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Editor's Observations: The Geology of Drug Policy in 2002

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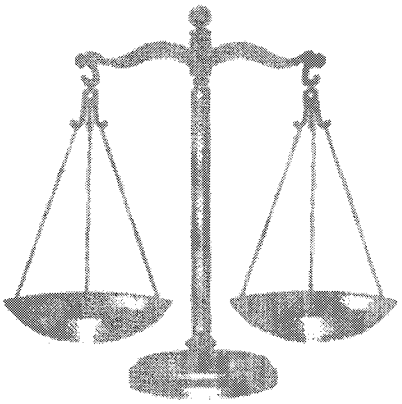

My father taught geology at the college in the small southwest Colorado town where I grew up. So I have always looked at the apparently solid, enduring features of the Earth's surface with the knowledge that the seeming stasis is an illusion born of my inability to see changes going on beneath the surface, as well as the disproportion between the span of human life and the scale of geologic time. There are times when the study of public policy seems akin to prolonged observation of a range of ancient hills—the seasons change, the winds blow, but the hills endure from year to year, unmoved and apparently unmovable.

For those of us whose political consciousness extends back at least to the early 1970's, the so-called "War on Drugs" has been a constant feature of the national landscape. Most people can scarcely remember a time when federal and state governments were not engaged in a perennial campaign to eradicate, or at least drastically reduce, the sale and consumption of illegal drugs through the aggressive enforcement of criminal sanctions, interdiction, forfeiture, public education, and (to a lesser degree) drug treatment. For those who deplore the anti-drug effort's heavy reliance on incarceration of sellers and users, the "drug war" seems an ineradicable evil. For those who see drug use as the true evil, the necessity of perserverance and unyielding stringency is an article of faith.

Nonetheless, there are signs that the ground is shifting. Public concern about drug abuse as a major issue in American life may be ebbing. The notion that "the drug war is a failure" has become the common wisdom in academic and journalistic circles. Support for routine and lengthy imprisonment of non-violent drug offenders may be eroding, even among the prosecutors, police, and judges whose job it is to enforce the law. Anger among African American, Latino, and other minority communities at the perceived discriminatory enforcement of drug laws is simmering and may begin to boil over in ways that effect the political terrain. And after the events of September 11, 2001, the newly declared "War on Terror" may supplant any "war on drugs" as the focus of the American mind for years to come. All these themes are observable in debates over federal and state drug policy during the last year or so. In the rest of this essay, I venture a tentative mapping of the current geology of the national drug policy debate—the plate tectonics, the fault lines, the erosion, the regions of potential volcanism—and some still more tentative thoughts about how the accretion of subterranean forces may change the contours of American drug policy.

Continental Drift: Public Opinion

One of the verities of American political life for the last thirty years has been that no politician ever lost an election by promising to be "tougher" on those who use and sell drugs. This may still be true in the narrow context of elective politics, but there is a body of evidence suggesting that public opinion on drug policy is becoming more skeptical and nuanced. In his article, Professor Ronald Wright notes that in 1989, the Gallup poll showed that 68% of respondents felt illegal drugs were the nation's most important problem. In December 2001, the figure had fallen to 1%.[1] A poll commissioned by the ACLU found that 61% of respondents opposed mandatory prison sentences for non-violent offenders, and that the public "draws a sharp distinction between trafficking in illicit drugs and buying, possessing, and using illegal drugs."[2] Ballot initiatives supporting drug policy reform have passed in more than a dozen states, notably including a recent successful initiative in California mandating treatment rather than incarceration for certain non-violent drug offenders.[3] And, as detailed in the article by Judge William Meyer and Denver District Attorney Bill Ritter,[4] across the country, the "drug court" movement has been steadily gaining momentum, with more and more states and localities creating special schemes for adjudicating

drug crimes and substituting mandatory participation in drug treatment programs for sentences of incarceration.

Among many, perhaps most, of the intelligentsia, the "failure" of the "drug war" is a given, and a curious alliance of the liberal left and the libertarian right argues for the decriminalization or outright legalization of drugs. In the population at large, black Americans have long perceived that anti-drug efforts have a disproportionate impact in their communities.[5] And at least some voices in the Hispanic community are beginning to express similar concerns.[6] Growing unease with law-enforcement-based anti-drug strategies even crosses international boundaries. For example, Great Britain is in the midst of a debate over a report by a parliamentary committee urging a new anti-drug philosophy of "harm reduction rather than retribution."[7]

Still, it would be at the least premature, and probably just plain inaccurate, to claim that the American public is now actively opposed to incarcerating those who sell narcotics. (Indeed the ACLU's own poll suggests that, when asked, most people say they favor imprisoning drug sellers.[8]) Nonetheless, it seems hard to deny that the national disposition toward drug offenders has turned less punitive and more therapeutic. The unanswered, and probably unanswerable, question is: how deep and how enduring is the apparent shift in public mood? Any truly dramatic change in national policy—for example, a repudiation of the lengthy mandatory drug sentences now imposed by federal and many state governments—presupposes a public disposed to accept such a change in direction. I use the word "accept" advisedly, because I do not believe that the public would have to be clamoring for change in order for change to occur. Rather, the necessary preconditions for change would be: (1) powerful currents of opinion among the interested elements of the political class—lawyers, judges, penological professionals, journalists, academics, ethnic and professional advocacy groups—favoring change, coinciding with (2) a public attitude that is at least sufficiently ambivalent about current drug policy that a majority of politicians perceive no crippling political cost to voting for change.

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What is the likelihood that the tectonic plates of professional opinion, public attitude, and political safety will align themselves favorably for drug policy change anytime soon?

Field Work: Are Anti-Drug Efforts Working?

A centerpiece of the argument that drug policy should be changed is the contention that current enforcement-based strategies do not work, that, in the rhetoric of drug policy critics, "the war on drugs is a failure." In order to assess this contention dispassionately, one must first consider the deeply unfortunate phrase "war on drugs."

It is easy to declare metaphorical war on things. Several weeks ago, I ran an internet search and discovered (in addition to the "war on drugs," the war on terror, and the good old War on Poverty) that there was a war on waste happening at the Pentagon, that "geeks had declared war on Intel," that protesters in San Francisco had declared war on copyright law, that the Canadian Labour Party had declared war on certain contract legislation in British Columbia, and that a Montana high school had declared a war on weeds. Most of the time, of course, all this war-mongering is just harmless rhetorical excess. But when a government consciously chooses the word "war" to describe a national policy initiative, as the United States government has persistently done since the early 1970's when President Nixon first declared a "War on Drugs," then it behooves us to pay careful attention.

Politicians declare war on things in order to emphasize both the seriousness of the threat and the seriousness of the government's resolve to meet the threat. A war by implication calls for mobilization of public resources, for sacrifice, for intense applications of state power, and where necessary for the use of armed force. Critics of American drug policy have often decried the warfare metaphor precisely because it is used to justify tactics the critics think excessive. And while they have a point, the government's persistent, one might almost say stubborn, embrace of the idea of a "War on Drugs" has always been a huge boon to drug policy *critics* because it mischaracterizes the nature of the problem and creates expectations that no government measures will ever be able to meet.

War calls for extraordinary measures precisely because it is, or is at least supposed to be, an extraordinary condition. In the American mind, a war has a beginning, a phase of intense struggle, and an end—a point at which one side (presumably us) triumphs and the other side

surrenders. At which point, we demobilize, the boys go home, go to college on the GI Bill, get married, have 2.5 children, and figure out new ways to sell Pepsi to our former enemies.

But of course the "drug war" is nothing like that. Although our opponents include a good many foreigners, most of the enemy is us. And there will never come a day when America's druggies throw down their bongs and crack pipes, come out with their hands up, and never, ever get high again. The simple truth is that a "War on Drugs" can no more achieve total victory in the form of total eradication of drugs from American life than a "War on Murder" could eliminate homicide, or a "War on Thievery" could eliminate property crime. Yet we do not declare laws against theft and murder a failure and start campaigns to legalize larceny and homicide. The inherent weaknesses of human nature guarantee that violence, dishonesty, and lust for pleasures of the flesh, however destructive to ourselves or others, will always be with us. In every case except that of drugs, we understand that crime is an inescapable component of communal life. And we measure our successes and failures in anti-crime efforts, not against the impossible standard of total victory, but in relative terms, in terms of the degree to which we have succeeded in minimizing an unavoidable evil.

If we consider America's anti-drug efforts not as warfare but as anti-crime measures, then the anti-drug programs of the last twenty or thirty years, far from being failures, appear to have scored some very impressive successes. Professor Stephen Easton, a former United States Attorney, describes in this Issue how drug use declined markedly from 1980, the beginning of the first Reagan Administration, until 1992, the beginning of the first Clinton Administration, rose slightly through 1996, and then essentially leveled off, still at levels far below those of 1980.[9] Professor Easton argues that there is a direct correlation between the degree to which presidential administrations emphasize and fund anti-drug efforts and the extent of illicit drug use in the country.

[Are] even significant incremental reductions in illicit drug usage . . . ultimately worth the monetary and human costs imposed by a primarily law-enforcement-based drug strategy?

There are certainly points at which Professor Easton may be pressing the temporal correlations he observes beyond their useful limits. For example, even if one assumes that government anti-drug policy is the primary factor determining the extent of illicit drug use (in itself a questionable assumption), an exclusive focus on *federal government* policy necessarily excludes consideration of state systems where the vast majority of drug prosecution and treatment takes place. Similarly, I find fairly unconvincing Professor Easton's intimation that there is a meaningful correlation between the declining number and percentage of federal drug cases resolved by trial during the 1990's and the apparent modest increase in drug use in the same period.[10] Nonetheless, he makes a powerful circumstantial case for the proposition that, considered as a crime control program, the anti-drug campaign of the last twenty years or so has been fairly successful.

Professor Easton's work necessarily leaves at least three questions unresolved: First, whether even significant incremental reductions in illicit drug usage are ultimately worth the monetary and human costs imposed by a primarily law-enforcement-based drug strategy? Second, whether similar results could be achieved at lower human and financial cost? And third, whether increased emphasis on drug treatment and education *in addition to* interdiction and incarceration might reduce drug use still more?

More Field Work: Do Drug Courts Work?

A relatively new factor in the drug policy debate is the "drug court," a special jurisdiction court created to rehabilitate defendants who commit drug crimes, or crimes motivated by drug use, through compelled participation in drug therapy and intense monitoring and probationary supervision. The advent and growing prevalence of drug courts in state court systems around the country may, as noted above, be one indicator of an incipient seismic shift in public and professional attitudes toward drug crime. But just as the "drug war" has been criticized as a failure, drug courts have critics every bit as vociferous in their skepticism of the new rehabilitationism. Whether the drug court movement continues to grow will depend in large part on who wins the argument about whether drug courts "work," in the sense of decreasing drug use and dependence, and reducing recidivism rates for non-drug crime among defendants who pass through them.

Indeed, the argument about the efficacy of drug courts has significance in the larger drug policy debate. If drug courts work, then their success is an important argument for de-

creased emphasis on interdiction and incarceration, or at the least for augmentation of current strategies with more rehabilitative programs. If drug court critics are right, if drug courts are no more effective than the systems they replace or augment, then the case for generalized reform is weakened.

We are pleased to host a debate between nationally prominent participants in the drug court controversy. Judge Morris Hoffman, a state district court judge in Denver, Colorado, questions the efficacy of drug courts and suggests that they are fundamentally incompatible with traditional conceptions of due process and the proper role of judges.[11] William Meyer is a former state judge from the same Denver district as Judge Hoffman and the Senior Judicial Fellow of the National Drug Court Institute. Bill Ritter is the elected District Attorney of Denver. Judge Meyer and District Attorney Ritter co-founded the Denver Drug Court. In their article, they respond to Judge Hoffman's critique of drug courts, and they argue that drug courts have proven their effectiveness.[12] Judge Hoffman then replies to their argument.[13]

Erosion: The Downward Movement of Federal Drug Sentences

Criticisms of the "drug war" from academics, the media, liberal activists, and the defense bar have been legion for years. However, as I intimated above, significant change of current anti-drug policy is unlikely absent the urging, or at least the tacit consent, of the majority of judges, prosecutors, and police officials who administer and enforce current laws. Here, too, some signs point in the direction of gradual seismic shift.

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One such sign may be the gradual erosion over the past decade of the average sentence length imposed for federal drug offenses. In a pair of recent studies, my colleague Michael Heise and I examined the little-known fact that, although the length of federal drug sentences climbed sharply through the 1980's (particularly after the enactment of the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986, and the advent of the Federal Sentencing Guidelines in 1987), the average length of federal drug sentences peaked in 1992, but has been declining ever since.[14] This decline was a surprise to practically everyone when it was first pointed out two years ago.[15] It certainly ran contrary to common perceptions. Why has it happened? To summarize, Professor Heise and I found three basic things.

First, some statutory and Guidelines changes in the early 1990s exerted downward pressure on drug sentence length. These changes were enacted by Congress and the Commission with the intention, or at least the knowledge, that sentences for certain categories of drug offender would be reduced from the very high levels in effect at the beginning of the 1990s.

Second, a large increase in marijuana cases in the five Mexican border districts (S.D. California, Arizona, New Mexico, W.D. Texas, and S.D. Texas) starting around 1996, combined with a so-called "fast track" program in which the U.S. Attorneys in those districts offered extra sentence discounts for early pleas, caused some decline in national average sentence length between 1996 and 1999.[16]

Third, nonetheless, neither the changes in the law nor the border activity are sufficient to explain the size or persistence of the drop. Rather, all the evidence points to a steady increase from 1992 onward in discretionary choices by front-line sentencing actors—judges, prosecutors, probation officers and defense attorneys—in the direction of shortening drug sentences. This discretion manifested itself in increased plea bargain rates, increased rates of acceptance of responsibility reductions, increased rates of downward role adjustments combined with reduced rates of upward role adjustments, higher proportions of sentences imposed at the low end of guideline ranges, lower rates of upward departures, increased rates of downward departures for reasons other than substantial assistance to the government,[17] the use of charge and fact bargaining, and in other ways.

In short, Congress, the Sentencing Commission, and front-line sentencing actors such as judges and prosecutors all contributed to the gradual nudging down of drug sentence length. Moreover, the persistent use of discretionary mechanisms to lower drug sentences by those most directly responsible for enforcing federal drug laws at least suggests some disenchantment, not necessarily with a law enforcement approach to narcotics control, but at the least with the severity of the penalties the law demands.

In this issue of FSR, John Scalia, formerly a statistician with both the Bureau of Justice

Statistics and the Sentencing Commission, takes his own look at the decline in federal drug sentences (which he believes did not begin until 1995).[18] Mr. Scalia concludes that the decline "can be partially attributed to three factors: (1) the greater influence of sentences for marijuana defendants – both the increase in the number of defendants convicted of trafficking marijuana and decrease in the average imposed sentence; (2) the increase in the number of defendants receiving a downward departure from the sentencing guidelines, for substantial assistance and other reasons; (3) the impact of the 'safety valve' that exempted certain defendants from otherwise applicable mandatory penalties and reduce the guideline range by two levels."[19]

Although Professor Heise and I agree that each of the factors Scalia identifies had some effect on declining federal drug sentence length, we have some difficulties with the particulars of his analysis and are disposed to think he has markedly oversimplified a very complex problem.

For example, Scalia points out that the percentage of marijuana cases in the federal system increased from 26% to 31% from 1995–99. He implies that this increase would necessarily lower the average federal drug sentence (because marijuana cases have a lower average sentence than cases involving the other four major drug types prosecuted in federal court: crack cocaine, powder cocaine, heroin, and methamphetamine). It is doubtless true that if all other factors were held constant, an increase in proportion of marijuana cases would lower the average drug sentence. However, the real question, which Scalia does not answer, is how the changes in proportions of the five major drug types affected average sentence length. In other words, the increase in low-sentence marijuana cases could have been offset by relative increases in the proportion of high-sentence crack or methamphetamine cases. As it happens, Professor Heise and I considered the question of changing drug type mix using a number of approaches and concluded that the increase in marijuana cases probably *did* exert some downward effect on average drug sentences *between 1996–99*.[20] However, that conclusion is not derivable from the simple observation that the percentage of marijuana cases increased.

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Similarly, Scalia asserts that the length of the average drug sentence declined between 1995 and 1999 in part because the average prison term imposed in marijuana cases declined from 45 to 34 months.[21] While this is doubtless true, so far as it goes, Scalia fails to mention that the average sentence for every other major drug type dropped as well during the same period – cocaine: 89.4 to 79.1 months; crack: 130.7 to 120.3 months; methamphetamine: 102.1 to 88.8 months; and heroin: 63.6 to 61.6 months. Thus, marijuana is only part of the story.

Even more fundamentally, saying that the average marijuana sentence dropped is merely an observation, a datum – it is not an explanation. An explanation would tell us *why* the average marijuana sentence dropped. Was it a decline in average drug quantity per defendant? An increase in percent and size of downward departures in marijuana cases? A change in the average role of marijuana defendants or in their average criminal history category? What?

At least part of the explanation for the decrease in average marijuana sentences probably lies in another consideration Scalia does not mention – the fact that between 1995 and 1997 U.S. Attorneys in the Mexican border districts from which most of the increase in marijuana cases sprang adopted a "fast track" system offering extraordinary sentencing concessions to low-level, mostly marijuana defendants who agree to plea guilty pre-indictment.[22]

Scalia's conclusion that increases in downward departures in drug cases were a significant factor in moving the average drug sentence downward is also subject to some question. The problem is that Scalia relies on the fact that the total percentage of downward departures (both substantial assistance departures under U.S.S.G. §5K1.1, and non-substantial assistance departures under U.S.S.G. §5K2.0) increased by 3% from 1995–99, but he does not consider whether the average *length* of departures increased or decreased during this period. As it happens, the average length of a substantial assistance departure in a drug case actually *decreased by thirteen months* from 1995–99, from 51 to 38 months.[23]

Moreover, the percentage of substantial assistance departures declined by 3% during the same period. While that percentage decline was more than offset by the increase of non-

substantial assistance departures, it is important to note that non-substantial assistance departures are, on average, about one-third the *size* of substantial assistance departures.[24] Thus, in addition to the decline in the average length of substantial assistance departures between 1995 and 1999, during the same period, in 3% of drug cases, the system substituted short non-substantial assistance departures for longer substantial assistance departures. In sum, without more analysis than either we or Scalia have performed to date, it is unclear what effect changes in departure practice had on average drug sentences between 1995 and 1999.

Finally, Scalia asserts that the "safety valve" amendments to the drug statutes and drug guidelines reduced average drug sentences between 1995 and 1999. The statutory "safety valve" passed in 1994 permitted certain first-time non-violent drug offenders to receive sentences below the otherwise applicable mandatory minimum.[25] The guideline "safety valve," enacted a year later, awarded a two-offense-level reduction to the same class of first-time non-violent drug defendants. As with the increase in marijuana cases, Professor Heise and I would not disagree that the safety valve caused some decline in average drug sentences, but again, the effect seems to us less certain, and its mechanism more complex, than Scalia implies.

In the first place, Scalia does not mention the critical fact that the guideline safety valve was enacted in 1995[26] and came into full effect in 1996. In 1996, 19.2% of all drug defendants received a two-level guideline safety valve adjustment, and one can hardly doubt that this had an immediate impact on average sentences. Indeed, the average sentence dropped dramatically in 1995–96, from 88.7 to 82.5 months.[27] However, thereafter, the percentage of defendants receiving the safety valve increased very modestly in 1996–97 and held virtually dead level in 1997–99.[28] So the safety valve certainly had a direct and immediate impact in 1996, and arguably a lesser direct impact in 1997, but it is difficult to explain the continued *relative decline* of average drug sentences from 1997–99 by reference to the safety valve. Or if one is going to argue that the safety valve had a big role throughout 1995–99, the argument has to be a more subtle one — namely that the safety valve not only conferred a direct benefit, but by eliminating the barrier of mandatory minimum sentences in many cases permitted a variety of other discretionary choices by judges and prosecutors which reduced sentences.

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In the end, Professor Heise and I feel that a simple three-factor explanation of the long slow decline in federal drug sentence length cannot capture the complex reality of the phenomenon. Likewise, we remain cautiously confident in our conclusion that some part of the motivation of the discretionary choices made by the judges and lawyers is a widely shared, if not universal, judgment that the federal drug sentences mandated by strict interpretation of the law are often longer than necessary. If we are right, then support for current drug policy among criminal law professionals may have eroded far enough that one of the preconditions for reconfiguration of the drug policy terrain may be in place.

The Caldera: Race and Drugs

Erosion is slow, the incremental, grain-by-grain removal of once-solid landforms. Volcanism can transform a landscape quickly and violently. If any factor at play in the drug debate conjures images of heat and explosive power, it is the issue of race. The federal sentencing guidelines were enacted in part to ensure race-neutral justice. The destructive impact of drugs on individuals and of drug markets on communities is perhaps most acutely observable in minority, inner city neighborhoods. Nonetheless, and however benign the motives of those who drafted and now enforce the nation's drug laws, those laws are widely perceived to be racially discriminatory in both purpose and effect.

The materials in this Issue are illustrative of several common themes in the ongoing debate on race and drug policy in America. No one denies that young male members of minority groups, principally African Americans and Latinos, are imprisoned for drug offenses at rates far higher than their proportion of the general population. However, there is considerable dispute about why this is so, and what, if anything, ought to be done about it.

One thread of the argument is over whether there is unjustifiable racial disparity in drug sentencing. The curious and disconcerting fact is that a number of highly qualified social scientists have examined federal drug sentencing data and arrived at diametrically opposite

conclusions. Two articles in this Issue illustrate the phenomenon. Paula Kautt analyzes federal drug sentences for 1998–99 and concludes that black drug defendants suffer statistically significant disparate treatment under the guidelines. In particular, she finds that black defendants receive higher sentences than similarly situated white defendants with the same offense level.[29] In stark contrast, John Scalia examines the drug sentences imposed on white, black, and Hispanic defendants in both 1986 (before the Guidelines) and 1999. He creates a model which attempts to determine how members of one racial group *would have been sentenced* if they belonged to another racial group. He concludes that "black defendants appear to receive a benefit at sentencing. Though sentences imposed on black defendants were substantially higher than those received by white or Hispanic defendants, estimated sentences for black defendants are significantly lower than what they would have received if black defendants were treated as whites or Hispanics."[30] Whether Kautt or Scalia is correct, or whether their results can be reconciled, is unknown. *FSR* would welcome commentary from readers with expertise in quantitative analysis, both regarding the particular conclusions of Kautt and Scalia and regarding the merits of the two competing bodies of work these two authors represent.

Regardless of one's conclusion about whether drug laws are enforced in a discriminatory way or with discriminatory motives, there is, as noted above, no dispute that drug enforcement has a statistically disproportionate impact on minority groups. The universally recognized—one might fairly say notorious—exemplar of this phenomenon is the quantity-based sentence differential between crack and powder cocaine. A defendant convicted of possessing 5 grams of crack receives the same five-year minimum mandatory sentence as a defendant found to possess with intent to distribute 500 grams of powder cocaine. And this 100-to-1 powder-to-crack ratio is replicated in the guidelines at every quantity level. The rationality of the 100-to-1 ratio has been questioned since its adoption. But the facts that make it notorious are that crack defendants receive the highest average sentences among federal drug offenders and more than 80% of all crack defendants in federal court are African American.[31]

Whether racially motivated or not, whether rationally supportable or not, for the American black community, the 100-to-1 crack-powder ratio has become a symbol of racial injustice in federal criminal law.

Whether racially motivated or not, whether rationally supportable or not, for the American black community, the 100-to-1 crack-powder ratio has become a symbol of racial injustice in federal criminal law. Doubtless for this reason among others, when the Sentencing Commission announced its intention in January 2002 to review the structure of federal drug sentencing, it identified its as its first priority a reexamination of cocaine sentencing generally and the crack-powder ratio in particular. Readers who have followed federal sentencing over the past decade will be aware that the Commission's resolution to reform cocaine sentencing displayed considerable political fortitude. In 1995, the Commission passed an amendment attempting to equalize the crack-powder ratio. Congress vetoed it. Of over 600 guideline amendments passed by the Commission since 1987, the crack-powder equalization amendment was one of only two to have been rejected by Congress.

This year, the Commission embarked on its spring deliberations in the apparent confidence that things were different, that the slow subterranean realignments of plates and blocks had progressed far enough that the impossible task of 1995 would be the manageable accomplishment of 2002. The second half of this Issue is largely a collection of primary materials describing the Commission's effort to reform cocaine sentencing—the issues for comment published in January 2002, transcripts of the extensive hearings held in February and March on the pharmacology and epidemiology of cocaine abuse, the state of social science research on violence associated with cocaine markets, and the views of criminal practitioners, public interest groups, the U.S. Judicial Conference, and the Department of Justice.

What emerges unmistakably from these materials is that the Commission was hoping to promulgate an amendment reducing the crack-powder ratio for guideline sentences, and to convince Congress either to amend the statutes embodying the 100-to-1 ratio for mandatory minimum sentences, or at least to ignore the discontinuity between a new guideline and the mandatory minimum statute. Equally unmistakable is the conclusion that concerted opposition from the Department of Justice (expressed personally to the Commission by Deputy Attorney General Larry Thompson[32]) and Rep. Lamar Smith, of the House Judiciary

Committee,[33] dissuaded the Commission from passing an amendment on crack. Rather, the Commission contented itself with conveying to Congress, once again, a report recommending congressional action to amend the statutory crack-powder ratio.[34]

But the story of the 2002 federal drug policy debate does not end with the strangulation of cocaine sentencing reform. The Commission did pass an amendment generally applicable to all drug types which caps at 30 the offense level of any defendant who receives a mitigating role adjustment. This amendment was the product of concerns that drug quantity, while an important indicator of offense seriousness, sometimes overwhelms considerations of a defendant's role in the offense. Despite the modest mitigating effect of this amendment, Congressman Smith promptly introduced legislation to veto it. We reproduce here the testimony by Commission General Counsel Charles Tetzlaff before Congressman Smith's subcommittee in response to the proposed legislation. As we go to press in June, 2002, the fate of the Smith legislation and the Commission's amendment remains unclear.[35]

Asteroid? 9/11 and the Drug Policy Debate

What conclusions, if any, can be drawn from the Sentencing Commission's 2002 drug policy adventure? Were they just bad geologists – counting on an earthquake before sufficient pressure had built up along the fault line? Or did their careful creation of a record and their, perhaps laudable, political caution merely help to prepare the ground for a future reconfiguration of the policy landscape? It is too early to predict.

Were the Commissioners just bad geologists? Or have they prepared the ground for a future reconfiguration of the policy landscape?

I would, however, tentatively suggest two things. First, I remain convinced that the national mood is turning, slowly but surely, away from an exclusively law-enforcement-based model of drug abuse control (although I am not at all sure where we are headed or how fast). Second, I have a sense that, like an asteroid striking the Earth, the events of 9/11 disrupted the evolution of the drug debate, albeit in ways that are hard to specify.

In this Issue, Sandra Guerra Thompson suggests that the post-9/11 "war on terrorism" may cause a marked de-escalation of the "war on drugs."[36] That may prove true, particularly from the point of view of resource allocation. However, I suspect that the terror attacks on America and their aftermath may have generated a contrary trend at those levels of the national government where policy, politics, and public rhetoric intersect. At a moment in which strength, toughness, and tenacity in opposition to dangerous adversaries are (quite properly) the fashionable public virtues, those in the Administration and Congress who support unwavering pursuit of the "war on drugs" are in tune with the mood of the times. By contrast, those voices in the drug debate who oppose law-enforcement-based drug policies are easily caricatured as appeasers. And even those who support active use of the criminal law to combat drugs, but are willing to entertain the adjustment of moderation of existing policies, can be portrayed, not as wise, but as weak.

This, at least, is my sense of the psychic geology of this spring's cocaine policy debate. Whatever forces may have been building in support of federal drug policy reform were, at least for the present, suppressed or diverted by 9/11 and its aftermath. What remains to be seen is whether the terror attacks will prove to have been the drug policy equivalent of the asteroid that brought on the mass extinction of the dinosaurs, an unexpected catastrophe that completely and permanently redirects the course of events away from what formerly had seemed inevitable. On balance, this seems unlikely. More probably, 9/11 will prove more akin to an earthquake that throws up an earthen barrier in the path of a river – eventually, the persistent power of water seeking its proper level will cut a way through the obstruction and return the current to its former course.

Notes

1 Ronald F. Wright, *Are the Drug Wars De-Escalating? Where to Look for Evidence*, 14 FED. SENT. REP. 141 (2001–2002).

2 *U.S. Sentencing Commission Hearing, 3/19/02: Cocaine Sentencing—Testimony of Public Interest Groups and Defense Bar*, 14 FED. SENT. REP. 211 (2001–2002) (testimony of Laura Murphy, Director, National Office, American Civil Liberties Union).

3 *Id.* at 211 (testimony of William D. McColl, Director of National Affairs, Drug Policy Alliance).

4 William G. Meyer and A. William Ritter, *Drug Courts Work*, 14 FED. SENT. REP. 179 (2001–2002).

5 *U.S. Sentencing Commission Hearing, 2/25/02: Powder Cocaine, Crack Cocaine, and Race*, 14 FED. SENT.

REP. 204 (2001–2002) (testimony of Wade Henderson, Leadership Conference on Civil Rights).

[6] *Id.* at. 208 (testimony of Charles Kamasaki, National Council of La Raza).

[7] Editorial, *Drugs and Damage: Better treatment should not be a conduit for legalisation,* THE TIMES, May 22, 2002, at 23.

[8] *See* Testimony of Laura Murphy, *supra* note 2.

[9] Stephen D. Easton, *Everybody Knows It, But Is It True? A Challenge to the Conventional Wisdom that the War on Drugs Is Ineffective,* 14 FED. SENT. REP. 132 (2001–2002).

[10] *Id.* at 137–38. Nonetheless, to the extent Professor Easton suggests that the decline in drug trials, and the concomitant increase in drug case plea bargains, during the 1990s is a factor in explaining the decline in federal drug sentence length during that period, I agree. *See* Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level,* 87 IOWA L.R. 477, 513 (2002) (hereinafter *Quiet Rebellion II*).

[11] Morris Hoffman, *The Rehabilitative Ideal and the Drug Court Reality,* 14 FED. SENT. REP.172 (2001–2002).

[12] William G. Meyer & A. William Ritter, *Drug Courts Work,* 14 FED. SENT. REP. 179 (2001–2002).

[13] Morris Hoffman, *Reply to Messrs. Meyer and Ritter,* 14 FED. SENT. REP. 186 (2001–2002).

[14] Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences,* 86 IOWA L.R. 1043 (2001); and Bowman & Heise, *Quiet Rebellion II, supra* note 10.

[15] *See, e.g.,* Frank O. Bowman, III, *Fear of Law: Thoughts on 'Fear of Judging' and the State of the Federal Sentencing Guidelines,* 44 St. Louis U. L.J. 299, 352 (2000); Eric Lichtblau & Josh Meyer, *Federal Drug Sentences Are Shrinking, Study Finds,* L.A. TIMES, March 13, 2000.

[16] *See* Bowman & Heise, *Quiet Rebellion II, supra* note 10, at 546–51.

[17] One of our more interesting findings was that, although the rate of substantial assistance departures in drug cases increased from 1992–95, both the percentage of substantial assistance departures and their average size decreased steadily thereafter. *See* Bowman & Heise, *Quiet Rebellion II, supra* note 10, at 518–520.

[18] John Scalia, *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison by, Drug Defendants Convicted in U.S. District Courts,* 14 FED. SENT. REP. 152 (2001–2002).

[19] *Id.* at 153.

[20] Bowman & Heise, *Quiet Rebellion II, supra* note 10, at 546–551.

[21] Scalia, *supra* note 18, at 153.

[22] Bowman & Heise, *supra* note 10, at 550 n. 298.

[23] *Id.* at 520, tbl. 8.

[24] *See, e.g.,* U.S. SENTENCING COMMISSION, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbls. 30 and 31 (2000).

[25] 18 U.S.C. § 353(f) (1994).

[26] U.S.S.G. § 2D1.1(b)(4) (1995).

[27] Bowman & Heise, *Rebellion II, supra* note 10, at 493.

[28] For precise figures on the award of guidelines safety valve adjustments in 1996–2000, see *id.*

[29] Paula Kautt, *Differential Usage of Guideline Standards by Defendant Race and Gender in Federal Drug Sentences: Fact or Fiction?* 14 FED. SENT. REP. 159 (2001–2002).

[30] *See* Scalia, *supra* note 18, at 155–56.

[31] U.S. SENTENCING COMMISSION, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 81, fig. 5; 69, tbl. 34 (2001).

[32] *U.S. Sentencing Commission Hearing: 3/19/02: Cocaine Sentencing—Testimony of Department of Justice and Criminal Law Committee,* 14 FED. SENT. REP. 217 (2001–2002).

[33] *Letter from Rep. Lamar Smith, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, to Diana E. Murphy, Chair, U.S. Sentencing Commission,* 14 FED. SENT. REP. 226 (2001–2002).

[34] *See Statement of Diana E. Murphy, Chair of the United States Sentencing Commission, Before the Senate Judiciary Committee, Subcommittee on Crime and Drugs, May 22, 2002,* 14 FED. SENT. REP. 236 (2001–2002).

[35] *Statement of Charles Tetzlaff,* 14 FED. SENT. REP. 233 (2001–2002).

[36] Sandra Guerra Thompson, *Did the War on Drugs Die with the Birth of the War on Terrorism?: A Closer Look at Civil Forfeiture and Racial Profiling After 9/11,* 14 FED. SENT. REP. 147 (2001–2002).