’s decision to place Ecstasy on Schedule I in 1985 by similarly classifying the drug under state law, state statutory searches suggest that states generally did not change state law or state sentencing guidelines in response to or in reflection of federal changes.¹²¹

¹¹⁶ Ecstasy Anti-Proliferation Act of 2000, 29 U.S.C. § 994(a)(1), (5), (b)(1) (2000) (directing the Commission to provide for increased penalties for the manufacture, importation, exportation and trafficking of Ecstasy).

¹¹⁷ See U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MDMA DRUG OFFENSES, EXPLANATION OF RECENT GUIDELINE AMENDMENTS 6 (2001).

¹¹⁸ *Id.* at 5. The Sentencing Commission ultimately concluded that the sentencing ratio for MDMA should be more severe than that for powder cocaine. *Id.* The Commission argued that, as it understood MDMA, MDMA was a more serious drug than powder cocaine, as it was marketed towards young users; was a neurotoxin; and, while cocaine was a stimulant, MDMA was both a stimulant and a hallucinogen. *Id.* The Commission determined that the sentencing ratio should be less severe than that for heroin, however, because it concluded that heroin was more addictive, created more secondary health effects, led to more serious direct health problems and hospital visits, had a greater association with violence, and was responsible for a larger number of drug prosecutions. *Id.* The guidelines change effectively tripled potential prison sentences for persons convicted of Ecstasy offenses. For recent efforts to roll back these ratios and recent legal challenges to them, see *infra* Part IV.

¹¹⁹ See *supra* text accompanying note 28.

¹²⁰ Edward H. Jurith, who was acting director of the Office of National Drug Control Policy at the time of the guidelines change, released a statement arguing that “We never again want another ‘crack epidemic’ to blindsides this nation By monitoring what is happening on the streets, we can often see a problem before it becomes an epidemic.” *Guidelines Stiffened for Selling Ecstasy*, CCLE (Mar. 21, 2001), <http://www.cognitiveliberty.org/news/mdmauscmarch21.htm>.

¹²¹ See *Ecstasy: Legal Consequences*, CONTROLLED SUBSTANCES (May 31, 2009, 2:08 PM), <http://ecstasy.com.ua/ecstasy-mdma/ecstasy-legal-consequences> (last modified May 31, 2009, 2:08 PM).

Ecstasy also saw the mustering of old criminal law statutes that had been drafted to address a past-perceived problem to take on the newly identified epidemic of Ecstasy. In 2000, federal prosecutors began using the so-called crack-house statute to prosecute persons who owned and operated venues where raves were held.¹²² Congress originally drafted the crack house statute to deal with urban property owners who were believed to be authorizing the transformation of their blighted properties into de facto drug dens.¹²³ The theory behind the crack house statute was that property owners often were not just permitting, but encouraging renters to use homes for drug sales and thus facilitating both crime and neighborhood deterioration; the crack house statute permitted those owners to be criminally prosecuted.¹²⁴ The prosecutorial rationale behind applying the crack house statute to rave venue operators was more indirect; the argument was less that club owners actively were encouraging drug sales and more that they were turning a blind eye to use and sales with the knowledge that such use and sales were taking place at events they had organized or in venues they owned.¹²⁵ Prosecutors pointed to evidence of particular measures taken by organizers and operators such as selling water at marked-up prices or having “chill rooms” kept at a lower

¹²² The State Palace Theater in New Orleans was the target of a federal criminal indictment against organizers of raves at the venue; the organizers were charged either with violation of the crack house statute or conspiracy to violate the crack house statute. See Cloud, *supra* note 48; *Feds Crack Down on “Rave” Organizers*, ABC NEWS (Jan. 13, 2001), <http://abcnews.go.com/US/story?id=94397&page=1>. The U.S. Attorney’s Offices in Boise, Idaho and Panama City, Florida also brought similar prosecutions. See Donna Leinwand, *Cities Crack Down on Raves: All-Night Dance Parties Seen as a Growing Nuisance*, USA TODAY (2002 Teachers’ Ed.), <http://usatoday30.usatoday.com/educate/ondcp/lessons/Activity15.pdf>.

¹²³ 21 U.S.C. § 856(a) (2011).

¹²⁴ *Id.* at § 856(b).

¹²⁵ The State Palace Theater defendants pleaded guilty and, in conjunction with their plea, agreed to pay a \$100,000 fine, to tighten security at the venue, and to search rave attendees for drugs and crack down on drug-associated paraphernalia. See Leinwand, *supra* note 122. The plea agreement specified the prohibited paraphernalia included pacifiers, glowing objects, vapor rub/vapor inhalers, dust masks, purposefully chilled rooms, and massage equipment. See McClure v. Ashcroft, 335 F.3d 404, 406–07 (5th Cir. 2003). The ACLU Drug Policy Litigation Project challenged the plea agreement on the grounds that it violated the First Amendment rights of Rave attendees. The district court granted relief after a bench trial, McClure v. Ashcroft, No. 01-2573, 2002 WL 188410 (E.D. La. Feb. 1, 2002), but the Fifth Circuit vacated the injunction on the grounds that the challengers lacked standing. *Id.* at 415.

temperature than other parts of the venue as evidence that owners and organizers were fully aware of drug use taking place on premises.¹²⁶

The public prosecution of club owners on a relatively thin theory¹²⁷ supports the argument that, as it had with crack cocaine, the government had decided to respond to a perceived drug epidemic with a criminal justice tool. Still, the prosecutions of club owners never were as widespread as prosecutions of homeowners under the crack house statute, and the handful of prosecutions pressed met resistance and were not universally successful.¹²⁸ In the most high profile case, the New Orleans prosecution, the government set out seeking jail sentences for the individuals who owned and operated the clubs, but ended up accepting a plea deal from a corporate entity whose only consequence was to impose obligations upon the owners to modify their policies and monitor their customers.¹²⁹ The limited effort to prosecute business owners in the rave context may best be read as an attempt to persuade private businesses to crack down on drug use and sales so that criminal justice efforts in that area might be spared, just as we witnessed a few years later with the measures states adopted to curb pseudoephedrine availability by requiring businesses to document and control purchases.

In order to improve the ability of prosecutors to pursue cases against rave promoters and club owners, in 2002, then-Senator Biden introduced the Reducing Americans' Vulnerability to Ecstasy Act, or the so-called RAVE act, which proposed to amend the crack house statute so that it would more easily apply to venues where Ecstasy might be used by permitting it to be applied to one-time events.¹³⁰ While Senator Biden expected that

¹²⁶ See, e.g., Cloud, *supra* note 48 (discussing reasoning).

¹²⁷ Federal prosecutors using the 1980s crack house statute acknowledged that application of the statute was a reach. See Leinwand, *supra* note 122, at 2 (quoting an assistant U.S. Attorney as recognizing that he was stretching the statute but that it was "the only statute that seemed to fit").

¹²⁸ See *id.* (noting that the Panama City case ended in acquittals by a jury). In the wake of these prosecutions, several students authored notes and comments suggesting that either the statute itself was overbroad or that the application of the statute to rave promoters was unconstitutional. See, e.g., Michael H. Dore, Note, *Targeting Ecstasy Use at Raves*, 88 VA. L. REV. 1583 (2002); Shadi Kardan, *The Government's New War on Drugs: Threatening the Right to Dance!*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 99, 100 (2003).

¹²⁹ See *McClure*, 335 F.3d at 406–07.

¹³⁰ These provisions, as ultimately adopted: (1) changed the title of the statute from "Establishment of manufacturing operations" to "Maintaining drug-involved premises;" (2) expanded the categories of persons who were liable

the bill, like most of those drafted to address perceived epidemics of drug use, would quickly pass, the bill faced organized opposition from the ACLU and similar policy bodies as well as from members of the electronic music community. Thousands of signatures quickly were collected, and Senator Biden's office reportedly was surprised that the bill faced opposition at all.¹³¹ Co-sponsors Patrick Leahy and Dick Durbin withdrew support, permitting the RAVE Act to die in committee.¹³² The RAVE Act passed in 2003 as the Illicit Drug Anti-Proliferation Act, after it was attached to the AMBER Alert bill to avoid floor debate on the drug provisions.¹³³ Passing the bill also required removing the word "rave" from the bill, as well as legislative "findings" that prosecutors should view the presence and sale of items such as glow sticks and water as indicative of drug use.¹³⁴ The new Act punished those who "knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, a place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance" with a criminal penalty of up to 20 years in prison and \$250,000 in fines.¹³⁵ The primary purpose of the RAVE Act was to

under the statute to include, for example, those who "lease, rent,[or] use" the property; (3) made explicit that the statute applies to those who "temporarily" engage in the prohibited activities; (4) expanded liability to those who simply "profit from" the presence of drugs on premise; and (5) added substantial new provisions for assessing civil penalties and obtaining civil injunctions against violators. 21 U.S.C. § 856 (a), (b) (2011).

¹³¹ See David Montgomery, *Ravers Against the Machine: Partiers and ACLU Take On "Ecstasy" Legislation*, WASH. POST, July 18, 2002, at A01 (quoting Senator Biden's chief of staff, Alan Hoffman, as surprised by the response, explaining that "[w]e thought this would be an innocuous bill that everybody would rally in support of").

¹³² See Janelle Brown, *Your Glow Stick Could Land You In Jail*, SALON (Apr. 16, 2003), <http://www.salon.com/2003/04/16/rave/> (narrating events); Eric Olsen, *Wretched RAVE Act Passes Through the Backdoor*, BLOGCRITICS (Apr. 12, 2003), <http://blogcritics.org/politics/article/wretched-rave-act-passes-through-the/>.

¹³³ See Brown, *supra* note 132; Olsen, *supra* note 132.

¹³⁴ See Brown, *supra* note 132. The original legislative findings also had included a notation that "the trafficking and use of 'club drugs' . . . is deeply embedded in the rave culture." The Reducing Americans' Vulnerability to Ecstasy Act, S. 2633, 107th Cong. (2002) (not enacted), available at <http://www.govtrack.us/congress/bills/107/s2633/text/is>.

¹³⁵ See 21 U.S.C. § 856 (d)(1)(A) (2012). The Act, as well as efforts to prosecute rave promoters and club owners under the prior version of the crack house statute, has been the subject of a fair volume of student scholarship. See Dore, *supra* note 128, at 1585; Christopher Haas, *Owner and Promoter Liability in "Club Drug" Initiatives*, 66 OHIO ST. L.J. 511, 516 (2005); Kardan, *supra* note 128, at 100; Amanda Kay, *The Agony of Ecstasy: Reconsidering the Punitive*

expand the application of the crack house statute from established drug-vending venues to one-night events such as parties and concerts, and to permit civil penalties for violations.¹³⁶ That the legislation faced opposition; that the opposition was organized, unexpected and to some extent unprecedented; and that the initial bill died in committee all attested to the fact that while the will to expand criminal law still existed, there was growing ambivalence on the question of whether or not to actually expand it.

During the peak of the Ecstasy panic, both the substance of the federal government's policy efforts and the rhetoric it used to explain those initiatives was surprisingly balanced, particularly in comparison to its reaction to the perceived crack cocaine epidemic. Official policy documents from the Office of National Drug Control Policy described the statistics and scientific evidence about ecstasy use in calm and relatively fair, albeit not completely even-handed, ways.¹³⁷ Those documents listed a variety of steps which public officials were taking to combat the drug, including the seizure of precursor chemicals, the funding of scientific research into the health effects of ecstasy and other "club drugs," the use of "juvenile curfews, fire codes, health and safety ordinances, liquor laws, and licensing requirements" to shut down raves, and the mobilization of publicly-funded print, internet, and radio campaigns to educate young people about the danger of such drugs.¹³⁸ While some criminal justice steps were

Approach to United States Drug Policy, 29 FORDHAM URB. L.J. 2133, 2141 (2002); Brooke A. Levy, *When Cute Acronyms Happen to Bad Legislation: The Reducing Americans' Vulnerability to Ecstasy "RAVE" Act*, 98 NW. U. L. REV. 1251, 1253 (2004); Christina L. Stein, *The Agony and the Ecstasy: Preserving First Amendment Freedoms in the Government's War on Raves*, 12 S. CAL. INTERDISC. L.J. 139, 141 (2002); Erin Treacy, *The Rave Act: A Specious Solution to the Serious Problem of Increased Ecstasy Distribution: Is it Unconstitutionally Overbroad?*, 28 HASTINGS COMM. & ENT. L.J. 229, 256 (2006).

¹³⁶ While the statute has never been applied to prosecute a college campus or administration, the specter of the crack house statute was used in 2010 to persuade administrators at Reed College to more closely monitor its Renn Fayre event, as Oregon's U.S. Attorney met with Reed's President to alert him to the possible applicability of the statute to the event. See Winston Ross, *College Threatened with "Crack House" Law*, DAILY BEAST (May 3, 2001, 8:00 PM), <http://www.thedailybeast.com/newsweek/2010/05/04/college-threatened-with-crack-house-law.html>.

¹³⁷ See, e.g., OFFICE OF NAT'L DRUG CONTROL POL., EXEC. OFFICE OF THE PRESIDENT, MDMA (ECSTASY), DRUG POLICY INFORMATION CLEARINGHOUSE FACT SHEET 1-3 (2002), <http://dvusd.org/docs/prevention/ecstasy.pdf>.

¹³⁸ *Id.* at 3-4.

included in these releases, they were largely portrayed as actions to destroy drugs or interdict their importation, rather than as campaigns to punish dealers, let alone users.¹³⁹

Fast-forward some eight to ten years, and the ambivalence rooted in the early 2000s came into full bloom. As media coverage of prescription drug addiction ramped up, policy solutions were posed—generally, policy solutions that were reminiscent of those we saw mustered to address methamphetamine a few years earlier, in that they often contemplated private entities and individual persons doing much of the work to combat the perceived problems.¹⁴⁰ Schools and communities developed education programs, all aimed expressly on helping—rather than punishing or stigmatizing—people addicted to prescription drugs.¹⁴¹ Experts and editorial writers focused much of their advice on solutions to prescription drug abuse that relied on individual actions, for example locking up prescription medications, disposing properly of unneeded medications, and talking to children about the dangers of prescription drug abuse.¹⁴²

To the extent that government has been involved in seeking collective answers to these problems, its answers have been largely regulatory. Most states have, for example, created electronic databases that permit tracking pharmaceutical prescriptions, and those states now require businesses that dispense prescription drugs to collect and transmit detailed information about their transactions.¹⁴³ Another popular policy

¹³⁹ *Id.*

¹⁴⁰ See Amy L. Cadwell, Comment and Note: *In the War on Prescription Drug Abuse, E-Pharmacies are Making Doctor Shopping Irrelevant*, 7 HOUS. J. HEALTH L. & POL'Y 85 (2006); see, e.g., Ed Woodworth, Note, *Pharmageddon: A Statutory Solution to Curb Ohio's Prescription Abuse Problem*, 26 J.L. & HEALTH 103 (2013).

¹⁴¹ See, e.g., Doran, *supra* note 94 (focus of Principal at profiled high school was “not to punish drug users, but to help them”).

¹⁴² See, e.g., Brown, *supra* note 96; *Canyon County Not Immune to Prescription Drug Abuse*, *supra* note 96; *How Prescription Drug Abuse Affects Your Community*, *supra* note 91; Sullivan, *supra* note 92; Thayer, *supra* note 91; *U.S. Attorney Sponsors Prescription Drug Summit in Rochester*, *supra* note 91.

¹⁴³ These programs generally require entities that dispense prescription drugs to track and electronically transmit information related to identified prescription drugs, including the date a prescription is filled, whether or not it is a refill, the quantity and number of days supplied of the drug, the patient's identifying information, and the prescriber's identifying information. As of 2013, at least forty-four states had prescription drug monitoring programs; five more had passed laws ordering their creation. See NATIONAL ALLIANCE FOR

aim is improved prescription drug disposal—a major strategy to combat unlawful prescription drug use has been to educate persons who prescribe pain medications about proper drug disposal and to set up drop boxes where unused medications can be deposited anonymously by ordinary citizens.¹⁴⁴ The purpose of such drug disposal is to get unused prescription drugs out of circulation and away from persons who might be tempted to use them, as well as to protect the environment from the effects of improper disposal. While such mechanisms still require modest community spending, as the drugs must be removed by trustworthy persons and disposed of in a secure and safe fashion, they represent a no-fault, relatively inexpensive way to get possibly dangerous drugs out of communities.¹⁴⁵ In a similar vein, some states have considered proposals to collect information and create databases tracking prescription-drug-related deaths.¹⁴⁶

Many legislators, police officers, and community leaders have convened “policy summits” to deal with the alleged epidemic of prescription drug abuse.¹⁴⁷ These summits tend to focus primarily, and often exclusively, on nonincarcerative policy proposals. One leading organization, Operation UNITE, describes itself as “created in 2003 by Congressman Harold “Hal” Rogers to rid communities of illegal drug use through a

STATE DRUG LAWS, STATUS OF STATE PRESCRIPTION DRUG MONITORING PROGRAMS (2013), <http://www.namsdl.org/documents/PMPPProgramStatus01022013.pdf> (providing a map with said data).

¹⁴⁴ See, e.g., Anderson, *supra* note 92 (describing secure, anonymous collection boxes set up in two jurisdictions to permit drop-off of unwanted medications); Morava, *supra* note 96 (noting that 125 prescription drug drop boxes have been established throughout the state of Oklahoma); Jennifer Pignolet, *Overdose Deaths Plunge: Fatalities Linked to Prescription Drugs Make a Big Drop in Spokane County*, SPOKESMAN-REV., Jan. 24, 2013, available at 2013 WLNR 1845113 (attributing a decline in prescription-drug-related deaths in Spokane County to efforts to help prescribers dispose of unused drugs dispose of them appropriately and to physician education on the subject of chronic pain); Swift, *supra* note 94 (describing a 24-hour drop box for safe, anonymous disposal of expired or unused prescription drugs); Thayer, *supra* note 91 (describing prescription drug disposal program in Kane County).

¹⁴⁵ At least one such program disposes of unwanted prescription drugs by offering them to an energy company that, at no cost to the government, burns the drugs and converts them into green energy. See Morava, *supra* note 96 (describing Oklahoma’s state “Safe Trip for Scripts” program).

¹⁴⁶ See, e.g., Press Release, Kelly Hartog, Sen. Curren Price Introduces Bill Requiring Coroners to Report Prescription Drug Deaths to Medical Boards (Jan. 15, 2013) (available at <http://sd26.senate.ca.gov/news/2013-01-15-sen-curren-price-introduces-bill-requiring-coroners-report-prescription-drug-deaths->).

¹⁴⁷ See *National RX Drug Abuse Summit*, OPERATION UNITE (2013), <http://nationa1rxdrugabusesummit.org/>.

comprehensive approach that includes educating youth and the public, coordinating substance abuse treatment, and providing support for families and friends of substance abusers.”¹⁴⁸ In April of 2012, leaders convened an event billed as the first national summit on prescription drug abuse. The most notable feature of the event was the unveiling of an exhibit displaying photographs of more than 250 persons who had died from prescription drug overdoses. The photographs were generally of smiling faces, mostly white and healthy in appearance.¹⁴⁹ It does need seem coincidental that the tone of the summit was reflective and educative rather than fearful or vindictive. Short descriptions previewing the 2013 Summit mention recovery programs, youth education, and clinician responsibilities, but do not specifically reference law enforcement or criminal justice responses at all, even though the DEA and law enforcement personnel expressly are invited to the summit and were described in the advertisements as presenters.¹⁵⁰

Finally, while Congress has historically been the prime mover in modern efforts to combat alleged drug epidemics, Congressional efforts to combat prescription drug abuse have largely failed to gather steam and have, in any event, been primary nonincarcerative in their focus.¹⁵¹ In 2011, and again just several months ago, Senator Jay Rockefeller introduced comprehensive legislation to combat prescription drug abuse, noting that “In the last decade, West Virginia has experienced a

¹⁴⁸ *Id.*

¹⁴⁹ Photographs of this “Wall” figure prominently in publicity for and coverage of the event. It is, for example, the lead image in this photo set, available via a link at Operation UNITE’s website. *Rx Summit*, OPERATION UNITE, <http://www.flickr.com/photos/uniteky/sets/72157629936081581/> (last visited June 9, 2013).

¹⁵⁰ The brief advertisement for the summit available on the website of the Substance Abuse and Mental Health Services Administration’s website notes that the sessions scheduled “include topics such as prescribing habits and trends, access to treatment and recovery programs, education for youth, dealing with addicted infants, regulations and policies, community-based approaches, responsibilities of clinicians and pharmacists, and recognizing and responding to risks.” *National Rx Drug Abuse Summit*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., <http://captus.samhsa.gov/news-and-events/national-rx-drug-abuse-summit-0> (last visited Apr. 9, 2013).

¹⁵¹ There is one notable exception to this trend. Last year, Congress passed and the President signed new legislation to increase the penalties for those who steal prescription drugs. See The Safe Doses Act of 2012, H.R. 4223, 112th Cong. (2012). This bill, obviously, deals only with a small corner of the problem and did not receive much press coverage.

tragic increase in deaths and overdoses from prescription drugs. Nine out of ten of the drug-related deaths in West Virginia are due to the misuse and abuse of prescription drugs, especially opioid painkillers.”¹⁵² That Act, the Prescription Drug Abuse Prevention and Treatment Act, would require additional training for health care professionals who would be in a position to prescribe drugs, the establishment of clinical standards for pain medication use and dosage, consumer education on prescription drug use and abuse, and greater reporting of opioid-related deaths.¹⁵³ As Senator Joe Manchin noted, “To fight our state’s drug abuse epidemic, we need to take a positive step toward combating this escalating problem in our state and across our country. Too many families and communities have been torn apart by drug abuse and my heart goes out to them.”¹⁵⁴

Neither the 2011 Act, nor the 2013 version, includes any criminal justice provisions, instead relying on education campaigns, treatment programs, and substantially increased federal regulation to combat the alleged epidemic.¹⁵⁵ Ultimately, the 2011 bill failed to get out of committee¹⁵⁶—another piece of evidence for the theory that the political will to create new policy initiatives to combat perceived epidemics of drug use is on the wane. Further, when West Virginia’s other Senator, Joe Manchin, separately introduced a single element of their program

¹⁵² Most of the frequent communications from Senator Rockefeller’s office on the issue include those words. See, e.g., *Senator Rockefeller’s History of Efforts to Fight Prescription Drug Abuse*, JAY ROCKEFELLER FOR WEST VIRGINIA, http://www.rockefeller.senate.gov/public/index.cfm/files/serve?File_id=8cc5e0a3-e038-46cb-b333-3f79d76d8218&SK=753AB668A8FA512F0C06D7B6AC782C13 (last visited Mar. 4, 2013). In addition to proposing this Act, Senator Rockefeller has been involved in a variety of other efforts to combat prescription drug abuse, most of which involved sponsoring or obtaining money for treatment or education programs. See *id.*

¹⁵³ See, e.g., Press Release, Rockefeller, Manchin, Rahall Reintroduce Legislation to Fight Prescription Drug Abuse (Feb. 14, 2013) (available at <http://www.rockefeller.senate.gov/public/index.cfm/press-releases?ID=de0d54d4-63ff-4f30-92e3-a39d11e5b877>).

¹⁵⁴ *Id.*

¹⁵⁵ For the text of the 2011 Act, see Prescription Drug Abuse Prevention and Treatment Act of 2011, S. 507, 112th Congress (2011–2013) (text as of Mar 08, 2011), available at <http://www.govtrack.us/congress/bills/112/s507/text>. For the nearly identical text of the current bill, see Prescription Drug Abuse Prevention and Treatment Act of 2013, S. 348, 113th Congress (2013–2015) (introduced Feb. 14, 2013), available at <http://www.govtrack.us/congress/bills/113/s348/text>.

¹⁵⁶ See S. 507, 112th Cong. (2011), available at <http://www.govtrack.us/congress/bills/112/s507> (showing that the Bill did not proceed out of the Senate Committee).

last Spring—a proposal to move some commonly abused pain drugs to a stricter Schedule—the new bill initially passed the Senate unanimously but was ultimately defeated by a lobbying campaign led by a strange coalition of anti-drug-regulation activists, pain experts, pharmacists, and drug store changes.¹⁵⁷ Though Congress may well ultimately adopt some or all of the legislative proposals contained within the broader Act,¹⁵⁸ it has faced tougher sledding and is a broader and better thought-out regulatory package than one might have expected to see twenty, or even ten, years ago.

IV. THE QUIET, FITFUL EBB OF THE WAR ON DRUGS

In 2009, Gil Kerlikowske, head of the White House Office of National Drug Control Policy, quietly declared an end to the construction of the policy response to drug abuse as a “War on Drugs.”¹⁵⁹ The end to the use of the war metaphor has not meant an end to criminal prosecutions – federal and state governments clearly continue to pursue drug cases and incarcerate persons who commit drug offenses, and drug convictions continue to account for a significant percentage of persons incarcerated.¹⁶⁰

¹⁵⁷ See sources cited *supra* notes 152, 153 (discussing these events); see also Press Release, Manchin Leads Bipartisan Fight to Prevent Prescription Drug Abuse (Feb. 14, 2013) (available at <http://www.manchin.senate.gov/public/index.cfm/2013/2/manchin-leads-bipartisan-fight-to-prevent-prescription-drug-abuse>).

¹⁵⁸ In addition to the West Virginia legislators profiled above, the Act has other high profile supporters. See, e.g., Cathleen Crowley, *A 3-Point Plan to Battle Prescription Drug Abuse: Schumer Proposes Method to Attack Growing Problem*, TIMES UNION (ALBANY) (July 12, 2011), <http://www.timesunion.com/local/article/A-3-point-plan-to-battle-prescription-drug-abuse-1461817.php> (demonstrating support of Senator Charles Schumer). Unlike the West Virginia Senators, Schumer’s preferred approach to combating prescription drug abuse combines education and treatment with some additional criminal penalties, particularly for those who steal drugs. See *id.* (showing his sponsorship of ideas that were adopted as part of Safe Doses Act of 2012).

¹⁵⁹ In his first post-confirmation interview, Kerliowske said, “[r]egardless of how you try to explain to people it’s a ‘war on drugs’ or a ‘war on a product,’ people see a war as a war on them. . . . We’re not at war with people in this country.” Gary Fields, *White House Czar Calls for End to “War on Drugs”*, WALL ST. J., May 14, 2009, at A3. The home page for the White House Office of National Drug Control Policy now sports the slogan, “A Drug Policy for the Twenty-First Century: Relying on science, research, and evidence to improve public health and safety in America.” See OFF. NAT’L DRUG CONTROL POL’Y, WHITE HOUSE, <http://www.whitehouse.gov/ondcp> (last visited May 10, 2013).

¹⁶⁰ See, e.g., E. ANN CARSON & WILLIAM J. SABOL, U.S. DEPT. JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 9–10 (2012), <http://bjs.ojp.usdoj.gov/>

The shift in metaphor reflects, however, a shift in the construction of illicit drug use from being a problem best ameliorated through harsh battle tactics to a problem that might be effectively combatted in large measure through criminal justice alternatives. I have illustrated here that the responses to perceived epidemics of Ecstasy use and prescription drug abuse have been more complicated than “lock up everyone associated with drug use,” and that, in general, the narrative of the one-way ratchet in criminal justice is becoming less persuasive as we progress through the twenty-first century. The popularity of education programs, civil remedies, and, even in the criminal justice arena, alternatives to incarceration such as drug courts, demonstrates that the use of mass incarceration as a favored tool for combatting drug abuse has begun to wane. This is not because Americans no longer consider drug abuse to be a problem, as the ongoing popularity of articles chronicling abuse attest.¹⁶¹ Americans continue to consider illicit drugs to be problematic; polling data suggest that Americans in general view illegal drugs as a serious issue and have not much softened that position.¹⁶² The same polls that illustrate the perception of an ongoing, serious problem, however, also indicate that Americans consider current efforts to combat unlawful drug use as largely ineffectual.¹⁶³

Why have the policy responses to new drug epidemics been more muted? One possibility is that the drug users in new epidemics have been conceptualized differently than those in epidemics past. Crack cocaine generally was associated (although use statistics did not necessarily bear this out) with inner-city African-Americans,¹⁶⁴ just as historical drug outbreaks had been

content/pub/pdf/p11.pdf (noting that, as of the end of 2011, there were 197,050 sentenced prisoners under federal jurisdiction, of whom 94,600 were serving time for drug offenses).

¹⁶¹ See *supra* notes 94–100 and accompanying text.

¹⁶² Joseph Carroll, *Little Change in Public's View of the U.S. Drug Problem*, GALLUP NEWS SERV. (Oct. 19, 2007), <http://www.gallup.com/poll/102061/little-change-publics-view-us-drug-problem.aspx>.

¹⁶³ *Id.*

¹⁶⁴ See, e.g., Troy Duster, *Pattern, Purpose, and Race in the Drug War*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 260, 264–65 (Craig Reinerman & Harry G. Levine eds., 1997) (citing statistics to the effect that while in the early 1990s, African-Americans comprised 15–20% of drug users, in most urban areas, they comprised half to two-thirds of persons arrested for drug offenses and attributing racial imbalances in arrest and prosecution rates to “the selective aim of the artillery in the drug war”).

associated with other disfavored cultural and racial groups.¹⁶⁵ The media face of Ecstasy, on the other hand, generally has been that of white teenagers – affluent, suburban, and privileged.¹⁶⁶ That presentation of the profile of Ecstasy users appears to be at least moderately accurate.¹⁶⁷ The coverage of prescription drug abuse, as it is unfolding, similarly seems sympathetic – users are often portrayed as persons who originally were sick or injured and slipped into drug abuse,¹⁶⁸ and the public image of prescription-drug abuse is white, middle-class, and, interestingly, generation-spanning.¹⁶⁹ Neither perceived epidemic has been accompanied by a flurry of articles indicating that violent spinoff crimes are taking place or that children are being seriously endangered, themes that were present even in the otherwise sympathetic coverage of the methamphetamine epidemic.¹⁷⁰

Some changes in the constitutional law of sentencing have also permitted the one-way ratchet on drugs to crank back in the other direction. The sentencing ratio established for Ecstasy in 2001 might or might not have been grounded in science and rational policymaking,¹⁷¹ but federal sentencing judges now have the option to void imposing that ratio if they find it to inaccurately reflect the social harm cause by Ecstasy-related offenses. *Booker* and *Blakely* spelled an end to binding, judicially-imposed sentencing guidelines.¹⁷² *Kimbrough*, which addressed

¹⁶⁵ See generally discussion *supra* Part I and the works cited therein.

¹⁶⁶ See, e.g., *Feds Crack Down on "Rave" Organizers*, *supra* note 122 (describing Ecstasy as "particularly trendy among middle class teenagers and young adults"); Fields, *supra* note 52, at A1 ("Ecstasy users primarily are affluent teen-agers who frequent all-night dance parties called raves, which are increasingly popular in suburbs and cities such as Austin, Texas; Miami; San Francisco; Washington, D.C.; and New York."); Leshner, *supra* note 31 (describing epidemiological data as illustrating that "MDMA use is spreading from raves and dance parties to high schools, colleges, and other social settings frequented by youth and young adults").

¹⁶⁷ See, e.g., SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, THE NHSDA REPORT: ECSTASY USE (2003) (reporting that during prior year majority of Ecstasy users were 18–25 years old, the bulk of the remainder were 12–17 years old, most were white or Asian, and most came from wealthier areas of the country).

¹⁶⁸ See *supra* notes 98–103 and accompanying text.

¹⁶⁹ *Id.*

¹⁷⁰ See Ahrens, *supra* note 4, at 862–63, 875–76, 890–91 (documenting these themes in media coverage of and policy response to methademic).

¹⁷¹ This issue is currently being debated in the courts. See case cited *infra* note 175.

¹⁷² *United States v. Booker*, 543 U.S. 220, 232 (2005) (declaring mandatory aspects of federal sentencing guidelines unconstitutional to the extent that they

sentencing guideline departures specifically in the context of guideline ratios that some sentencing judges felt unfairly exposed persons convicted of offenses involving particular substances to excessive sentences,¹⁷³ cleared the path to permit federal judges to address perceived drug war excesses, which many federal judges now are doing by providing reduced sentences for drug offenses.¹⁷⁴ In the specific context of Ecstasy, some federal judges recently have determined that the federal sentencing guidelines adopted in 2001 are excessive in light of any scientific justification for those guidelines.¹⁷⁵

Political will also has weakened in light of practical fiscal considerations, and it has done so broadly in the criminal justice context. While incarceration and crime rates were traveling in opposite directions for two decades,¹⁷⁶ during the past few years,

rely on facts not found by a jury beyond a reasonable doubt); *Blakeley v. Washington*, 542 U.S. 296, 296 (2004) (finding similarly with regard to state sentencing guidelines); *see also* *Rita v. United States*, 551 U.S. 338, 341, 344, 350–54 (2007) (interpreting *Booker* and holding that sentencing judges must take the Guidelines into account in sentencing, but may no longer presume that the recommended Guidelines sentence should apply).

¹⁷³ *Kimbrough v. United States*, 552 U.S. 85, 108 (2007). In *Kimbrough*, the Supreme Court considered—and approved—a Guidelines departure that reflected a federal judge’s conclusion that the then-existing 100:1 crack cocaine: powder cocaine ratio excessively penalized a defendant convicted of a crack-cocaine-related offense. *Id.*

¹⁷⁴ On the general influence of the *Kimbrough* opinion, and in particular on the growing practice of reducing sentences based on policy disagreements with the Sentencing Commission, *see* UNITED STATES SENTENCING COMMISSION, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 35–38 (2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/index.cfm.

¹⁷⁵ *See, e.g.*, *United States v. Qayyem*, No. 10 CR 19, 2012 WL 92287, *2, *4, *5 (S.D.N.Y. Jan. 11, 2012) (rejecting ratios in Ecstasy guidelines); *United States v. McCarthy*, No. 09 Cr. 1136, 2011 WL 1991146, at *1 (S.D.N.Y. May 19, 2011) (holding that applying the Ecstasy sentencing guideline would “give rise to a sentence that is greater than necessary to serve the objectives of sentencing”); Sentencing Memorandum for Defendant at 3, *United States v. Sanudo*, S.D. Fla., Case Number 11-cr-20559-Seitz; Sentencing Memorandum for Defendant at 1–5, *United States v. Phan*, W.D. Wa., Case Number 2:10-cr-00027-RSM; *see also* Scott Michelman & Jay Rorty, *Doing Kimbrough Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083, 1114 (2012) (article by counsels in the *McCarthy* case theorizing their approach to such cases).

¹⁷⁶ Compare GLAZE & PARKS, *supra* note 3, at 3 (showing that incarceration rates continued to increase sharply for most of the last twenty years) with JENNIFER L. TRUMAN & MICHAEL PLANTY, U.S. DEP’T JUSTICE BUREAU, CRIMINAL VICTIMIZATION, 2011 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv11.pdf> (showing that violent crime rates peaked between the late 1970s and early 1990s and have receded steadily since the early 1990s).

national incarceration rates receded slightly,¹⁷⁷ probably less because crime has fallen (as it had been in decline for years while incarceration rates continued to rise) and more because constrained government budgets and ongoing economic recession have made criminal justice expenditures less attractive. To the extent that this explanation is persuasive, it may reflect less a declining desire to criminally punish persons associated with illicit drugs and more a practical inability to continue expanding criminal punishment indefinitely.

If I am correct that public opinion and political will has softened in the area of illicit drugs, one result we may expect to see in the next several years is a rescheduling of Ecstasy to a schedule that would permit therapeutic use of the drug – most likely Schedule Three, where it briefly was placed in the 1980s.¹⁷⁸ As I have noted,¹⁷⁹ even as Ecstasy was initially being scheduled to Schedule I in 1985, there was some opposition from the psychiatric community. Since Ecstasy was permanently scheduled, psychiatrists have continued to offer critiques, and have further questioned the research that has supported both the emergency scheduling and subsequent legislative efforts.¹⁸⁰ Over the past few years, regulators have licensed a small number of labs to perform research into the possible therapeutic uses of Ecstasy.¹⁸¹ In the past year, that research has supported some therapeutic use; in November of 2012, a Medical University of South Carolina study that found Ecstasy to be of possible use in treating patients with Post-Traumatic Stress Disorder received wide national publicity.¹⁸² We might also see, as we saw in the crack cocaine context,¹⁸³ a change in the federal sentencing guidelines ratio for Ecstasy.¹⁸⁴ We should also expect, in the

¹⁷⁷ See GLAZE & PARKS, *supra* note 3, at 3 (providing annual incarceration rates and showing small declines over the last few years).

¹⁷⁸ See *supra* notes 34–36 and accompanying text.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See, e.g., Benedict Carey, A “Party Drug” May Help the Brain Cope With Trauma, N.Y. TIMES, Nov. 20, 2012, at D1 (describing one such study).

¹⁸² *Id.*

¹⁸³ See The Fair Sentencing Act of 2010, Pub. L. No. 111-220, §2, 124 Stat. 2372 (2010) (eliminating the mandatory minimum sentence for possession of crack and reducing the crack-cocaine disparity under statutory sentencing laws from 100:1 to 18:1).

¹⁸⁴ The ACLU has made replacing the 500:1 ratio for ecstasy: marijuana with a 1:1 ratio one of its handful of policy proposals in comments addressed to the United States Sentencing Commission. See Letter from Laura W. Murphy & Jesselyn McCurdy to Hon. Patti B. Saris (Mar. 19, 2012) (*available at*

prescription drug context, to see legislators looking for policy alternatives that they consider less expensive and more efficacious than incarceration, rather than seeing calls to prosecute broadly and severely persons found to be abusing prescription drugs.

Some legislative developments do contradict the broad observation that the criminal justice response to drug abuse is slowing down. Last year, for example, the federal government adopted the Synthetic Drug Abuse Prevention Act of 2012, which placed twenty-six “designer” drugs on Schedule I.¹⁸⁵ There has been some push to place prescription drugs that currently are on Schedule III onto Schedule II, which provides tighter controls.¹⁸⁶ And, as always, many people currently are prosecuted for drug-related offenses, including persons who primarily are obtaining prescription drugs unlawfully for personal use, rather than engaging in broader sales or trade.¹⁸⁷ Still, the general focus of *new* anti-drug efforts in the face of what is perceived as an epidemic of abuse appears to be on personal, civil, and educational solutions, rather than on criminal justice and mass incarceration.

http://www.aclu.org/files/assets/aclu_comments_to_ussc_on_bzp_mdma_and_immigration_3-19-12.pdf). The ACLU letter draws an explicit parallel with the now discredited crack: cocaine ratio, stating that both ratios were selected in response to “emotional public frenzies” and that neither was based on “empirical evidence.” *See id.* at 2.

¹⁸⁵ Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, 126 Stat. 993, § 1151 et seq. (July 9, 2012).

¹⁸⁶ Early this year, responding to a request from the DEA, an FDA advisory panel voted 19–10 to approve the reclassification of some popular prescription drugs (such as Vicodin) from Schedule III to Schedule II. The drugs in question are pills that combine hydrocodones with other less regulated pain killers (such as Tylenol). While pure hydrocodones have been on Schedule II since 1970, these combination pills have always been regulated on the less restrictive Schedule III. The FDA is currently taking public comment before issuing a final decision on this rescheduling. *See FDA Panel Wants Limits on Hydrocodone Painkillers*, USA TODAY (Jan. 25, 2013), <http://www.usatoday.com/story/news/nation/2013/01/25/fda-panel-hydrocodone-painkillers/1865345/>. Last year, proposed legislation to reclassify the drugs passed the Senate but failed to become law after an intense lobbying effort by pharmacists and drug stores. *See* Robert Pear, *Lobbying Effort Is Said to Sink New Controls on Painkillers*, N.Y. TIMES, June 19, 2012, at A14.

¹⁸⁷ *See 98 Arrested in Prescription Drug Crackdown*, UPI.COM (June 7, 2012, 5:00 PM), http://www.upi.com/Top_News/US/2012/06/07/98-arrested-in-prescription-drug-crackdown/UPI-59391339102807/.

CONCLUSION

The tide tentatively appears to have turned in the War on Drugs – we have, it seems, grown weary of paying a hefty price tag without a perceived return on investment. That voters in two states recently determined to authorize recreational marijuana use was not surprising – despite federal government enforcement priorities, some localities already had essentially quietly decriminalized personal use of marijuana, and some states had begun to permit medicinal use of marijuana, despite Congressional findings that marijuana has no medical use.¹⁸⁸ Nor have developments been limited to marijuana. Recent years have seen the repeal of harsh state drug laws,¹⁸⁹ a substantial reduction in the infamous crack cocaine sentencing ratio,¹⁹⁰ and the burgeoning of drug courts and other alternative sentencing mechanisms.¹⁹¹

The seeds for these recent developments, however, were, as this Article argues, planted in the late 1990s. While the dramatic criminal justice response to crack cocaine marked the latest in a long line of criminal-justice responses to perceived drug epidemics, and while those perceived drug epidemics generally have been linked to disfavored social groups (particularly disfavored ethnic/racial groups), the past several perceived drug epidemics have been met with a more tempered criminal justice response. As I documented previously,¹⁹² methamphetamine, conceptualized as the greatest drug scourge of the early twenty-first century and widely covered in the popular press, was directly addressed by public policy; however, while we might have

¹⁸⁸ See generally *supra* note 1 and accompanying text (discussing these developments).

¹⁸⁹ See, e.g., Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1 (discussing deal to repeal remaining aspects of harsh “Rockefeller” drug laws, aspects of which had already been repealed in 2004).

¹⁹⁰ See The Fair Sentencing Act of 2010, Pub. L. No. 111-220, §2, 124 Stat. 2372 (2010).

¹⁹¹ In recent months, drug courts and other diversion programs, which had grown rapidly in state courts in recent years, have begun to appear in the federal system. See Mosi Secret, *Outside Box, U.S. Judges Offer Addicts New Path*, N.Y. TIMES, Mar. 2, 2013, at A1. For a recent article that summarizes and carefully critiques the different kinds of drug and problem-solving courts springing up across the nation, see Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1590–91, 1596–97, 1612, 1620, 1625, 1627 (2012).

¹⁹² See generally Ahrens, *supra* note 4.

expected that policy to focus on prosecution and incarceration, instead, states and the federal government sought to combat the perceived epidemic by restricting access to methamphetamine precursors for home methamphetamine cooks through legislation introduced from 2005 forward.

In this Article, I have explored the press coverage and public policy response to alleged epidemics of Ecstasy use at the turn of this century and of prescription drug abuse over the last few years. My conclusions are similar. As I have argued here, the public policy response to Ecstasy was complicated. While we did see some significant increase in criminal penalties, we also saw significant resistance to the most sensationalist press accounts and scientific reports, some quieting of the criminal justice drumbeat, and a notable softening of the characterization of persons abusing drugs. Similarly, our current perceived epidemic of prescription drug abuse is being met, not with calls for mass incarceration or vigorous prosecution, but with attempts to restrict unlawful access and to educate the public against dangers of unlawful or excessive use. The official end to the War on Drugs was declared four years ago, but that was only a notable signpost in an evolution that started at least a decade before that and continues apace. The bulk of the evidence suggest that we have entered a period where we are willing to consider more tempered responses to the public policy problem of drug abuse.