
Volume 31

Number 2 *Symposium on Juvenile Crime: Policy
Proposals on Guns & Violence, Gangs, & Drugs*

pp.i-xlii

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On Ending the War on Drugs

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Recommended Citation

Edward McGlynn Gaffney Jr., *On Ending the War on Drugs*, 31 Val. U. L. Rev. i (1997).
Available at: <https://scholar.valpo.edu/vulr/vol31/iss2/27>

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**JUVENILE CRIME:
POLICY PROPOSALS ON
GUNS & VIOLENCE,
GANGS & DRUGS**

SYMPOSIUM ISSUE

Foreword

ON ENDING THE WAR ON DRUGS*

EDWARD MCGLYNN GAFFNEY, JR.**

I. INTRODUCTION

The Articles in this symposium are the outgrowth of a National Conference on Teenage Violence and Drug Use held at Valparaiso University in November of 1996. The purpose of the conference was to gather some of the nation's leading scholars to search with prominent policy makers for deep connections between American youth and the phenomena of gangs and guns, drugs and death. Many disciplines were ably represented: anthropology, criminology,

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** Dean and Professor of Law, Valparaiso University School of Law. I am grateful to my colleagues, Bruce Berner, Derrick Carter, Laura Gaston Dooley, and Jack Hiller for comments on this article. I am especially grateful to the Symposium Editor, Michael Terwilliger, for his attentiveness to a host of details in organizing and executing this Symposium; he is a model of patience and tact.

economics, law, medicine, and sociology. President Clinton's Director of the Office of National Drug Control Policy, the Honorable Barry R. McCaffrey, sent his General Counsel, Patricia Seitz, to represent his office; Ms. Seitz delivered the concluding remarks at the conference. And Attorney General Janet Reno sent her representative, the Honorable Jon DeGuilio, the United States Attorney for the Northern District of Indiana; Mr. DeGuilio reported on the current efforts of the Justice Department to deal with illicit drugs.

The conversation was lively, and the Articles published in this symposium reflect the best thinking of some of the finest minds in the country on this subject. Both sides of our brain were exercised. We began with a keynote address by the Reverend Jesse Jackson, who told us: "So often the struggle to realize the American dream has been led by young people That's why the behavior of young America is so critical in the struggle You cannot 'set the captive free' if you are a captive of drugs." When the conference formally convened, we began not with the wordy discourse of academics, but with the startling and moving images of American youth caught up in the milieu of gangs and guns, drugs and death. I am grateful to the prize-winning photo-journalist, Eugene Richards, not only for providing this splendid photographic essay at the conference, but also for his willingness to allow us to use three of his images in this symposium issue of the *Law Review*.

I said that we had here at Valparaiso some of nation's finest minds. But I should add that we also had here some of America's strongest hearts, because these writers are deeply compassionate about the victims of violence and drug addiction, and are frequently passionate about the injustices at the heart of the current war on drugs.

The Articles in this symposium are grouped around three interrelated sets of issues: (1) the problem of guns and violence and what should be done about it; (2) the characteristics of gangs that provide the social structure supporting much of the drug use and violence in this country; and (3) the problem of drugs and what should be done about it. I have organized my thoughts around a different focus. As I read these Articles, one thought kept recurring. It is time to end the war on drugs. In this Foreword, I set myself to explaining why the imagery of warfare is misplaced with respect to the issue of drug addiction and violent crime. One way of thinking about the war on drugs is that it is what philosophers call a category mistake. In this Foreword I trace the origins of two distinct attitudes toward war—pacifism and the just war tradition—within my religious community. I then apply these two traditions to the Articles in this symposium. And I conclude that ending the war on drugs will by no means solve all of the complicated issues relating to drug addiction and violent crime

in America. But getting rid of a useless metaphor may at least help us turn our creative energies to the long and difficult task of constructing a sensible set of alternative policies on these issues.

President Richard Nixon is generally credited with declaring an "international war on drugs" in 1969.¹ Since the problem of consumption of illegal drugs in America is obviously related to the production of those drugs abroad, one can understand why this war would be dubbed an international one. The United States Constitution places limits upon the authority of the Executive to declare war, a power expressly given to Congress.² The Charter of the United Nations obliges member nations to "settle their international disputes by

1. See, e.g., President Richard Nixon, Special Message to the Congress on Control of Narcotics and Dangerous Drugs, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES* 513 (1971). See also *Mexico, U.S. Exchange Prisoners at Airport Ceremony*, WASH. POST, Dec. 10, 1977, at A19 (noting that the treaty allowing the exchange of drug offenders was an outgrowth of President Nixon's "international war on drugs").

2. U.S. CONST., art. I, § 8, cl. 11. The President is identified as the "Commander in Chief of the Army and Navy of the United States." U.S. CONST., art. II, § 2, cl. 1. The literature on the meaning of these texts is vast, especially during the period of the Vietnam War. President Lyndon Johnson relied upon a Joint Resolution of Congress on August 10, 1964, relating to an incident in the Tonkin Gulf. Pub. L. No. 88-408, 78 Stat. 384 (1964). This resolution was repealed on December 31, 1970. The theory relied upon by the Executive for continuing the War after this point was its inherent power to do so under the Commander in Chief provision. In 1971 the Mansfield Amendment declared "the policy of the United States" to be "to terminate at the earliest possible date all military operations of the United States in Indochina." Military Procurement Authorization Act of 1971, Pub. L. No. 92-156, 85 Stat. 423 (1971). President Nixon signed the Act, noting that "legislative actions such as this hinder rather than assist in the search for a negotiated settlement." 7 WEEKLY COMP. PRES. DOC. 1531 (1971). The Vietnam War was never formally declared by Congress, and was finally terminated by an express cut-off of any congressional authorization of funds "to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia" on or after August 15, 1973. Pub. L. No. 93-52, 87 Stat. 130 (1973).

The Supreme Court was given numerous opportunities to review the question of the constitutionality of the Vietnam War, but declined to do so. See *Holtzman v. Schlesinger*, 416 U.S. 936 (1973); *DaCosta v. Laird*, 405 U.S. 979 (1972); *Massachusetts v. Laird*, 400 U.S. 886 (1970); *McArthur v. Clifford*, 393 U.S. 1002 (1968); *Mora v. McNamara*, 389 U.S. 934 (1967). With no guidance from the Court on the constitutional matter, Congress enacted the War Powers Resolution of 1973 over President Nixon's veto. Pub. L. No. 93-148, 87 Stat. 555 (1973). The usual argument against the constitutionality of this legislation—made at some point by every President since Nixon—is that it hobbles the Executive. Noting that hobbling the Executive before it unleashed the "dogs of war" was the precise purpose of placing the War Power in Article I of the Constitution, one distinguished commentator argues that this legislation is unconstitutional because Congress invalidly surrendered to the Executive a power expressly reserved to it. Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 *LOYOLA L.A. L. REV.* 599 (1984). See also THOMAS EAGLETON, *WAR AND PRESIDENTIAL POWER* (1974); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); JACOB JAVITS, *WHO MAKES WAR?* (1974); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986).

peaceful means in such a manner that international peace and security, and justice, are not endangered.”³ Whatever these provisions mean in practical reality, they at least serve as a forceful reminder that we are really dealing with a metaphor when we speak of a war on drugs, especially if the “war” is “international.”

Once we understand that the so-called “war on drugs” is only a metaphor, we can then analyze whether the metaphor is apt. There is usually a problem with a metaphor when it has to be explained. I suppose that the point of the metaphor of the “war” on drugs is to suggest the vigor with which laws prohibiting the sale or consumption of certain illicit or contraband drugs will be enforced. One can hardly fault a President for wanting to coordinate federal and state policies relating to illicit drugs.⁴ But there are some severe problems with describing such coordination under the metaphor of warfare. Once the metaphor of warfare takes hold of the popular imagination, moreover, it requires that the President become a cheerleader promising victory, perhaps more swiftly than is possible.⁵ Thus the metaphor of warfare is unhelpful in explaining the real point of public policy about drug addiction and crimes related to it, and it raises as many questions as it purports to resolve. Absent a civil war such as the one that tore England apart in the Seventeenth Century or our own country two centuries later, why would a leader of a country declare war on one’s own

3. U.N. CHARTER, art. 2, para 3.

4. For example, in his radio address to the nation on October 2, 1982, President Ronald Reagan emphasized that the metaphor about a “war on drugs” describes better coordination of federal agencies involved with law enforcement:

Well, for the first time, the actions of the different Government agencies and departments dealing with narcotics are being coordinated. There are 9 departments and 33 agencies of Government that have some responsibility in the drug area, but until now, the activities of these agencies were not being coordinated. Each was fighting its own separate battle against drugs. Now, for the very first time, the Federal Government is waging a planned, concerted campaign. Previous administrations had drug strategies, but they didn’t have the structure to carry them out. We now have that structure.

18 WEEKLY COMP. PRES. DOC. 1249 (1982).

5. On September 3, 1940 President Franklin Delano Roosevelt announced the transfer of 50 overage destroyers to Britain in exchange for 99 year leases of air and naval bases on Newfoundland, British Guiana, Bermuda, and the islands of the West Indies. Later that year the President met with Prime Minister Winston Churchill on a battleship in the mid-Atlantic to celebrate the Lend-Lease Agreement, singing *Onward, Christian Soldiers* with the assembled American and British sailors. In a similar vein, President Reagan said in the same radio address noted above: “The mood toward drugs is changing in this country, and the momentum is with us. We’re making no excuses for drugs—hard, soft, or otherwise. Drugs are bad, and we’re going after them. As I’ve said before, we’ve taken down the surrender flag and run up the battle flag. And we’re going to win the war on drugs.” 18 WEEKLY COMP. PRES. DOC. 1249 (1982). By January of the following year, the General Accounting Office had prepared a report casting serious doubt on the effectiveness of the much-publicized war on drugs. Mary Thorton, *War on Drugs Is Criticized in GAO Report*, WASH. POST, Jan. 8, 1983, at A1.

citizens? And given the tendency of wars generally to erode, if not obliterate, any sense of respect for opponents,⁶ why use this metaphor to describe the relationship of the government to the people? Examples of difficulties of this sort include the extension of military operational language, the imposition of military curfews restricting freedom of movement within interdicted "war zones," and even the use of heavy-duty military equipment,⁷ into local law enforcement. Another critical problem with the use of the metaphor of warfare to describe the nation's drug policies is that fine minds sometimes turn to mush when it comes to protecting civil liberties during wartime.⁸ This phenomenon may at one level explain what has happened to the Fourth Amendment⁹ and, to

6. War tends to depersonalize the enemy. This phenomenon can take the form of derogatory references to the entire people represented by an opposing army. Thus, in World War I Germans became the "Huns"; while in the Vietnam War the Vietnamese became "gooks." Even more problematic is the tendency of depersonalization of the enemy through modern technology of aerial bombardment and laser-guided missiles. Infantry units encounter human faces when they engage the enemy; pilots release their weapons on computerized coordinates.

7. For example, in 1985 the Los Angeles Police Department began using a tank with a 14 foot battering ram to smash into suspected drug "rock houses." Patricia Klein, *Pacoima Leaders Protest Police Use of Motorized Ram*, L.A. TIMES, Feb. 9, 1985, § 2, at 1. Police Chief Daryl Gates said the ram went through the wall "like butter," but as luck would have it, there was no evidence of illegal drugs in the house; the occupants included two women and three children, some of whom were eating ice cream when the L.A.P.D. showed up. See also Patricia Klein, *Ram Puts Some Narcotics on Run, Police Say*, L.A. TIMES, Mar. 14, 1985, § 2, at 1 (L.A.P.D. states that new weapon has caused drug dealers to close down their heavily fortified "rock houses" or to move out of Los Angeles; this statement has not led to putting the ram in moth balls); *The New Battering Ram*, L.A. TIMES, Feb. 13, 1985, § 2, at 4 (editorial opposing the ram as "a military weapon having little place in an urban environment").

8. The Constitution itself provides: "The Privilege of the Writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST., art. I, § 9. President Lincoln took the view that this provision authorized the Executive to do so without any legislative authorization from Congress. In his capacity as a Circuit Justice, Chief Justice Taney held that the President's action was invalid. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). Lincoln then sought and obtained congressional authorization to suspend the writ. Act of Mar. 3, 1863, § 1, 12 Stat. 755. See WILLIAM H. REHNQUIST, *THE SUPREME COURT 147-49* (1987). Perhaps the most notorious example of wartime deprivation of civil liberties was during World War II, when the Court sustained penalties imposed on racial grounds against all persons of Japanese ancestry, including Japanese-American citizens. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding incarceration and dispossession of persons of Japanese ancestry); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding military curfew on persons of Japanese ancestry). See PETER ARONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983); JACOBUS TENBROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* (1954); and Eugene Rostow, *The Japanese American Cases: A Disaster*, 54 YALE L.J. 489 (1945).

9. See, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991) (police have considerable leeway to stop and question a person riding on a public bus, without any articulable cause for suspicion preceding the stop; a "reasonable" person is really an *innocent* reasonable person); *California v. Ciraolo*, 476 U.S. 207 (1976) (the Fourth Amendment is not violated by a warrantless aerial observation of marijuana growing in a fenced-in backyard); *United States v. Leon*, 468 U.S. 897 (1984) (police acting in good faith may rely upon a warrant even if it was issued without probable cause); *Florida*

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a lesser degree, to the Sixth Amendment¹⁰ ever since the Presidential declaration of the war on drugs. The focus of this symposium suggests, moreover, that we should be especially troubled by the intentional waging of war against young people of color.¹¹ Maybe the war on drugs is just a case of an item for short notice in the *New Yorker's* "Block that Metaphor" department. The tenacity of the metaphor in the American imagination, however, suggests that further discussion is needed.

II. THE RELEVANCE OF THE CHRISTIAN TRADITION ON WAR AND VIOLENCE

I am a Christian. Hence, for me, the treatment of the larger question of war and violence in the Christian¹² tradition has some bearing on the analysis of whether we should be waging war on drugs in America today.

Some might object to the introduction of any religious beliefs, let alone the convictions of a particular tradition, into the discussion of public policy. On this view, politics must be secular and religion must be relegated to the private sphere. This objection proves too little and it proves too much. It proves too little by misunderstanding both the secular and the religious, and it proves too much by negating the basic principle of democratic participation in a pluralistic society. It is not a mistake to insist that legislation should have a valid secular purpose.¹³ But this requirement of secularity in governmental policy means

v. Royer, 460 U.S. 491 (1983) (airport confrontation between a drug agent and a suspected drug courier is not a "seizure" within the Fourth Amendment); *Stone v. Powell*, 428 U.S. 465 (1976) (the exclusionary rule is not applicable to grand jury proceedings). Perhaps members of the Court view these outcomes as permissible because, after all, there is an "international war on drugs" going on. See Wayne R. LaFave, *The Fourth Amendment: A Bicentennial "Checkup,"* 26 VAL. U. L. REV. 223 (1991).

10. One corollary of the war on drugs is that forfeiture laws have been tightened. The purpose of these laws is to inhibit the taking of economic profit from illegal drug transactions. If one thinks that the application of these laws to the attorneys representing defendants accused of drug violations may seem a stretch, see *Caplin and Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

11. See, e.g., H. Westley Clark et al., *Cultural Aspects of Adolescent Addiction and Treatment*, 31 VAL. U. L. REV. 647 (1997); Coramae Richey Mann, *We Don't Need More Wars*, 31 VAL. U. L. REV. 565 (1997); David E. Smith et al., *Methamphetamine Abuse, Violence and Appropriate Treatment*, 31 VAL. U. L. REV. 661 (1997).

12. I speak in this article as a Christian because that is the religious tradition with which I identify personally and communally. I am, of course, aware that the issue of war and violence has been addressed in other religions. The literature is vast. One brief survey may be enough for the curious reader wishing to expand her horizons. See JOHN FERGUSON, *WAR AND PEACE IN THE WORLD'S RELIGIONS* (1978).

13. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The cases discussing this requirement have almost uniformly found the requirement easily met. The sole exception is the subject of the curriculum in public schools. The Court has invalidated the following practices in public schools for want of a "valid secular purpose": a ban on the teaching of evolution, *Epperson v. Arkansas*, 393 U.S. 97 (1968); a requirement of equal time for the teaching of "creation science,"

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that public policies must be shaped to provide for the general welfare of the nation or the local community.¹⁴ It is a misunderstanding of secularity to extend this requirement into an anti-religious ideology of secularism that would exclude religious voices from the conversations or debates that precede the formation of secular policies.¹⁵ As Justice Brennan noted in *McDaniel v. Paty*:

[G]overnment may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.¹⁶

In a similar way, Chief Justice Burger noted in the leading case on tax exemption of religious bodies: "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."¹⁷

The anti-religious objection also misunderstands the nature of religion, at least for many, when it insists that religion can be relegated to the private sphere. For many biblical believers—who form the overwhelming majority of the American public¹⁸—it is impossible to privatize the great promises of

Edwards v. Aguillard, 482 U.S. 578 (1987); the posting of the *Ten Commandments* on wall of classroom, *Stone v. Graham*, 449 U.S. 39 (1980); and a statute authorizing a period of silence for meditation or voluntary prayer, *Wallace v. Jaffree*, 472 U.S. 38 (1985).

14. The *Williamsburg Charter*, a bicentennial document celebrating religious freedom, notes: "Secular purpose,' for example, should not mean 'non-religious purpose' but 'general public purpose.' Otherwise, the impression is gained that 'public is equivalent to secular; religion is equivalent to private.' Such equations are neither accurate nor just." *The Williamsburg Charter*, 8 J.L. & RELIGION 5, 14 (1990).

15. In *Harris v. McCrae*, 448 U.S. 297 (1980), the Court noted: "[T]he fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." *Id.* at 319-20.

16. 435 U.S. 618, 640 (1978) (Brennan, J., concurring) (citations omitted).

17. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 670 (1970).

18. James Davison Hunter, *Pluralism: Past and Present*, 8 J.L. & RELIGION 273, 274 (1990) (describing the growth of the "religious nones," as sociologists call persons of no religious convictions, from 2% of the nation in 1952 to 11% in 1988).

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biblical religion.¹⁹ For example, in this perspective freedom is not only about individual liberty, but also bespeaks communal liberation from forces of oppression.²⁰ And peace is not just inner serenity or personal calm, nor even the absence of war; to use St. Augustine's phrase discussed below, peace is the "tranquility or order," that is, something that has to do with just and harmonious societal arrangements.

The anti-religious objection also proves too much by negating the basic principle of democratic participation in a pluralistic society. This is the point made by Justice Brennan and Chief Justice Burger in the citations above. As Richard John Neuhaus, a leading commentator on religion and public life in America, has written:

Contrary to the dogmas of secular Enlightenment, . . . religion has neither withered away nor can it successfully be confined to the private spheres of life. The social scientists who until recently argued that there is a necessary connection between modernization and increased secularization have in many instances done an about-face. The social hypothesis could not withstand the social fact. If "the men of action and the men of thought" are to be reconciled, it will have to be in working toward a new synthesis that reappropriates the biblical as well as the classical tradition. This is the case if only because such a synthesis must be supported democratically in order to be viewed as morally legitimate. Again, the democratic reality, even, if you will, the raw demographic reality, is that most Americans derive their values and visions from the biblical tradition.²¹

In the words of the Williamsburg Charter, the desired result in American politics is "neither a naked public square where all religion is excluded, nor a sacred public square with any religion established or semi-established. The result, rather, is a civil public square in which citizens of all religious faiths, or none, engage one another in the continuing democratic discourse."²²

19. See, e.g., JOHANNES BAPTIST METZ, *THEOLOGY OF THE WORLD* (1969). See also JOHANNES BAPTIST METZ, *FAITH IN HISTORY AND SOCIETY: TOWARD A PRACTICAL FUNDAMENTAL THEOLOGY* 32-48 (1980) (rejecting privatization of religion and proposing a political theology of the human subject as a theological criticism of middle-class religion); JOHANNES BAPTIST METZ, *THE EMERGENT CHURCH: THE FUTURE OF CHRISTIANITY IN A POSTBURGEOIS WORLD* 67-81 (1981). See also Francis Fiorenza, *Political Theology and Liberation Theology: An Inquiry into Their Fundamental Meaning*, in *LIBERATION, REVOLUTION, AND FREEDOM: THEOLOGICAL PERSPECTIVES* 3-29 (T. McFadden ed., 1975).

20. See, e.g., *Exodus*.

21. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* 139 (1984).

22. *The Williamsburg Charter*, *supra* note 14, at 17 (1990).

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In short, what the First Amendment Religion Clause requires is not the radical secularization of politics or the privatization of religion, but substantive neutrality on the part of the government with respect to religious claims.²³ It is not neutral to exclude religion from public debate about public policy. It is unwarranted hostility.²⁴

This view recognizes the vital role that religion has historically played in American politics.²⁵ But constitutional protection of religious participation does not make all forms of such participation wise, any more than secular participation in politics is necessarily wise. The religious participant in a discussion about a political judgment might do well to heed the Williamsburg Charter:

Arguments for public policy should be more than private convictions shouted out loud. For persuasion to be principled, private convictions should be translated into publicly accessible claims. Such public claims should be made publicly accessible for two reasons: first, because they must engage those who do not share the same private convictions, and second, because they should be directed toward the common good.²⁶

Since I cannot assume that others understand how my religious claims relate to a question of public policy, much less that they share my own convictions, it is legitimate for me to introduce a biblical and post-biblical religious argument into this discussion only if I clarify the religious argument and make it accessible for those who do not share my own particular religious convictions. I turn now to these two tasks.

In the early period of church history, there were basically two questions that needed to be resolved. First, could a Christian serve in the Roman army? Second, could the State ever legitimately wage war? The answers to these two questions fall into two general ways of thinking that correspond to positions widely held by religious ethicists down to the present moment: *pacifism*, or the view that no Christian may cooperate in acts of violence; and *the just war tradition*, which holds that there are some limited circumstances under which the State may, and even must, resort to violence to preserve justice. Both of these

23. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

24. See Edward M. Gaffney, *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263 (1992).

25. See Kelley, *The Intermeddling Manifesto, Or the Role of Religious Bodies in Affecting Public Policy in the United States*, 8 J.L. & RELIGION 85 (1990).

26. *The Williamsburg Charter*, *supra* note 14, at 21.

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positions have been explored in the cases concerning conscientious objection to war. Ironically, in this context, both the Congress and the Court have favored pacifism over the just war tradition.²⁷ Both traditions merit further elaboration before I attempt to draw them into the conversation about the war on drugs.

A. *Christian Pacifism*

The question of military service in the Roman army did not become a significant problem in the period when the *New Testament* was written. According to a distinguished church historian, Hans von Campenhausen, "Till about 175 A.D. there were, as far as we can tell, no Christian soldiers, and therefore, no actual question about military service arose."²⁸ Von Campenhausen goes further, suggesting that when the problem did arise in the late Second Century, attempts to adduce answers to this problem from the *New Testament* were fruitless.²⁹

Although it is generally a sound principle of interpretation that a text does not provide an answer for a question that was not asked when the text was written, von Campenhausen understates the possibility that the *New Testament*

27. In 1775 the Continental Congress passed the following resolution:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and do all other services to their oppressed Country, which they can conscientiously with their religious principles.

2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 189 (1904). The Universal Military Training and Service Act provided an exemption from military service to those "who by reason of religious training and belief are conscientiously opposed to participation in war in any form." 50 U.S.C. § 456(j) (1958). Thus, from the founding period to the present there has been a tilt in the law towards traditional pacifists. During the Vietnam War the constitutionality of various provisions of the draft law was challenged. In *United States v. Seeger*, 380 U.S. 163 (1965), the Court sustained the Act by giving a very loose construction to the provision that defined "religious training and belief" to mean "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* at 165. The Court stated that a sincere and meaningful belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" would suffice for the exemption. *Id.* In *Welsh v. United States*, 398 U.S. 333 (1970), the Court again sustained the Act by holding that the exemption was applicable to one who had crossed out the words "my religious training." *Id.* at 337. A year later, in *Negre v. Larsen*, 401 U.S. 437 (1971), the Court narrowly construed the provision allowing conscientious objector status only to those objecting to participation in war "in any form," denying objector status to a Catholic who was willing to perform military service, but who refused to serve in combat duty in Vietnam on the ground that fidelity to the teaching of his church required him to abstain from indiscriminate killing. *Id.* at 460.

28. HANS VON CAMPENHAUSEN, TRADITION AND LIFE IN THE CHURCH: ESSAYS AND LECTURES ON CHURCH HISTORY 162 (1968).

29. *Id.*

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ethic had clear implications for the followers of Jesus with respect to violence. At the very least, one can conclude that the teaching of the *New Testament* on this theme has been received in various ways.

The church in the post-biblical period tried to live with fidelity to the apostolic witness to Jesus reflected in the books of the *New Testament*. Hence a brief overview of some of the *New Testament* texts relevant to the issue of military service is essential to understanding why some Christians repudiate all forms of violence. For example, in the *Sermon on the Mount* Jesus is portrayed as a new Moses correcting the text of *Torah* by offering instruction that he intends his hearers to take seriously. In place of the law of the talion ("an eye for an eye and a tooth for a tooth"),³⁰ Jesus says: "Do not resist one who is evil. But if any one strikes you on the right cheek, turn to him the other also."³¹ In place of an ethic of love of one's neighbor and hatred of one's enemy,³² Jesus teaches his disciples: "Love your enemies and pray for those who persecute you."³³ In the famous parable of the Good Samaritan,³⁴ Jesus expanded the duty of care considerably by enlarging the definition of a neighbor as any human person in need of help. And in the passion narratives, he tells his disciples to put away their swords on the ground that "those who live by the sword die by the sword."³⁵

At least some Christians, notably those within the perspective of the "Radical Reformation,"³⁶ often associated with Menno Simons and his Mennonite associates,³⁷ have found these and similar teachings of Jesus on nonviolence to be a binding norm in their lives. These Christians include Martin Luther King, Jr., and many of the other leaders of the civil rights movement in recent American history.³⁸ In this perspective, to be a disciple

30. *Exodus* 21:23-24; *Leviticus* 24:19-20; *Deuteronomy* 19:21. Although this law is frequently misunderstood as encouraging vendetta justice, it actually functioned in the ancient world as a restraint upon violence, limiting victims to compensatory damages for their injuries. See DALE PATRICK, *OLD TESTAMENT LAW* 76-77 (1985).

31. *Matthew* 5:39.

32. *Leviticus* 19:2,18; *Proverbs* 25:21-22.

33. *Matthew* 5:44.

34. *Luke* 10:25-37.

35. *Matthew* 26:52.

36. See, e.g., *SPIRITUAL AND ANABAPTIST WRITERS* (George H. Williams & Angel M. Mergal eds. 1957).

37. See, e.g., JOHN T. NOONAN, JR., *THE BELIEVER AND THE POWERS THAT ARE* 62-64 (1987).

38. See, e.g., MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 77-100 (1964) (text of Letter from Birmingham Jail).

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or follower of Jesus means not only to attend carefully to his teaching about nonviolence, but also to live as he did, nonviolently; and to follow the path he walked, the way of the cross.³⁹

Von Campenhausen does not claim that the church always allowed Christians to engage in military service. Rather, he explains the view of the early church on military service as follows:

If [Christians] comply with and accept some factor in the outside world, that does not mean that they approve it; it is simply that they cannot change the world and make it the Church. At the same time, if definite obligations are imposed on Christians by the Church . . . , that does not mean that they are intended as principles to which all law must conform; it is simply that they cannot commit themselves wholly to the law of this world. This explains the seemingly inconsistent ways in which the ancient Church judged war and military service. Not a single one of the Fathers doubted that, in the world as it is, war is inevitable, and consequently, they saw no reason to condemn the military profession in particular. . . . It is only by force that external peace is preserved, for which Christians also are grateful. They themselves, however, would not have anything to do with war service. The world may need its Caesars, but no emperor can be a Christian nor a Christian ever be an emperor [citing Tertullian]. The Church knows no war [citing *Clement of Alexandria*]. Christians are peacemakers and adhere to the commandments in the Sermon on the Mount. They are ready to suffer and die in testimony to their truth; but they do not kill [citing Justin, Irenaeus, Tertullian, and Minucius Felix].⁴⁰

He notes that since “there was practically no conscription” at the time, “it was easy to avoid anything to do with the army.”⁴¹

The reign of the Emperor Constantine (306-337 C.E.) produced a decisive turn in Christian attitudes about the imperial army. Again, von Campenhausen notes:

When the supreme commander had himself become a Christian, the “idealistic approach” was seen to be obviously untenable. It was no

39. See, e.g., G.H.C. MACGREGOR, *THE NEW TESTAMENT BASIS OF PACIFISM* (1953); JOHN HOWARD YODER, *NEVERTHELESS: THE VARIETIES OF RELIGIOUS PACIFISM* (1971); and JOHN HOWARD YODER, *THE POLITICS OF JESUS* 115-134 (1972).

40. VON CAMPENHAUSEN, *supra* note 28, at 160-61.

41. *Id.* at 161.

longer possible to shift the responsibility for wars to the heathen population exclusively. Christians had themselves become members of the army—no longer just in isolated cases and by way of concession, but in general and on principle. The Church did not reach this decision easily. Indeed, the atrocities committed in the preceding persecutions and civil wars powerfully reinforced the general horror of war on the part of civilians, as well as the Church's own impressions of the sordid character of the military profession.⁴²

A canon or church law issued at a synod at Hippo in northern Africa held: "Persons who possess authority to put to death' (that is to say, Christian judges) 'and soldiers, must, in no circumstances, kill, even when they are commanded to.'"⁴³ By the year 416 C.E., however, an edict of the Emperor Theodosius II decreed that only Christians could enter the army.⁴⁴

Von Campenhausen concludes:

Notwithstanding the basic assertion that certain duties, political and military, are incumbent on all citizens, including Christians, war service is not held simply as an absolute law. There are possible exceptions, and from the Christian standpoint, necessary ones. Monks, clerics, and "spiritual persons" of all kinds are not obliged to fight, but may always restrict themselves to sacrifice and suffering. Perseverance and stability in these callings are a sign and a constant reminder of the possibility of exemption as a live issue. For, in fact, the main thing is the freedom of such "exceptions," which persist in full view of the world. The Christian readiness to share in all the burdens and responsibilities of civic life is not thereby revoked. It subsists unimpaired, and holds good even when—as in the case when war has become inevitable—it is clearly a matter of the *consequence* of human sin On the other hand, the impression should never be given that sin is itself a power to which Christians must submit, instead of fighting; and so their compliance with the political and military authorities never means that they take war to be an ultimate truth and a reality of life that suffers no impairment. The real and always valid truth is, rather, the truth of the peace given to the world, and this truth be witnessed to at all times. The forces of enmity must be breached by those of the spirit, and this must be done repeatedly In this way, both war service and the renunciation of war on the part of Christians belong, in a sense, together. In this case, the

42. *Id.* at 167.

43. *Id.* at 168 (citing CANNON 13f, SYNOD OF HIPPO).

44. THE THEODOSIAN CODE (Clyde Pharr trans., 1952).

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“exception,” rightly understood, is the necessary explanation and ratification of the “rule” rightly understood.⁴⁵

B. The Just War Tradition

In the Fourth Century a major shift occurred in Christianity. It went first from virulent persecution under Emperor Diocletian (284-305 C.E.) to toleration under Emperor Constantine (306-337 C.E.) and then to establishment as the official religion of the empire under Emperor Theodosius I (379-395 C.E.). When this shift occurred, the ethical questions about war posed new dimensions. Now Christians had to ponder not whether it was ever permissible to serve in the imperial army, but whether the State could ever wage war (*jus ad bellum*), and if so, whether there were any limits that the Christian religion placed on the conduct of warfare (*jus in bello*).

The leading Christian theologian to address these questions systematically was Augustine (354-430 C.E.), who wrote about these realities after almost a century of open Christian influence at the center of power: “The preeminence of his theological insights and rhetorical skills, his energetic delight in argument and mental combat, his encyclopedic range, his personality, his personal experience, and his willingness to speak personally made him the most influential writer on morals for the Christian West.”⁴⁶ Starting with his own experience of human weakness articulated powerfully in his autobiographical *Confessions* (circa 397 C.E.), and elaborating his theological anthropology more systematically in *The City of God* (413-426 C.E.), Augustine held a view of the human condition that was deeply pessimistic. The Augustinian doctrine of original sin meant that all persons are selfish and prone to sin; without redeeming grace we are full of depravity. This perspective influenced Augustine’s views as the founder of the just war tradition.

Although Augustine viewed the pacifism of earlier Christian writers cited above as too great a concession to evil and injustice, “Augustine was no

45. VON CAMPENHAUSEN, *supra* note 28, at 169-70. See also ROLAND BANTON, CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION 66-84 (1960); C.F. CADOUX, THE EARLY CHRISTIAN ATTITUDE TO WAR (1919); ADOLPH HARNACK, MILITIA CHRISTI: THE CHRISTIAN RELIGION AND THE MILITARY IN THE FIRST THREE CENTURIES (1981); ADOLPH HARNACK, THE MISSION AND EXPANSION OF CHRISTIANITY IN THE FIRST THREE CENTURIES (1962). For an assessment of the impact of the Constantinian shift on the teaching of Christianity on violence, see STANLEY HAUERWAS, THE PEACEABLE KINGDOM (1983); John Howard Yoder, *The Constantinian Sources of Western Social Ethics*, in THE PRIESTLY KINGDOM 135-47 (1984).

46. JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 12 (1987).

militarist; there is no glorification of war in *The City of God*.⁴⁷ On the contrary, he expressly condemned wars of military conquest such as the destruction of Rome by Alaric, leader of the Goths, in 410 C.E.⁴⁸ For Augustine, the fallenness of the world does not make war necessary, let alone desirable, but simply inevitable. Once Augustine posited the inevitability of war, his moral question was how to set limits upon it.

George Weigel aptly summarizes Augustine's teaching on the justifiability of war, which forms the basis of the modern just war tradition:

In Augustine's theory, three kinds of war were morally defensible: a defensive war against aggression, a war to gain just reparations for a previous wrong, and a war to recover stolen property. But historical circumstances alone did not create the conditions for a "just" war. A properly constituted authority must decide that the resort to war is necessary Further, war must be waged with a "right intention": not for revenge, or lust for glory and spoils, but with a sober commitment to conduct the war as an instrument of punishment necessary to protect the innocent and to prevent malefactors from doing worse. Right intentions would be expressed, not only in the decision to go to war, but also in the just conduct of a war. Here, "the rules were taken from classical antiquity. Faith must be kept with the enemy. There should be no wanton violence, profanation of temples, looting, massacre, or conflagration. Vengeance, atrocities, and reprisals were excluded, though ambush was allowed." Thus, Augustine, who counseled against self-defense in the case of individual threat, outlined the skeleton of a just-war theory rooted in a moral passion for peace as the tranquility of order.⁴⁹

The Princeton ethicist Paul Ramsay emphasizes the last point, that Augustine did not justify Christian participation in war on grounds of self-defense, but on grounds of defense of the innocent. This defense required the State to use no more force than is necessary to prevent the attacker from destroying the innocent.⁵⁰

47. GEORGE WEIGEL, *TRANQUILITAS ORDINIS: THE PRESENT FAILURE AND FUTURE PROMISE OF AMERICAN CATHOLIC THOUGHT ON WAR AND PEACE* 29 (1987).

48. BAINTON, *supra* note 45, 93-95.

49. WEIGEL, *supra* note 47, at 29 (citations omitted). See also BAINTON, *supra* note 45, at 89-100; John Langan, *The Elements of St. Augustine's Just War Theory*, 12 *J. RELIGIOUS ETHICS* 19 (1984); JOHN HOWARD YODER, *WHEN WAR IS UNJUST: BEING HONEST IN JUST-WAR THINKING* 8-18 (1996).

50. PAUL RAMSAY, *WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY?* 35-39 (1961). See also STANLEY HAUERWAS, *AGAINST THE NATIONS: WAR AND SURVIVAL IN A LIBERAL SOCIETY* 138 (1985).

To sum up, from the First Century of Christianity to the present, some Christians have held the view that war is never justifiable. Although I have traced the origins of this view within Christianity, it is clear that in our contemporary world this view is held not only by Christians like Dorothy Day,⁵¹ Thomas Gumbleton,⁵² and John Howard Yoder,⁵³ but also by Jews like Martin Buber,⁵⁴ Muslims like Badshah Kahn,⁵⁵ Hindus like Mohandas Gandhi,⁵⁶ Buddhists like the Dalai Lama,⁵⁷ and nonbelievers like Bertrand Russell.⁵⁸ For people committed to pacifism, a war on drugs suffers from the same infirmity of all wars: they are senseless, not to be participated in, or even supported.

51. Day founded the Catholic Worker movement, which stresses the duty of hospitality to the poor and the renunciation of violence. See her autobiography, *DOROTHY DAY, THE LONG LONELINESS* (1952). See also MEL PIEHL, *BREAKING BREAD: THE CATHOLIC WORKER AND THE ORIGIN OF CATHOLIC RADICALISM IN AMERICA* (1982).

52. Gumbleton is the Auxiliary Bishop of the Roman Catholic Archdiocese of Detroit and the national President of Pax Christi, USA, an organization that repudiates all forms of war.

53. Yoder is a Professor of Theology at the University of Notre Dame. He is a leading Mennonite theologian who has written extensively about nonviolence, both at the level of political theory and at the level of practical significance. See YODER, *supra* notes 39 and 49. See also Yoder, *supra* note 45.

54. Martin Buber (1878-1965) was an Austrian existentialist philosopher best known for his personalist reflections. See *MARTIN BUBER, I AND THOU* (1958). He was a prolific writer who explored many facets of his Jewish faith. For his study of Jewish pacifism, see *MARTIN BUBER, PATHS IN UTOPIA* (1958). See also Arthur Hertzberg et al., *Judaism, Pacifism, and the Middle East Crisis*, in *JEWISH ETHICS OF PEACE* (Steven S. Schwarzschild ed., 1980). See also *Rabbinic Adumbrations of Nonviolence: Israel and Canaan*, in *JEWISH ETHICS OF PEACE* (Steven S. Schwarzschild ed., 1980). The Jewish Peace Fellowship, headquartered in West Nyack, New York, is a community of Jews committed to peaceful resolution of disputes, including those involving the State of Israel.

55. For a study of Kahn's movement to preserve Islamic culture against formidable odds in the former Soviet Union, see EKNATH EASWARN, *A MAN TO MATCH HIS MOUNTAINS* (1984). For general surveys of Islamic thought about violence, see Abdulaziz Sachedina, *Justifications for Violence in Islam*, in *WAR AND ITS DISCONTENTS* 122-60 (J. Patout Burns, ed. 1996); and Robert Johansen, *Radical Islam and Nonviolence*, 34 *J. PEACE & RESEARCH* 53-72 (1977). For careful analysis of the problem of violence in Islam, see JAWDAT SAID, *MATH.HAB IBN ADAM EL-AWWAL: MUSHKILAT EL-'UNF FI AL-'AMAL AL-ISLAMI [THE CREED OF FIRST HUMAN BEING: THE PROBLEM OF VIOLENCE IN ISLAMIC WORK]* (1993); and AHMAD AL-SUFI, *AL-'UNF: WA AL-'UNF AL-SIYASI FI AL-MUJTAMA' AL-YAMANI [VIOLENCE: AND POLITICAL VIOLENCE IN YEMENI SOCIETY]* (n.d.).

56. Gandhi (1869-1948) was the spiritual and political leader of the nonviolent movement that brought an end to British imperial rule in India. See *MAHATMA GANDHI, NON-VIOLENT RESISTANCE* (1961).

57. The fourteenth Dalai Lama (b. 1934) is the spiritual leader of Buddhists who has been living in exile ever since the People's Republic of China "annexed" Tibet in 1959. He preaches a message of harmony and nonviolence.

58. Lord Russell (1872-1970) was an English philosopher, mathematician, and pacifist. See *BERTRAND RUSSELL, UNARMED VICTORY* (1963). See also *BERTRAND RUSSELL, COMMON SENSE AND NUCLEAR WARFARE* (1959).

Other Christians, primarily after the age of the Emperor Constantine, are prepared to acknowledge that the State may and even must sometimes resort to violence, but only under fairly precise conditions set forth in the just war doctrine first systematically clarified by Augustine. The second approach has been refined over time by scholars such as Thomas Aquinas,⁵⁹ Francisco Suárez,⁶⁰ and Hugo Grotius.⁶¹ The result of centuries of reflection on the justification of war is that there is now fairly strong consensus in international law that war may be justified only if: (1) declared and waged by legitimate authority; (2) resorted to after all efforts to resolve the conflict peacefully have failed; (3) waged for a just cause (e.g., restoration of peace and justice) and with reasonable hope of success; (4) waged within the principle of proportionality, according to which the good sought to be achieved must outweigh the evil inherent in all war; and (5) waged within the limits of the law of war, providing, for example, immunity for noncombatants.⁶² Although these principles derive from the thinking of Augustine, they are no longer bound up with the belief that there is a God who discloses himself to human persons through some form of revelation. The contemporary consensus on the just war tradition rests not on religious insight, but on secular norms that are empirically grounded and accessible to human reason.⁶³

The exception to this consensus in ethical thought and in international law is the amoral view that war is merely a matter of statecraft better left to political rulers and their aides than to philosophers, ethicists, or international lawyers. The classic statement of this perspective is by Nicolo Machiavelli.⁶⁴ Perhaps the most prominent contemporary proponent of this perspective is Henry Kissinger, who while serving as Secretary of State in the Nixon administration

59. Aquinas (1225-1274) was an Italian Dominican whose *SUMMA THEOLOGIAE* was the most influential theological work throughout the Middle Ages. See THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, q. XL (Fathers of the English Dominican Province trans., 1916). See also discussion in WEIGEL, *supra* note 47, at 33-38.

60. Suarez (1548-1617) was a Spanish theologian and jurist who is regarded as the founder of international law; he maintained that the human race, though divided into different nations, maintains a moral unity in which mutual relations are governed by the *jus gentium* or law of the nations. See JOHN EPPSTEIN, *THE CATHOLIC TRADITION OF THE LAW OF THE NATIONS* 97-123 (1935).

61. Grotius (1583-1645) was a Dutch jurist and statesman whose principal contribution to Western law was the codification of international law. See Wolfgang Friedmann, *Hugo Grotius*, in 3 *ENCYCLOPEDIA OF PHILOSOPHY* 393-95 (1967).

62. For a schematic summary of the just war tradition, see EPPSTEIN, *supra* note 60, at 92-93. See also WEIGEL, *supra* note 47, at 41.

63. See, e.g., RICHARD A. FALK, *LAW, MORALITY, AND WAR IN THE CONTEMPORARY WORLD* (1963); RICHARD A. FALK, *LEGAL ORDER IN A VIOLENT WORLD* (1968); *THE STRATEGY OF WORLD ORDER* (Richard A. Falk & Saul H. Mendlovitz eds., 1966); *THE WAR SYSTEM: AN INTERDISCIPLINARY APPROACH* (Richard A. Falk & Samuel S. Kim eds., 1980).

64. Machiavelli (1469-1527) was an Italian statesman and political theorist. See NICOLO MACHIAVELLI, *THE PRINCE* (1513).

took a Realpolitik approach to the handling of the Vietnam War, and who denounced the Congress for imposing economic sanctions on the People's Republic of China, after the brutal massacre of demonstrators in Tiananmen Square in June of 1989.⁶⁵ If only, because leaving war to bureaucratic experts seems so undemocratic, I do not linger long over this view here. The overarching thrust of the National Conference on Teenage Violence reported in this symposium is that the issues are far too complicated and too important to be left to the government. Especially in a period of severe budget constraints, the people outside the Beltway must be engaged in the struggle to end the war on drugs and replace it with a sensible set of humane policies.

Long centuries after Augustine, the untractable problem of war is no longer one of how Christians might restrain the force of the Roman imperial army in the Mediterranean, but how after two great conflagrations in this century and untold human misery from undeclared wars throughout the Third World, we might find a way to end war as a means of resolving international disputes. The goal may seem illusory to the cynics who adorn their pose with the name of "realism." But, given the current state of technology with the proliferation of weapons of mass destruction and given the spread of reckless terrorism as an ideological commitment by aggrieved or at least hostile groups throughout the world, the commitment to the task of ending war now seems more urgent than ever before in human history. And if that task cannot be achieved, at least there must be stronger consensus on just war principles that curb the savagery of war if it breaks out.

III. APPLICATION OF PACIFIST PRINCIPLES TO THE WAR ON DRUGS

It is tempting for hard-nosed policy makers to dismiss people with pacifist views as simply irrelevant to the war on drugs. If someone ever were to mention the views of pacifists in think tanks that thrive on the war on drugs, one might imagine a very short conversation: "Who cares whether these crazy people don't like our war metaphor? They don't like any war!" It seems to me, though, that the commitment to nonviolence should not be dismissed quite so readily from the range of options that the government should contemplate as it formulates drug policies.

When the scholars who contributed to this symposium were in Valparaiso, I did not ask them about their views on the larger question of whether violence can ever be justified. So I do not know for sure whether there are any pacifists

65. See Henry Kissinger, *Turmoil on Top: A World of Changing Leaders, Struggling Governments and Strange Bedfellows*, L.A. TIMES, July 30, 1989, Opinion Section, at 5. See also Anthony Lewis, *Kissinger and China*, N.Y. TIMES, Aug. 20, 1989, § 4, at 23; Anthony Lewis, *The Kissinger Syndrome*, N.Y. TIMES, Dec. 17, 1989, § 4, at 21.

among them. But at least at an intuitional level, the work of some of the contributors to this symposium seems closer to pacifism than to the just war tradition or to Machiavellian statecraft. For all I know, the anthropologists and sociologists (Professors David Curry, Scott Decker, Mark Fleisher, and Coramae Richey Mann), the photo-journalist (Eugene Richards), and the physicians (Westley Clark, Garrett O'Connor, and David Smith) who contributed to this symposium are all of the view that violence is inevitable. For that reason they might regard themselves as just warriors rather than pacifists. Yet whatever their personal views on the more general theoretical question of armed violence, I think that they represent in this symposium the sorts of concerns that pacifists typically bring to the discussion of war and violence. For example, the approach of Mark Fleisher⁶⁶ and Eugene Richards⁶⁷ to the realities they have studied closely in Kansas City, and the approach of David Curry and Scott Decker to the gangs they have been studying in St. Louis, reflects careful, almost reverent, attention to the intimate personal lives of the human beings with whom they have lived as companions in close quarters for years.

For over a year Professor Fleisher has been "hanging out" with a gang in Kansas City known as the Fremont Hustlers.⁶⁸ In his Article, Fleisher offers recommendations to control the burgeoning problem of youth gangs and gang-related violence. Fleisher draws five conclusions from his fieldwork experience, funded with a Guggenheim grant: (1) Fremont parents had no incentive for making the kind of investments in their kids that "straight" parents make in their children; (2) intrafamily dysfunction transcended generations when Fremont girls had babies; (3) over-zealous gang policing exacerbated the youth gang problem; (4) probation did not alter the behavior of the members of the Fremont Hustlers; and (5) adolescents who pulled away from gang life had no access to social services. Fleisher offers a six-point program to address the situation of gang life he has observed so carefully for so long: (1) finding financial resources for gang intervention by diverting money currently spent on prodigiously expensive prisons; (2) extending protection to abused children; (3) assisting school teachers and administrators to be better prepared to diagnose and seek treatment for emotionally and physically injured kids; (4) providing services to attend to the addictions, medical problems, psychological issues, and social maladjustment of

66. Mark S. Fleisher, *Guns, Drugs, and Violence: Kids on the Streets of Kansas City*, 31 VAL. U. L. REV. 485 (1997).

67. EUGENE RICHARDS, COCAINE TRUE, COCAINE BLUE (1994); Eugene Richards, *The Fremont Street Hustlers*, in BEST OF PHOTOJOURNALISM 21 (1996).

68. Fleisher, *supra* note 66, at 487-88.

juveniles in detention centers; (5) providing on-site neighborhood teams of public health professionals, psychiatric social workers, and teachers; and (6) educating teenagers about firearms.⁶⁹

Professors Curry and Decker contribute two Articles. The first tackles the definitional problem of what a gang is. They note a wide disparity among police departments, many of which confuse a “gang” with any group. Los Angeles has historically used a member-based definition, while Chicago has used a motivation-based definition. Why should this matter? Because, as two colleagues in the field of gang research—Cheryl Maxson and Malcolm Klein—show, if one applies Chicago’s motivation-based definition to the Los Angeles gang homicide statistics, Los Angeles had half as many gang homicides as the Los Angeles definition produced.⁷⁰ Noting that “[t]he ways in which gang members define gangs do not differ greatly from how they are defined by law enforcement, social service and research groups,”⁷¹ Curry and Decker enable the voices of gang members whom they interviewed to emerge in their Article.⁷² Curry and Decker conclude:

If we equate gangs with non-criminal organizations, and gang members with members of other groups, we miss fundamental differences between gangs and groups. To be sure, gangs are a form of group, but gangs have a strong criminal orientation and gang members commit crimes. During periods of gang membership, young men and women commit more crimes, and more serious crimes, than prior to entering *or* after leaving the gang. It may be popular for political or partisan reasons to equate gangs with other groups. To do so, however, is to miss the fundamental reason gangs have attained the level of public concern and law enforcement attention they have. Gangs facilitate the commission of crime. To ignore that is to ignore (or worse to excuse) the violence gang members commit against each other and their communities.⁷³

In their second Article in this symposium,⁷⁴ Curry and Decker describe with particularity their work in St. Louis, where they have been conducting their ethnographic research. St. Louis has adopted the Comprehensive Community-

69. *Id.* at 496-500.

70. G. David Curry & Scott H. Decker, *What's in a Name?: A Gang by any Other Name Isn't Quite the Same*, 31 VAL. U. L. REV. 501, 503 (1997).

71. *Id.* at 504.

72. *Id.* at 504-14.

73. *Id.* at 514.

74. G. David Curry & Scott H. Decker, *Understanding and Responding to Gangs in an Emerging Gang Problem Context*, 31 VAL. U. L. REV. 523 (1997).

Wide Approach to Gangs, also known as the Spergel model.⁷⁵ Under this model, the St. Louis effort “requires courts and social service providers to expend extra resources in bringing drug treatment, job preparation, support in school, and family services to gang-involved youths and serious, violent, and chronic juvenile offenders.”⁷⁶ Curry and Decker further note that “the gang unit has developed a prototype multi-level classification that counts both crimes involving gang members as offenders and victims and the subcategory of ‘gang-motivated’ crimes.”⁷⁷ They also report that empirical research does not support the popular misconception that most gang violence is drug-related. In Chicago, they note, “gang homicides were shown to be more likely the result of turf disputes than to have been drug-related. In Los Angeles, gang involvement in drug crime was relatively limited and no more violent than other drug-related crime.”⁷⁸ A similar pattern emerges in St. Louis, “where individual gang members often use and sell drugs, but collectively, organized drug distribution by gangs is almost non-existent. These findings have profound implications for policy and underscore the need for individual-level drug treatment programs as opposed to suppression programs designed to disrupt organized distribution networks, especially at the street level.”⁷⁹ These findings state the truism that juvenile crime is a problem of tragic proportions, with severe impacts on minority youth. “Everywhere the major sufferers are the young, the children and adolescents who are our nation’s most valuable resource.”⁸⁰ But they conclude that the St. Louis response to juvenile crime,

75. The authors posit:

Irving A. Spergel, a social work professor and a veteran of thirty years of research on gangs, was charged with identifying existing promising approaches to gang problems across the nation and from them formulating a model that could serve as the basis for a coordinated national-level response to gang crime problems. The result constituted an effort to integrate research into policy that remains central to current federal programs

. . . . As a set of resource materials, the Spergel model is a set of research documents and prototypes. In practice, the Spergel model is an extremely flexible format for responding to gang problems at the community level. It consists of a set of ten components. There is one component for each potential agency partner and separate components on community mobilization and employment programs. Any of the component agencies can be the lead or mobilizing agency. Key agencies that must be involved are the police, grassroots organizations, and some form of jobs program. Otherwise, not all potential components need be involved in every community. The Spergel model is intended to be tailored to the special needs of each individual community, to take advantage of local agency strengths, and provide a framework that facilitates inter-agency cooperation and minimizes inter-agency conflict.

Id. at 527-28.

76. *Id.* at 531.

77. *Id.* at 530.

78. *Id.* at 526-27.

79. *Id.* at 527.

80. *Id.* at 532.

which they describe as a “coordinated, community-based effort that involves grass roots organizations, government, the juvenile justice system, and law enforcement,”⁸¹ offers hope for the “possibility for overcoming the problems of teenage drug use and violence.”⁸²

Professor Malcolm Klein, Director of the Social Science Research Institute at the University of Southern California, has been studying street gangs since 1962. He, too, addresses the definitional problem of what is meant by a “gang.”⁸³ Klein notes:

Because gangs are informal groups commonly lacking membership rosters, time clocks, written constitutions or organizational charts, they are inherently ambiguous. Every effort to provide a definition common to all gangs has failed. Efforts to determine who is and who is not a gang member similarly have failed, with the numbers of false positives and false negatives often approaching the numbers of agreed-upon membership.⁸⁴

Yet gangs exist, and Klein offers seven distinguishing features of street gangs:

(1) Territoriality, usually based on common residence; (2) Versatility in offense patterns, as opposed to crime specialization; (3) A preponderance of male members, but note that there are a few autonomous female gangs and many female gangs in auxiliary status to male gangs; (4) A preponderance of racial or ethnic minority membership, usually black or Hispanic; (5) Ages that may range from pre-teens to the thirties, with average age being between sixteen and twenty-one; (6) Location in the more inner city areas even if the location is generally classed as suburban—i.e., gangs are concentrated in areas with other social problems; (7) Street gangs are composed of members who are generally oriented toward, and often quite involved in, criminal activity. The range of such activity between gangs can be great, but the tolerance for and engagement in criminal pursuits is a central normative standard.⁸⁵

Klein also identifies three major advantages that the government has in prosecuting gang cases: (1) many states have passed special antigang legislation

81. *Id.* at 533.

82. *Id.* at 532.

83. Malcolm W. Klein, *What Are Street Gangs When They Get to Court?*, 31 VAL. U. L. REV. 515 (1997).

84. *Id.* at 516.

85. *Id.* at 516-17.

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to increase suppression of gang activity through major sentence enhancements;⁸⁶ (2) in cities with a sizeable gang problem, the prosecutor may have a special gang prosecution unit that employs such tactics as vertical prosecution, special search warrant training procedures, refusal of plea bargains, and witness protection procedures to achieve conviction rates in gang cases well above the norm;⁸⁷ and (3) in most gang-involved cities the police now have special gang officers or gang units that can serve as expert witnesses in court. "Their ability to cite specifics about the behavior of the gangs whose members are being prosecuted goes largely unchallenged, as there are few defense experts whose profession it is to know the local gangs as the gang police do."⁸⁸ In short, Klein knows something about gangs. But a funny thing happens on the way to the courthouse to one of America's most knowledgeable and prolific scholars on street gangs. Called to serve as an expert witness in juvenile proceedings ranging in severity from juvenile fitness hearings to capital cases, Klein experiences that courts give the government a fourth advantage by disallowing his testimony and allowing the expert testimony of the "gang cop" who has conducted surveillance of a particular gang.⁸⁹

Professor Alan Lizotte, Director of the Hindelang Criminal Justice Research Center at the State University of New York at Albany, and his colleagues, Gregory Howard, Marvin Krohn, and Terence Thornberry, share the results of their intensive longitudinal study of gun carrying in Rochester, New York. They note: "Despite the link between guns and youth homicide we know very little about the ownership, carrying, and use of firearms in the adolescent population."⁹⁰ The research that exists focuses on ownership of guns; the Rochester study focuses on carrying illegal guns. Their data show that:

[22% of] young men [in their study] carry illegal guns at some point between fifteen and twenty years of age While a high percentage of subjects carry illegal guns, most do so only for a short period of time. Since there is little overlap between legal gun ownership and carrying hidden, illegal guns, we might speculate that illegal gun carriers have relatively little socialization into the safe use of guns. Given the high percentage of carrying and the apparent lack

86. Klein laments the "convenient but criminologically incorrect" definition of gangs, gang members, and gang behavior in these antigang statutes. "For example, a gang may be defined in law as 'three or more people,' gang members as youth seen in the company of gang members, and gang behavior as normal activities sometimes associated with drug sales (carrying a beeper, being on a roof top, and so on)." *Id.* at 518.

87. *Id.*

88. *Id.*

89. *Id.* at 519.

90. Alan J. Lizotte et al., *Patterns of Illegal Gun Carrying Among Young Urban Males*, 31 VAL. U. L. REV. 375, 375-76 (1997).

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of training, it is no wonder that the homicide rate for young people is so high.⁹¹

On the connection between gangs and guns, Lizotte and his colleagues report:

The analysis shows that having friends who own protection guns is a powerful correlate of the subject's illegal gun carrying. Whether this situation is due to the need related to associating with violent armed people, or due to socialization, or both, is unclear. However, either way, it suggests that convincing these individuals to give up their guns will not be easy since it appears to have peer support and reinforcement.⁹²

Professor Coramae Richey Mann of Indiana University at Bloomington objects to these studies, but most assuredly not—as the blunt title of her Article⁹³ suggests—because she is a lover of the war on drugs. In Mann's view white anthropologists and sociologists should stop studying black gangs. She argues that “few of these findings have assisted minority communities, improved minority communities, or changed public policies, except, perhaps, to make them more punitive. An ancillary result of these reports is that they exacerbate the problem of negative minority stereotyping that already impacts the malleable psyches of fearful whites.”⁹⁴ Mann states: “The hundreds of grants funded to Caucasians over the last two decades to ‘study’ minority crime produced a picture of minority crime that is biased, inaccurate, and certainly not intended to address, much less eliminate the problems they purport to identify.”⁹⁵

In a similar vein, the contribution of Dean Victor L. Streib of Ohio Northern University School of Law is congruent in a certain way with the pacifist tradition. His long-standing opposition to the death penalty⁹⁶ bespeaks a respect for human life, even when a criminal has committed an outrageous act of violence. His particular focus on the execution of teenagers in our society has the passion of a Charles Dickens. Dean Streib seems to be saying: “Look how far this war metaphor will take us! We can now justify imposing the ultimate

91. *Id.* at 389.

92. *Id.*

93. Coramae Richey Mann, *We Don't Need More Wars*, 31 VAL. U. L. REV. 565 (1997).

94. *Id.* at 565.

95. *Id.* at 566.

96. VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* (1987); VICTOR L. STREIB, *JUVENILE JUSTICE IN AMERICA* (1978); Victor L. Streib, *Perspectives on the Juvenile Death Penalty in the 1990s*, in *CHILD, PARENT AND STATE: LAW AND POLICY READER* 646 (S. Randall Humm et al. eds., 1994).

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sanction—the death penalty—on our youngsters!” In his Article in this symposium Streib offers two replies to the question, “What works?”: “(1) harsh punishments do not ‘work’ if the goal is to reduce violent juvenile crime; and (2) correcting the social conditions under which so many young children live is the only thing that will ‘work’ in the long run.”⁹⁷ Dean Streib acknowledges the enormous difficulty of shifting the focus of the criminal justice system away from its obsessive fixation on punishment, but concludes: “Our focus should be less on punishing the last offender and more on saving the next victim.”⁹⁸

Professor Lawrence O. Gostin, Co-Director of the Georgetown/Johns Hopkins Program on Law and Public Health, brings the discussion on drug policies around to considerations of public health.⁹⁹ His focus is narrow: what to do about injecting drug users (IDUs). Gostin examines the mechanism by which blood-borne disease is transmitted through sharing of injection equipment. And he presents a public health strategy for reducing multi-person use of contaminated injection equipment. This strategy includes:

repealing or modifying current laws and regulations making possession and distribution of sterile injection equipment a criminal offense; implementing syringe exchange programs to expand access to new syringes for users of injection drugs; and counseling, education, and treatment targeted to IDUs, including those in the prison and health care system. The objective of a public health approach is not to encourage or enable IDUs to obtain and use drugs; public health strategies actively seek to reduce drug use due to its profound adverse effects on physical and mental health. Rather, the public health approach seeks to substantially improve health outcomes for IDUs who cannot or will not stop using drugs.¹⁰⁰

The physicians writing in this symposium (Doctors Clark, O'Connor, and Smith), make a strong—perhaps the best—case for abandoning the metaphor about a war on drugs. Each of them is a leading physician in America focusing on the treatment of alcoholism and other addictions. As physicians sworn to healing rather than to taking life, they bring a very different perspective to the issue of drugs in America. For one thing, they remind us powerfully that drug addiction is an illness. For that rather obvious reason, they argue, any set of drug policies that does not include a major commitment to treatment of this

97. Victor L. Streib, *The Efficacy of Harsh Punishments for Teenage Violence*, 31 VAL. U. L. REV. 427, 428 (1997).

98. *Id.* at 434.

99. Lawrence O. Gostin, *The Epidemics of Injecting Drug Use and Blood-Borne Disease: A Public Health Perspective*, 31 VAL. U. L. REV. 669 (1997).

100. *Id.* at 673.

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disease is doomed to failure. It almost does not matter how the war metaphor would be contracted or expanded. Without a strong commitment to treatment of alcoholism and other addictions, they tell us, the war will not be won. Strategic maneuvers may go on apace. For example, policy makers will debate whether more or less money should be allocated for interdiction of drugs at the border. But to repeat, all that sort of strategy talk is unavailing, and victory in such a war will elude us as long as we fail to commit significant resources to the treatment of alcoholism and other addictions that are at the root of the drug problem in America. In fact, these physicians are the most explicit contributors to this symposium urging an end to the war on drugs.

Dr. David Smith, the founder of the Haight-Ashbury Free Clinic and the current President of the American Society of Addiction Medicine, focuses on the pharmacological aspect of drug addiction.¹⁰¹ More specifically, Dr. Smith explores the evidence on one particular drug, methamphetamine. By showing the epidemiological evidence that the contribution of methamphetamine abuse to violence occurs most commonly in the Caucasian population, Dr. Smith shatters “the stereotype that stimulant induced violence is a phenomenon almost entirely associated with crack cocaine in the African American community.”¹⁰² And Dr. Smith excoriates the war on drugs for grossly disproportional racial results:

The incidence of substance abuse when matched with socio-economic status is only slightly higher in African American males than in Caucasian males, but an African American male is ten times more likely to be in prison for the same drug offense as a Caucasian male. The perception that drugs and violence occur only in the African American community is a driving force behind this public policy imbalance.¹⁰³

Dr. Smith cites evidence showing that:

treatment for addiction produces a substantial reduction in criminality and associated violence and is a much more cost effective approach to this problem. The lack of discussion of treatment as an alternative to drug abuse and violence suggests that pessimism exists regarding its ability, particularly related to stimulant abuse. In fact, the evidence indicates that addiction is a treatable illness and there are good results when treatment is made available for stimulant abusers.¹⁰⁴

101. David E. Smith et al., *Methamphetamine Abuse, Violence and Appropriate Treatment*, 31 VAL. U. L. REV. 661 (1997).

102. *Id.* at 662.

103. *Id.*

104. *Id.*

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Smith concludes:

Drug use and teenage violence needs to be placed in a broader context that includes education, prevention and treatment as well as criminalization. The drugs themselves are potent contributors to violence and increased attention needs to be paid to the role of substance abuse in violent behavior. Further, expanded treatment for addiction needs to be presented as a cost-effective crime prevention technique as well as a humane alternative to incarceration.¹⁰⁵

Dr. Westley Clark focuses on cultural aspects of adolescent addiction and treatment.¹⁰⁶ His Article, articulating a theme central to this Foreword, merits extensive citation. Clark writes:

Our society is at a watershed. The “war on drugs” continues to be the preferred metaphor for intervention. The drug problem is a public health problem. It requires public health solutions. It requires public investment. It has become a race problem, with the African American and Hispanic communities inappropriately stigmatized as the causes of the problem or “the enemy,” and as the areas where the problem is most virulent. Thus, the battleground where the problem is being “fought” must be eliminated. It is appalling that America is willing to accept a “war” metaphor that is becoming a “race war” metaphor.

. . . .

Only when America is willing to understand the drug problem in the context of public health and is willing to save all of its children will it perhaps recognize the cultural aspects of the drug problem in public health terms rather than simple criminal justice terms. When larger numbers of white adolescents line up for incarceration, as disproportionately large numbers of African American and Hispanic adolescents are doing, then perhaps treatment will receive the emphasis it deserves.

Prevention and treatment efforts must recognize that the felonization of young males of color only creates fodder for prisons, boot camps, and jails. Young men and women who have been labeled felons by the time they reach eighteen often find themselves on the

105. *Id.* at 667.

106. H. Westley Clark et al., *Cultural Aspects of Adolescent Addiction and Treatment*, 31 VAL. U. L. REV. 647 (1997).

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criminal career track. It is difficult to secure education or employment. The felonization process may be contributing to the violence and decay of communities where poverty is a dominant social force.

. . . .

Substance abuse treatment and prevention must recognize the importance of all America's children, of all the circumstances in which those children function, and of the importance of all those children to the future of this country. Criminalizing children of color and patronizing white children will only erode the effectiveness of substance abuse treatment efforts and compromise substance abuse prevention campaigns.¹⁰⁷

Dr. Garrett O'Connor focuses on the psychology of adolescent addiction.¹⁰⁸ He speaks refreshingly about simple truths about teenagers that some of the warriors on drugs seem to have forgotten or repressed:

The biological purpose of the adolescent phase of human development is to facilitate the teenager's separation from parents and to prepare him or her for the transition to early adulthood and the development of emotional and physical maturity. From a physiological standpoint, the adolescent process follows a fairly standard pattern of psycho-hormonal chaos in teenagers the world over.¹⁰⁹

And O'Connor focuses our attention on the nature of addiction as a disease, another point too often overlooked by the war on drugs. This is what the teen drug culture looks like to a leading physician in the field of addiction medicine:

Because of the progressive nature of addictive disease, and the crucial role of gateway drugs as precursors of adult addiction when used by vulnerable teenagers, it is essential that demand reduction strategies for dealing with drug and alcohol problems in the population at-large should start with programs to educate, treat and rehabilitate adolescents. Comparatively speaking, and for a variety of biological reasons, the health and social consequences of substance abuse for adolescents are more serious than for the adult population. Mortality

107. *Id.* at 657-59.

108. Garrett O'Connor, *The Psychology of Adolescent Addiction*, 31 VAL. U. L. REV. 701 (1997).

109. *Id.* at 701.

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and morbidity rates from automobile crashes, suicide, homicide and drug overdoses are disproportionately elevated in substance abusing adolescents. The incidence of sexually transmitted diseases, unplanned pregnancies, perinatal morbidity and homelessness is similarly increased. In inner city environments the deadly combination of guns and drugs (including alcohol) actively promotes extreme risk-taking by teenage gang-bangers leading to escalations in neighborhood death rates and the gratuitous infliction of severe bodily harm.¹¹⁰

Unsurprisingly, Dr. O'Connor's policy prescription corresponds to his approach to addiction as a disease:

Substance abuse in America is a public health problem requiring public health solutions. Numerous outcome studies performed in the past fifteen years have shown that addiction treatment works. Based on this critical finding, health authorities, law enforcement agencies, politicians and community activists *must* be willing to bury their hatchets and be taught to work in harmony. Treatment for *all* addicts should be available on demand in cities, suburbs and jails, and state-of-the-art marketing campaigns should target the teenage population, just like cigarettes and beer.

. . . .

Future government approaches should meet gang members and other inner city residents on their own turf. Treatment needs to be provided in a context that appeals to adolescents who are accustomed to living at risk, and should ultimately provide addicts with the opportunity to become involved with Twelve Step and other mutual-aid programs including Alcoholics Anonymous (AA), Narcotics Anonymous (NA), Cocaine Anonymous (CA), Al-Anon family groups and Rational Recovery (RR) to name a few. According to public policy expert, Robert DuPont, addiction programs based on the Twelve Steps of Alcoholics Anonymous are "the bedrock of lifelong recovery," and should be given a thorough trial before turning to other recovery approaches. With regard to risk, purpose-designed Outward Bound-type programs for inner city addicts would likely garner more applicants than kitchen jobs at McDonald's. It is too much to imagine the possibility of a modified VISTA program consisting *exclusively* of recovering adolescent gang members who would be paid well to share

110. *Id.* at 701-02 (citations omitted).

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their experience, strength and hope with their still-addicted urban cousins in other cities and elsewhere in the country?¹¹¹

As I stated above, I may be guilty of mislabeling the convictions of these scholars on the issue of war and peace. But it seems to me that the fundamental attitudes of the scholars and physicians mentioned above toward the problem of guns and gangs, drugs and death among American youth are not the attitudes of cold warriors or even just warriors. They are the attitudes of warm peace-makers trying more to understand than to be understood.

III. APPLICATION OF THE PRINCIPLES OF THE JUST WAR TRADITION
TO THE WAR ON DRUGS

The strength of the just war tradition is its ability to articulate sound principles governing, and thereby preventing, the use of armed violence to resolve conflicts. That certainly is the point of the requirement that all means of peaceful resolution of conflict must be exhausted before resorting to war. There may be room for improvement in stating the principles with clarity, but the principal weakness associated with the just war tradition has not been with the principles themselves, but with the myopia of those who apply its principles to actual outbreaks of violence. Thus, the French were very good at seeing the violations of just war principles by the Germans in World War I, and the Germans returned the compliment to the French. In other words, many just warriors seem never to have met a war they did not like or at least could not justify, as long as the conduct in question was that of their own government. The Vietnam War is the first instance of which I am aware in which the principles of the just war were rigorously and systematically applied to the conduct of one's own country to reach the conclusion that a war was no longer just.¹¹² The war on drugs may soon become another of the few instances in the history of ethics in which a "war" was denounced as unjustifiable.

The scholars writing in this symposium cast serious doubt on all five of the traditional criteria for justifying warfare. First, the war on drugs is obviously not a war in the classical sense, one declared and waged by legitimate authority. When the war metaphor gets unpacked, it seems to be a publicity stunt by politicians willing to prey upon the people's fear of violence. Second, the war on drugs was not resorted to after all efforts to resolve the drug problem in America had failed. The sad fact is that the most effective remedy—treatment—has scarcely been tried at all. Third, the commentators in this symposium

111. *Id.* at 717-19 (citations omitted).

112. *See, e.g.*, 1-4 THE VIETNAM ERA AND INTERNATIONAL LAW (Richard A. Falk ed., 1968-76); CRIMES OF WAR (Richard A. Falk et al. eds., 1971); ROBERT MCAFEE BROWN ET AL., VIETNAM: CRISIS OF CONSCIENCE (1967).

repeatedly cast doubt on the proposition that the war on drugs has a reasonable hope of success. Fourth, the evil inherent in all war is equally present in the war on drugs; and as long as our popular imagination is fixated upon a military victory that will elude us, we will also avoid doing the good that we could otherwise do through offering humane treatment to those suffering from drug addictions. In other words, this war is not being waged within the principle of proportionality. Fifth, the war on drugs seems to have no limits. That fact is particularly distressing because the fatalities of the innocent are all on our side. There is no "other side" that enables us to rationalize the body count in the way that Walter Kronkite used to do during the Vietnam War: so many on our side died today, so many on their side. Every child who dies in this war is one of ours. Noncombatant immunity is disregarded daily in the random violence that has become a part of this crazy war. A moral restraint that was originally designed to keep clerics out of warfare and that was eventually extended to all noncombatant civilians by international conventions, is now flaunted in our inner cities where the flower of our youth is being wasted.

One can safely draw inferences from many of the Articles in this symposium that their authors would be comfortable with some version of the just war tradition. Obvious examples are Professor David Kennedy of the John F. Kennedy School of Government at Harvard, and the "gang of five" from the University of Chicago Law school—Professors Alschuler, Lott, Meares, Morris, and Schulhofer. But locating these scholars and the others whom I discuss below within the just war tradition by no means suggests that any of them would conclude that the conditions of a just war have been met in the case of American teenagers doing drugs. On the contrary, the thrust of their Articles is that the war metaphor is entirely misplaced.

Professor Daniel D. Polsby of the Northwestern University School of Law expressly says so in the very title of his perceptive and challenging essay,¹¹³ which makes the case for "decriminalizing the commerce in and use of most recreational drugs."¹¹⁴ Polsby believes that "on net, this policy would leave society better off than it is now."¹¹⁵ Polsby acknowledges that the matter is uncertain, and he argues that for this very reason, "uncertainties, at least of this kind, ought to be resolved in favor of liberty."¹¹⁶ Polsby does not hide the costs of his argument for decriminalization of drugs. For example, he states candidly that his proposal entails "new public health (and other) costs."¹¹⁷ In

113. Daniel D. Polsby, *Ending the War on Drugs and Children*, 31 VAL. U. L. REV. 537 (1997).

114. *Id.* at 537.

115. *Id.*

116. *Id.*

117. *Id.*

this respect at least, he is in agreement with the emphasis on treatment stressed by the physicians mentioned above. Polsby also acknowledges that "Decriminalization would certainly do much harm; it is just that failure to decriminalize must also do much harm. I do not believe that the legalization argument has much of a chance if its burden is to show that this reform would definitely, or probably, lower the social costs associated with drugs. But it is possible to show that the *distributional* consequences of legalization would improve the world." Whether or not one agrees with Polsby's specific conclusion, he is manifestly not arguing for a war on drugs, let alone a war on our own children.

Professor Mark Kleiman of the School of Public Policy at the University of California at Los Angeles focuses not on retail consumption of illicit drugs, but on wholesale dealing.¹¹⁸ Kleiman considers the possible value of efforts to reduce the prevalence of cocaine and heroin dealing among adolescents, explores the forms such efforts might take, and proposes a research program designed to support the development and execution of a dealing-prevention effort. At the outset, Kleiman sets himself a modest goal: to place on the agenda for public decision the question whether "such efforts, in worthwhile form, can in fact be developed and implemented."¹¹⁹ He does not "make a conclusive case for one or another answer to that question," but merely puts "the question of doing so on the agenda for public discussion."¹²⁰ Kleiman discusses three approaches to reducing dealing prevalence: (1) reducing opportunity for adolescents in the cocaine and heroin trades, resulting either from smaller markets or from markets with a smaller (relative) role for young people; (2) improving alternatives to dealing; and (3) efforts to persuade potential dealers in illicit drugs not to start dealing. Under the second rubric Kleiman writes:

Dealing provides money, social status and function, excitement, and access to drugs. It also absorbs time, which may appear as a cost if there is something else of value to do with that time or as a benefit if time hangs heavy and needs to be filled to avoid boredom.

. . . .

Improving job prospects for poor urban teenagers has received considerable attention, both from the viewpoint of encouraging employers to hire them and from the viewpoint of changing the

118. Mark A.R. Kleiman, *Reducing the Prevalence of Cocaine and Heroin Dealing Among Adolescents*, 31 VAL. U. L. REV. 551 (1997).

119. *Id.* at 551.

120. *Id.*

teenagers' mix of skills and attitudes to make them more "employable." Less has been written and done about changing the social status accorded to entry-level employment among those who seek it and those whose opinions they value. One would like to create a situation where teenage boys in drug-impacted neighborhoods would prefer to have their girlfriends see them working at McDonald's to having their girlfriends seeing them dealing rock. But surely the endless repetition of the mantra "dead-end jobs flipping burgers" by those who hope for political action to change job opportunities cannot fail to have some negative impact on the eagerness with which the existing opportunities are grasped.¹²¹

Finally, Kleiman sets forth a case for more research on a host of timely questions.¹²²

To put it mildly, Eric Sterling, President of the Criminal Justice Policy Foundation, does not like Polsby's argument.¹²³ By contrast, Sterling likes Kleiman's approach, finding his analysis "sophisticated" and his distinctions "important."¹²⁴ More interesting than Sterling's comments on Polsby and Kleiman is his brief account of the rise of crack in the mid-1980s:

Cocaine consumption by the rich was beginning to diminish. The market need for new outlets was matched by the market opportunities now opened to sell inexpensive units of drugs. Cocaine imports, notwithstanding the control measures, were coming into the country in ever increasing quantities, and cocaine's availability was growing in more and more communities.

For many years, cocaine aficionados knew that cocaine could be "smoked" in the form of freebase. . . . Crack filled a market niche that was in many respects created by the war on drugs.

The war on drugs also created new opportunities for the youth to enter the crack business. The enactment of mandatory minimum sentences in the Anti-Drug Abuse Act of 1986, triggered by the

121. *Id.* at 557.

122. *Id.* at 562-64.

123. Eric E. Sterling, *Drug Policy: A Smorgasbord of Conundrums Spiced by Emotions Around Children and Violence*, 31 VAL. U. L. REV. 597 (1997). Among other things, Polsby's article—in Sterling's eyes—is "an intellectual romp" which is "dismissive of other scholars, picayune in its quibbles, sweeping in its generalizations, obscure in its language, self-assured in its pronouncements, and overall inconclusive." *Id.* at 598.

124. *Id.* at 613-14.

distribution of at least five grams of crack cocaine, or at least fifty grams, set the stage to substitute underage workers for adults in the drug market. The Anti-Drug Abuse Act of 1988 applied the mandatory minimum sentences to attempts to distribute and to all members of conspiracies that distributed at least five grams or fifty grams. The potential incarceration costs for adults to take low level jobs in the crack distribution organizations were too high for many to continue, but these costs were not applied to youths not subject to adult-level sentencing, even though there were now special new penalties for employing minors in the trafficking in drugs.¹²⁵

This history sounds plausible in the abstract. But when I recalled Dr. Smith's Article citing the statistic that "an African American male is ten times more likely to be in prison for the same drug offense as a Caucasian male,"¹²⁶ and I correlate crack with black youth, I wonder why anyone would describe entry into the crack business as a "new opportunity."

Professor Franklin Zimring, Director of the Earl Warren Institute at Boalt Hall, describes the legislative response to recent data on teenage violence as a "moral panic," reflected by the fact that from 1992 to 1995 "forty-seven of the fifty American states passed legislation designed to change juvenile or criminal court procedures addressing violent juvenile offenders."¹²⁷ Noting that "historical perspective is one of the first victims of an emergency," Zimring situates the current crisis over teenage violence in longitudinal data from the past fifteen years.¹²⁸ One of the most interesting findings of his research indicates that:

[O]nly gun killings expanded during the post-1984 homicide boom. Non-gun homicide is essentially flat (and quite low) throughout the period from 1976 to 1992. The extreme contrast between gun and non-gun homicide trends suggests that there is more change in weapons at work since 1985 than any essential change in the character of the population. If there were a large group of "new, more violent juvenile offenders" that was the proximate cause of explosive increases in homicide, one would expect the increase in killing to be spread broadly across different weapon categories [A] change in hardware rather than a change in software was the principal cause of higher youth homicide. Obviously, one conclusion is that policies to

125. *Id.* at 612-13 (citations omitted).

126. Smith, *supra* note 101, at 662.

127. Franklin E. Zimring, *Juvenile Violence in Policy Context*, 31 VAL. U. L. REV. 419, 419 (1997).

128. *Id.*

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minimize youth gun use should receive priority attention in responding to youth violence.¹²⁹

Mr. Eric Lotke, a senior research associate at the National Center on Institutions and Alternatives, suggests that there are two problems with youth homicide in America: (1) the fact that there are some neighborhoods, primarily in four cities (Chicago, Detroit, Los Angeles and New York), where youth homicide has doubled or even tripled in the past decade; and (2) the exaggerated national response to the first problem.¹³⁰ Lotke points out that the response to youth homicide “arises from sympathy for the victim and fear of victimization,” but “it ends with a loss of perspective on the small scale and limited range of youth violence. Although American homicide rates are high and youth homicide is rising, only a tiny fraction of Americans run a real risk of homicide, and only a tiny fraction of those homicides are committed by children.”¹³¹ He cites statistical evidence that 82% of the counties in America experienced *zero* youth homicides in 1994, and that another 10% of the counties experienced only one youth homicide.¹³² Lotke concludes with greater hope than one is accustomed to hearing from criminologists:

[A] combination of graduated sanctions, skillful policing, and prevention programs can reduce the incidence of youth homicide in America. The problems seen on the evening news or referenced by politicians on tour may appear unmanageable—but analysis reveals that the number of children involved is not so large and the solutions are not so far off that hope must be abandoned. With a little creative energy, this nation can help its children to navigate the difficult path through adolescence in this turbulent and troubled time.¹³³

Once again, this is not the rhetoric that justifies warfare on our youth. It is the discourse of searching for meaningful policies that actually work in the real world.

Professor David M. Kennedy of the John F. Kennedy School of Government at Harvard University addresses the very good question why we are not able to stop violent youth gangs and street drug dealers from

129. *Id.* at 423-24.

130. Eric R. Lotke, *Youth Homicide: Keeping Perspective on How Many Children Kill*, 31 VAL. U. L. REV. 395, 395 (1997).

131. *Id.*

132. *Id.* at 401.

133. *Id.* at 417-18.

reoffending.¹³⁴ The question is all the more baffling to the public, who are told that “we know who [the gang members] are.”¹³⁵ Kennedy capitalizes on this very knowledge in his extensive report on the Boston Gun Project, which is aimed at reducing serious youth violence in Boston. The principal burden of Kennedy’s analysis is on getting deterrence right. He agrees with Malcolm Klein that “authorities do not generally have the capacity to ‘eliminate’ all gangs in a gang-troubled jurisdiction, nor do they have the capacity to respond in a powerful way to all gang offending in such jurisdictions. Pledges to do so, though common, are simply not credible.”¹³⁶ But Kennedy notes that it is possible to craft an effective response to lethal gang violence, which is rare relative to the larger spectrum of gang offending. That response is what Kennedy calls “pulling every lever” available on the gang or gangs in question:

[S]hutting down drug markets, serving warrants, enforcing probation restrictions, making disorder arrests, dealing more strictly with any resulting cases as they made their way through prosecution and adjudication, deploying federal enforcement powers, and the like. The potential deterrent power of this strategy was considerable. Rather than the sanction for a given homicide being possible arrest, prosecution, and sentencing, the sanction became that *plus* all other unpleasant consequences agencies could bring to bear.¹³⁷

He thus argues persuasively that “deterrence can be created by means other than sentencing and other formal sanctions, many of which are readily deployable within the ordinary range of agency discretion.”¹³⁸ Kennedy concludes:

[W]e should win compliance from offenders by making the rules clear to them and then doing what we say, we should act flexibly and cleverly according to the demands of particular problems, and we should build up enough credibility so that we can use less, not more, authority. We already have the levers, and, as the machinery of criminal justice grinds daily on, we are already pulling them. We might as well pull them properly.¹³⁹

The University of Chicago Law School has long been distinguished for thoughtful research on criminal justice. Thus, it causes no surprise that

134. David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449 (1997).

135. *Id.* at 450.

136. *Id.* at 462.

137. *Id.*

138. *Id.* at 471.

139. *Id.* at 480.

Professors Alschuler, Lott, Meares, Morris, and Schulhofer all contributed informative and powerful Articles. They represent the finest traditions of ambitious empirical research and rigorous debate that one associates with any fine institution of higher learning, but especially so with the University of Chicago.

Professor John R. Lott, Jr., the John M. Olin Law and Economics Fellow at the University of Chicago's Law School, states crisply the view of gun control advocates:

If guns are introduced into a violent encounter, the probability that someone will die increases. Murders are viewed as arising from unintentional fits of rage that are quickly regretted, and simply keeping guns out of people's reach will prevent deaths. More guns are also seen as leading to more accidental gun deaths. The solution is clear: more regulation or even the complete elimination of guns.¹⁴⁰

Noting the difficulty with the anecdotal evidence widely available from both sides of the debate on gun control, Lott describes the results of an extensive econometric study that he conducted with David Mustard to answer the "real question" about the net effect of right-to-carry laws adopted in thirty-one states: "[A]re more lives saved or lost as a result of allowing law-abiding citizens to carry concealed handguns?"¹⁴¹ The Lott and Mustard study was extensive; it used annual cross-sectional time-series county level crime data for all 3054 U.S. counties from 1977 to 1992. They concluded:

[A]dopting these so-called "shall issue" or nondiscretionary permit laws reduced murders by 8%, rapes by 5%, aggravated assaults by 7%, and robbery by 3%. To put it another way, if those states which did not have concealed handguns laws in 1992 had adopted them, citizens in those states would have avoided suffering approximately 1500 murders; 4200 rapes; over 60,000 aggravated assaults; and 12,000 robberies. Criminals do apparently respond to deterrence.¹⁴²

Professor Albert W. Alschuler offers a critique of the Lott and Mustard study.¹⁴³ Noting that "from the end of 1983 through the end of 1993, the rate

140. John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 VAL. U. L. REV. 355, 355 (1997).

141. *Id.* at 358.

142. *Id.* at 359.

143. Albert W. Alschuler, *Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime?*, 31 VAL. U. L. REV. 365 (1997).

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of homicides committed by people seventeen and younger nearly tripled,"¹⁴⁴ Alschuler suspects that "something is wrong" with Lott's and Mustard's findings, which he views as a risky regression to Dodge City.¹⁴⁵ The consequences for getting the gun control issue right could hardly be starker, according to Alschuler, who notes:

The irony is that these states have come close to repealing their concealed weapons laws at the moment that they are gaining the ability to enforce them. Within a few years, gun-detection technology apparently will enable us to disarm the gang-bangers and to keep the guns from our streets. But we are busily arming everyone. Because our gun-detection technology cannot distinguish gun-carriers with permits from gun-carriers without permits, right-to-carry laws coupled with well-established Fourth Amendment restraints will limit the ability of the new technology to discover even the concealed weapons that remain unlawful.¹⁴⁶

And in one of the funniest alliterations in law review history, Alschuler writes of Lott's and Mustard's "fallible finding" that right-to-carry laws deter intra-family homicides more than stranger homicides: "*When a right-to-carry law persuades Polly to procure a pistol to put in her purse to pulverize predators in the park, Polly may still have the pistol when her pernicious paramour Peter Piper proposes to punch her in the parlor.*"¹⁴⁷ More probably, Alschuler concludes, "Something's wrong."¹⁴⁸ What is one to do? Alschuler's response might not resonate in legislative chambers these days, but he offers a litany of alternatives to current policies that are more expensive and less effective:

Well-financed schools, after-school recreational programs, anti-truancy programs, anti-drop-out programs, tutoring programs, parenting classes, less bloody television programs, a peace officer corps, job programs, drug and alcohol treatment programs, rent vouchers, neighborhood clean-up programs, the renewal of families, the renewal of churches, and the extension of a spirit of hope and responsibility through inner city communities and through all of America could offer us greater protection from violence than can capital punishment, three-strikes-and-you're-out, truth-in-sentencing, mandatory minimum crack

144. *Id.* at 365.

145. *Id.* at 366.

146. *Id.*

147. *Id.* at 369.

148. *Id.*

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sentences, impeaching all federal judges who care about civil liberties, and placing 100,000 new police officers on the streets.¹⁴⁹

Alschuler returns to the Lott and Mustard study, where he calls the proliferation of right-to-carry laws a distressing reflection of "America's mistrust of government and a self-help mentality Right-to-carry laws indicate how our faith in the social contract has faded; they take us a long step back toward Thomas Hobbes' state of nature."¹⁵⁰

If Professor Alschuler is pretty sure what will work, his colleague, Professor Stephen Schulhofer is at least pretty sure about what not to do about youth crime.¹⁵¹ Like Professor Polsby, Schulhofer stares his problem in the face and acknowledges candidly: "Whether our high-risk kids are violent because they are young or because they are poor, it is still true that too many of them are unmanageable and violent."¹⁵² And like Polsby, Schulhofer is blunt about the failure of the current rush to shifting young offenders from juvenile to adult court. He concedes that:

A long period of custodial confinement is the only prudent or tolerable response to some of the violent offenses that teenagers commit. It is precisely the point of the traditional system's waiver hearing to identify such cases by careful examination of the circumstances, and then to direct such cases to criminal court. But when blanket policies mandate automatic adult-court prosecution for whole categories of criminal conduct defined broadly in advance, the mandates divert enormous numbers of new cases into the criminal-court system. That step, combined with the strict sentencing policies applicable in adult court, means sweeping large numbers of new inmates into our adult prison system.¹⁵³

Like Alschuler, Schulhofer links the increase in teenage violence to the easy access to guns: "In no other Western nation are handguns so widely distributed in the general population and so readily available to young people."¹⁵⁴ Schulhofer proposes three long-term solutions to youth violence: (1) targeting truly dangerous, brutal teenagers;¹⁵⁵ (2) diverting them whenever possible to

149. *Id.* at 372-73 (citations omitted).

150. *Id.* at 373.

151. Stephen J. Schulhofer, *Youth Crime—And What Not to Do About It*, 31 VAL. U. L. REV. 435 (1997).

152. *Id.* at 441.

153. *Id.* at 442.

154. *Id.* at 441.

155. *Id.* at 444.

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“constructive programs of preventive education and treatment rather than to custodial confinement”;¹⁵⁶ and (3) a front-end focus, or “prevention programs that target high-risk youth *before* they commit crimes.”¹⁵⁷ Schulhofer concludes that the “current crop of categorically punitive proposals . . . are politically appealing but needlessly harsh and dangerously counterproductive.”¹⁵⁸

Professor Norval Morris, the distinguished *doyen* of criminologists, offers a reply to Professor Polsby explaining why he favors gradual decriminalization rather than legalization of drugs.¹⁵⁹ Morris first suggests that prudentially, the only hope is “a steady move towards regulatory, much less punitive policies.”¹⁶⁰ This is so because:

The citizenry of the United States has been engulfed for so long and so persistently by the strident advocacy of wars on drugs that it seems entirely unlikely that sufficient political force could be mobilized for a program of drug legalization. The rhetoric of the drug warriors, their promises of success in the task of making America drug free are so powerfully and regularly delivered, even at the very highest level of governments, federal and state, with presidential and gubernatorial force, that the drug addict has been demonized and the advocate of change rendered deeply suspect. The public discourse does not seem to have learned enough from eighty-two years of uninterrupted failure of our prohibitory drug policy to countenance radical reform.¹⁶¹

The prudential path favored by Morris is not one of a “mindless liberality,” but one of “a growing movement to treat drugs and addiction with less moral fervor and more rationality.”¹⁶² Thus he advocates:

[N]o mandatory minimum sentences; no protracted imprisonment for drug distribution of anyone other than those elusive “drug king-pins” we rarely apprehend; no imprisonment for possessing drugs unless the amount possessed clearly indicates a substantial business investment directed towards sales; drug treatment available for all addicts, including residential treatment (and such treatment should certainly be compulsory in many cases, and backed by the threat and sometimes

156. *Id.*

157. *Id.* at 445.

158. *Id.* at 447.

159. Norval Morris, *Teenage Violence and Drug Use*, 31 VAL. U. L. REV. 547 (1997).

160. *Id.* at 547.

161. *Id.*

162. *Id.* at 548.

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reality of imprisonment); no incarceration for a dirty urine when under treatment (only if repeated tests reveal rejection of treatment should this follow)¹⁶³

Morris agrees with Polsby's characterization of our drug policy as "mumpsimus," thus driving the conferees to the Oxford English Dictionary, where we learn that this term refers to "an obstinate adherent of old ways, in spite of clear evidence of their error."¹⁶⁴ Morris' examples of mumpsimus are all funny, except when he concludes: "In relation to American drug policy, mumpsimus reaches its apogee."¹⁶⁵ A powerful indictment, coming from so learned and so highly regarded a criminologist as Morris.

Professor Tracey Meares brings sociology to bear on the issue of law enforcement generally and the application of drug laws to teenagers in particular.¹⁶⁶ Meares challenges the conventional wisdom that teen drug offending can be altered by punitive law enforcement strategies that focus on extremely long sentences. Meares questions "[w]hether this 'get tough' approach actually improves the lives of the teens and their families experiencing problems related to prevalent drug use and marketing in their neighborhoods and the violence that often accompanies it."¹⁶⁷ Certainly, she argues:

[S]imply counting the numbers of drug users or drug dealers who are penalized by the current regime tells us little. To determine whether raising the numbers of incarcerated drug offenders actually makes a meaningfully positive difference in the lives of the most embattled requires a theory that holistically and systematically assesses the costs and benefits of the current regime.¹⁶⁸

Meares draws from a 1942 study by two University of Chicago¹⁶⁹ sociologists, Clifford Shaw and Henry McKay, who showed that "low socioeconomic status, ethnic heterogeneity, and residential mobility led to the disruption of community social organization, which in turn accounted for variation in crime and delinquency."¹⁷⁰ Relying on this important study, Meares concludes that their "theory of community social organization tells us that the structure of the community in which an individual lives interacts in important ways with the

163. *Id.* at 547-48.

164. *Id.* at 550.

165. *Id.* at 549.

166. Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579 (1997).

167. *Id.* at 580.

168. *Id.*

169. Naturally!

170. Meares, *supra* note 166, at 580.

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individual's own characteristics to either facilitate or retard criminal or delinquent behavior such as drug offending and violent conduct."¹⁷¹ The makers and shakers of drug and gun policy can ignore this wisdom not just at their peril, but at that of all of our communities where the war on drugs is currently raging.

In none of these varying and vigorous contributions from the Midway is there the slightest hint that a war on drugs or on our youth is justifiable. As I mentioned above, five conditions must be met before a war may be justified under the principles of a just war. After reading the Articles in this symposium, I cannot make out a sound argument for justifying the war on drugs on traditional just war grounds.

IV. CONCLUSION

The Articles in this symposium are focused on a particular aspect of drug policies in this country: the relatively recent involvement of youth as major players in the drug culture. Lurking in the background of all of these Articles is the larger question of how to formulate an effective set of policies to deal with drug addiction and related crimes. From the pacifist perspective, only a nonviolent solution should be contemplated. From the perspective of the just war tradition, America's twenty-year-old war on drugs is likewise unjustifiable. Both ethical traditions suggest that it is time to end the war on drugs.

Perhaps only a President who understood the necessity of resisting a war that he—and millions like him—deemed unjust is the kind of leader who can have the courage to bring an end to this crazy war on drugs. And perhaps it takes a brilliant four-star General like Barry McCaffrey to have the logistical and operational savvy to know not only how to save lives for years to come, but also how to bring the troops home safely and to honor them for their service. But when I start expanding the metaphor of the war on drugs, I know it is time for me to stop, for my real point is that we must end the war on drugs.

As I stated at the outset of this Foreword, to end the war on drugs is but to begin a long and arduous task of constructing a sensible set of alternative policies on drug addiction and the related problem of violent crimes in America. Those who read these Articles carefully will realize the urgency of this task. For that reason alone, I would like to thank all the participants in this symposium for their interesting and provocative contributions to this issue of the *Law Review*.

171. *Id.*