The Discriminatory Origins of the American Drug Wars, The Creation of the Drug Criminalization Industry, and The Effect On Modern Fourth Amendment Law

Using Luhmannian Concepts To Determine The Historical Origins And Effects of Social Phenomena

Lori Ann Parker

The United States of America currently has one of the highest incarceration rates in the world. As of June 2002, the U. S. Department of Justice reported 2,021,223 men and women incarcerated in the American prison system ("U. S. Prisoner Number," 2003). After passage of the Controlled Substances Act in America in 1970,[1] the incarceration rate in America rose dramatically from approximately 100 persons per 100,000 in 1970, to 668 persons per 100,000 in 1998 (Gilliard, 1998; Cole & Smith, 2001), to 718 persons per 100,000 by June of 2002.[2] America's abnormally high incarceration rate seems contrary to the assertion it is the land of the free.

The act of incarcerating a human being should never be trivialized. While it is true that some members of a society must be isolated as punitive measure for actual harms caused to other persons or their property, incarceration should never be instituted for mythical "crimes" enacted by ruling elite groups to financially enrich themselves, or to increase their power in a society. Incarceration not only takes away the right of freedom of the one incarcerated, it also causes trauma upon their family.

An additional danger of American incarceration is potential physical and mental abuse inflicted upon the imprisoned by states and their officials. This potential danger is

---

[1] The Controlled Substances Act of 1970 created what are commonly called "the Schedules." The Schedules were created in 1970 by President Richard Nixon and the Federal Bureau of Investigation (Tera Media, 2000). The Schedules placed all substances in some manner regulated under existing federal law into one of five schedules (U.S. Controlled Substances Act of 1970, 2002).

[2] Based upon U.S. Census Bureau June 2002 American population estimate of 281,945,000 (U.S.Census Bureau, 2003).

caused from the power of sovereign immunity granted to American states in 1890 by the Hans v. Louisiana U. S. Supreme Court case. In Hans, American states were granted the same sovereign immunity rights as those of hated English kings in pre-Revolutionary times. English kings were considered blameless and unaccountable for any harm they caused their own citizens.

Sovereign immunity allows American states and their officials to engage in acts of mental and physical abuse against their own citizens unless prevented by a state's own legislature, by abrogation by Congress of a state's sovereign immunity in specific acts, or by waiver from acceptance of federal benefits (Parker, 2003). Protection of prisoners from abuse is one of only a multitude of problems facing America's overwhelmed criminal justice system. In such a state, it is likely only the most serious allegations of prisoner mental and physical abuse are attended to,[3] while "less serious" violations are likely ignored from the crushing weight upon the American criminal justice system.

America's War On Drugs

Much of the crushing weight on America's criminal justice system today is attributable to the additional burden placed upon the system from the American war on drugs after the enactment of the Controlled Substances Act of 1970, and especially after the enactment of the Asset Forfeiture Fund in 1988 (Parker, 2003). The Asset Forfeiture Fund provided financial enrichment opportunity to state, local, and federal law enforcement for enforcement of drug related crime (Miller & Selva, 1994; Parker, 2003).

Between 1986 and 1999, the number of drug defendants charged in federal court nearly doubled from 15,762 to 29,306, and the number incarcerated in federal prisons for drug-related offenses increased from approximately 15,000 to 68,000 (Freking, 2001). In 2001, of the 121,818 investigations opened against suspects by U. S. attorneys, thirty-

[3] For example, see Parrish v. Johnson, 800 F. 2d, 600, 603, 605 (6th Cir. 1986) in which a prison guard repeatedly threatened paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead."

one percent – or approximately 37,736 – were for drug offenses (Bureau of Justice Statistics, 2003).

Throughout the 20th century in America, incarceration rates fell disproportionately upon the African-American and Hispanic-American social groups (Parker, 2003). At the beginning of the 21st century, this disproportionate incarceration rate in regards to drug offenses still persisted. In 2001, the Justice Department indicated forty-six percent of those charged with a federal drug offense were Hispanic, and twenty-eight percent were black (Freking, 2001). U. S. Census population demographics in 2001 estimated the Hispanic social group comprised only 13.1% of the American population, and the black social group comprised only 11.8% of the American population (2001 Supplemental Survey, 2003).

Application of Autopoeisis Theory To The Socio-Legal Problem of America's War On Drugs

German theorists Niklas Luhmann and Gunther Teubner asserted that the increasing complexity of modern societies can be seen from the proliferation of forms of regulation (such as legislation). Luhmann and Teubner further asserted that such complexity can only be managed by a correspondingly intense differentiation of various sub-systems (legal, political, economic, scientific, etc.) within such complex societies. Law – whose system of communication is based upon decisions of "right" and "wrong" (legal or illegal) – becomes overloaded if it does not remain functionally distinct from other social sub-systems such as science (which is preoccupied with issues of truth or falsity), or politics and economics (which are more preoccupied with issues of power and efficiency) (Cotterrell, 1992: 168).

Teubner asserted that legal decisions are valid only because they are founded upon legal rules, but that also in the same context, legal rules are given significance only because they are the basis of legal decisions (Cotterrell, 1992: 168). In this regard,

Teubner seems to assert that there is a reciprocal and reproducing system relationship between legal rules and legal decisions. Teubner's assertions are validated in what are commonly known as "legal precedents" in American law in which current legal decisions are based upon precedent set by previous legal decisions and legal rules.

Legal precedents represent a reproducing feature of the legal system in which legal precedent causes reproduction and expansion of previous legal conceptualizations attributable to earlier periods of American history. In American law, legal precedent defines current law unless the precedent is overturned. The U. S. Supreme Court is granted the ultimate authority to stop reproduction of legal precedent by overturning previous legal decisions and legal rules of American law.

Law, according to Teubner, should not attempt to assert direct control over the increasing complexity of modern society; instead law should only provide a sophisticated, but carefully modulated "'external stimulation' of the 'internal self-regulating processes' of society's various sub-systems of activity" (Cotterrell, 1992: 168). In other words, law's role is to act as a means of promoting the self-regulating, self-management nature of other sub-systems. According to Luhmann, the autonomy of law from other sub-systems "…is not a desired goal but a fateful necessity" (Cotterrell, 1992: 168).

More specifically, Teubner and Luhmann seem to be asserting that, ideally, the law's role should be limited in society, and it should encourage the independence of other sub-systems from the legal sub-system in order to prevent them (other sub-systems) from developing a dysfunctional dependence on the law to solve the problems of their sub-system they should be solving for themselves. Teubner and Luhmann's concepts seem to be in keeping with opponents of what is known as legal instrumentalism.

Legal Instrumentalism:
The Use of Law As An Instrument of Power

Legal instrumentalism proposes that the power of the law should be used to implement policy in order to cause social change. One argument of opponents of legal instrumentalism is that when law is used as an instrument of power by government to cause social change, it can become inadequate and harmful, and it can ignore the problem of law's integrity as a specific mode of reasoning, discourse, or system of communication. Additionally, opponents argue that when law is used as an instrument of social change, law can then trivialize the ideal of the "rule of law"[4] and its autonomy from politics (Cotterrell, 1992: 66).

This study focused on these arguments of opponents of legal instrumentalism. It was clear after preliminary historical review that the American drug laws of the 20th century were a use of legal instrumentalism. Upon initial cursory review of 20th century drug laws in American society, it appeared, on the surface, that drug laws had been instituted with noble intentions; after all, Prohibition – the first national attempt to control the use of a drug (alcohol) in American society – was called "The Noble Experiment" (Young, 1961).

But it was also clear upon initial historical review of the 20th century drug wars that the drug laws had caused the opposite effect of their surface intention. Instead, they had caused severe social dysfunction, turmoil, and trauma through the drug wars caused by the enactment of drug laws. Additionally, the trauma caused from the drug wars fell disproportionately upon certain ethnic, racial, cultural, and lower income groups (Parker, 2003).

Upon the continuation of the historical review back to colonial times in America, the study revealed a somewhat startling, and unexpected finding. During the three centuries prior to the American drug wars of the 20th century, alcohol in the form of liquor, and nicotine in the form of tobacco were considered to be drugs that Americans found to be more dangerous and potentially socially devastating (Parker, 2003; O'Brien

[4] The rule of law in American government ideally being a representative, collective "voice of the people" as "the Sovereign" (Parker, 2003).

& Cohen, 1984; Asbury, 1950) than non-toxic[5] forms of opium products, marijuana products, and later coca products when they became available in the late 1800's.

While it was true that in each product category (opium, marijuana, and coca) there existed a small subset of abusers of the non-toxic forms of these products, as is typical with current day users of alcohol, the general consensus in American society during the three centuries prior to the American drug wars of the 20th century was that alcohol in the form of liquor, and nicotine in the form of tobacco were more dangerous (Parker, 2003).

This unexpected and unusual finding indicated that some social phenomenon or phenomena must have occurred in American society to cause the non-toxic forms of opium products, marijuana products, and coca products that were widely and legally used in American society without incident[6] during the three centuries prior to the drug wars to completely reverse in their perceived dangerousness and criminal status, especially when compared to alcohol in the form of liquor.

The Luhmannian Concepts Used To Identify The Social Phenomena That Created The American Drug Wars of the 20th Century

To evaluate and document the social phenomenon or phenomena that had occurred in American society to reverse these substances perceived dangerousness and criminal status in American society in the 20th century, autopoiesis theory was applied. Specifically, autopoietic concepts defined by Niklas Luhmann were isolated to apply to the forward historical transit through the four centuries leading up to our current day war on drugs. Autopoiesis, as defined by Niklas Luhmann, refers to

> Systems that reproduce all the elementary components out of which they arise by means of a network of these elements themselves and in this way distinguish themselves from an environment – whether this takes the form of life,

[5] Non-toxic defined as not synthesized into more potent forms such as heroin or crack cocaine, and in non-injected forms.

[6] Without incident meaning without substance abuse other than that which is typical with alcohol use in current American society where the majority of Americans self-manage their use of alcohol responsibly and do not abuse alcohol, while a small subset of alcohol abusers has always been present.

> consciousness or (in the case of social systems) communication. Autopoiesis is the mode or reproduction of those systems.
>
> (Luhmann, 1989: 143)

Certain autopoietic concepts defined by Luhmann were particularly helpful in the study. The concept of "complexity" is one in which a state of affairs arises out of so many elements that these elements can only be related to one another selectively. Complexity always presupposes, both operatively as well as in observation, a reduction procedure that establishes a model of selecting relations, such model then provisionally excluding as only mere potential possibilities other ways of connecting elements together (Luhmann, 1989: 143). Complexity, then, establishes models by relation selection and relation exclusion (Parker, 2003).

The "functional differentiation" concept refers to the formation of systems within systems. The formation of systems within a system into sub-systems does not mean that the entire system has been decomposed into sub-systems; instead, it means that the sub-systems have only evolved as system-environment differences within the system. The sub-systems acquire their identity – and functional difference –through their fulfillment of a function for the entire system (Luhmann, 1989:144).

"Social systems" come into being whenever an autopoietic connection of communication occurs and distinguishes itself against an environment by restricting the appropriate communications; therefore, social systems are not comprised of persons and actions, but of communications (Luhmann, 1989: 145). An act of isolation or withdrawal from a social system (anti-social system behavior) - either by a group or an individual - is then an expression of a rebellion against the communications of the social system one withdraws and isolates from (Parker, 2003).

Finally, Luhmann's theory concerning legal systems is important in understanding the way "the law" codifies what is "right" and what is "wrong." Luhmann proposes that

legal systems receive their autopoiesis through this binary coding (Luhmann, 1989:64; Luhmann, 1985).[7] Binary codification of the finalized legal judgment through court ruling - in which one communication will be declared right and the other communication will be declared wrong - empowers the one declared right with the force of the law, and disempowers the one declared wrong (Parker, 2003). Luhmann suggests no other system operates according to this binary-type coding (Luhmann, 1989:64; Luhmann, 1985). The legal system, then, operates in such a way as to distribute power, empowering the one who is right, while disempowering the one who is wrong.

Competing social systems, then, can be seen as models born from complexity. Sub-systems arise within each competing social system to support "their" system with functional differentiation, the life of the sub-systems being tied to the survival of their system. The social system draws to it members through its communications. Each competing social system is empowered or disempowered when the legal system declares its communications either right or wrong.

The legal system, then, becomes a power distributor of the competing social systems. It can turn the communications of select systems off or on by declaring their communications to be either wrong or right. How (or more importantly, by whom) the laws are created becomes a determinant factor of power distribution between competing social systems, and the strength or weakness of each competing social system's communications. If one social system dominates the creation of law, it can silence the communications of its competing social systems with the law (Parker, 2003).

The Drug War's Effect On Modern Fourth Amendment Law

A secondary research objective of the study was to understand the effect the drug wars had appeared to have on weakening the privacy protections of the Fourth Amendment to the Constitution of the United States over the course of the 20th century,

[7] Binary coding being mathematically-defined as "one" or "nothing," or electrically-defined as power being turned "on" or turned "off" (Parker, 2003).

especially during the last three decades. The Fourth Amendment states

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Upon review of the text of Fourth Amendment search and seizure cases submitted to the Supreme Court from 1900 to 2002, it appeared that during the last three decades, law enforcement had become more and more dependent upon the use of militaristic electronic surveillance weaponry to fight the drug wars. Telephonic wiretaps had been in use since the alcohol drug wars of the early 20th century. As the years progressed from the repeal of the alcohol drug wars in 1933, law enforcement had increasingly used more and more electronic surveillance equipment to spy on Americans.

By the end of the 20th century, American law enforcement had an arsenal of electronic surveillance weaponry of such technological marvel, it was somewhat shocking. It was especially troubling considering the pursuit of their weaponry was to stop use of substances Americans had use for centuries without incident. Helicopters, jets, electronic listening devices, wiretaps, and thermal imagers,[8] were only a few of the high-tech weaponry used by law enforcement on a routine basis. At times the amount of use of such weaponry seemed obsessive, especially for substances that were less dangerous than alcohol, such as marijuana.

The study revealed that a large percentage of the cases submitted to the Court for possible violations of Fourth Amendment privacy protections were related to the American drug wars. Additionally, the type of electronic surveillance weaponry used by

[8] Thermal imagers allow night vision capability through heat sensing, and are used by law enforcement to detect heat lamps used to grow marijuana in homes. In the process, law enforcement is also capable of viewing heat images of persons engaging in private and intimate activities. See U.S. v. Cusumano, 67 F. 3d.1597, (10th Cir.), 1995.

law enforcement appeared to completely violate natural individual privacy zones. Violation of such natural privacy zones would have likely appalled the Framers of the Constitution, whether such violations occurred with or without a warrant (Parker, 2003).

In 1967, the Court attempted to protect individual privacy from the onslaught of high-technology electronic surveillance weaponry being increasingly and obsessively used by law enforcement. The Court established a new Fourth Amendment decisional analysis - the Katz (1967) two-prong privacy analysis.[9] The Katz privacy analysis was supposed to protect the individual by fashioning a legal protective privacy barrier around the individual. Instead, as time progressed through Court majority opinion, the Katz privacy analysis created an almost unprecedented pattern of rulings in favor of law enforcement.[10]

The year prior to Katz, the Court issued a harsh warning to the American government concerning law enforcement's increasing and obsessive use of electronic surveillance equipment to spy on Americans

> We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and "bugging" run rampant, without effective judicial or legislative control. Secret observation booths in government offices and closed television circuits in industry, extending to even rest rooms, are common. Offices, conference rooms, hotel rooms, and even bedrooms are "bugged" for the convenience of the government. Peepholes in men's rooms are there to catch homosexuals. Personality tests seek to ferret out a man's most innermost thoughts on family life, religion, racial attitudes, national origin, politics, atheism, ideology, sex, and the like. Federal agents are often 'wired' so that their

[9] The Katz two-prong privacy analysis evaluates Fourth Amendment violations with a subjective privacy test in which alleged violations must prove to a majority of the Court , 1) whether the person exhibited an actual (subjective) expectation of privacy, and 2) whether that expectation is one that society is prepared to recognize as 'reasonable' (Katz, 1967:361).

[10] See Appendix: "Graphs of Supreme Court Search & Seizure Ruling Trends, 1965 to 2002."

> conversations are either recorded on their persons or transmitted to tape recorders some blocks away. The Food and Drug Administration recently put a spy in a church organization. Revenue agents have gone in the disguise of Coast Guard officers. They have broken and entered into homes to obtain evidence. Polygraph tests of government employees and of employees in industry are rampant. The dossiers of all citizens mount in number and increase in size. Now they are being put on computers so that by pressing one button, all the miserable, the sick, the suspect, the unpopular, the offbeat people of the Nation can instantly be identified. These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken each individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen – a society in which the government may intrude into the secret regions of a man's life at will.
>
> (Osborn, 1966:439-440)

In Osborn, the Court made it very clear the U. S. government was creating a police state in America. The institution of the Katz privacy analysis was an attempt to remedy the problem by giving the individual maximum privacy protection from law enforcement. But obviously, as shown in the graphs of the Appendix, something went wrong. To have the Katz privacy analysis effect the opposite result than what it intended indicated some legal or socio-legal phenomenon or phenomena had occurred to completely reverse the initial intent of the Katz privacy analysis.

The American Revolution - Tyranny And Oppression
Defined in Autopoietic Terms

The purpose of the American Revolution was to rise up against the tyranny and oppression of England. By 1764, England had incurred severe war debt whose interest alone was consuming one-half of England's national annual budget (Divine, Breen, Frederickson, & Williams, 1987: I). To address the problem, England embarked on a twelve-year hysterical taxation frenzy against the American colonial states.

From 1764 to 1776, England used its entire legislative, judicial, and law enforcing governmental machinery to extract taxes from the American colonists. The tactics used by England to extract tax monies from the American colonists included passage of increasingly punitive law, fines, imprisonment, interrogation, and quartering of troops amongst the colonists, among other measures. Finally, the colonists rose up against England, and helped in large part by assistance from France, defeated the English military and created the United States of America (Divine, et al., 1987:I; Parker, 2003).

A particularly helpful feature of Luhmann's concepts of social systems, sub-systems, and the complex state of affairs is that in system application these concepts are somewhat interchangeable in meaning. For example, in the complex state of affairs known as the complex state of global affairs, individual countries can be viewed as social systems within the complex state of global affairs. Each country's legal, political, and economic system can be viewed as sub-systems within each social system defined as an individual country within the complex state of global affairs. Likewise, in regards to application to the American Revolution, England can be seen as a social system in the complex state of global affairs. Each of the colonial states on the American mainland can also be viewed as individual social systems in the complex state of global affairs.

The tyranny and oppression England exerted upon the American colonies in the twelve years prior to the American Revolution - when viewed from autopoietic concepts - was an act of one social system in the complex state of global affairs (England) attempting to subjugate other social systems in the complex state of global affairs (the individual American colonies) through its power. England's assertion of its power against the colonies in order to force compliance to provide money to England was a

social system preservation act to accomplish England's goal of paying down its tremendous war debt. The method by which England attempted to accomplish its subjugation of competing social systems to its own system environmental goals and purposes in the complex state of global affairs was through legal instrumentalism.

Using legal instrumentalism, England created law for social system preservation. In concert with King George III, the English Parliament (a sub-system) enacted legislation (law) for the English social system preservation goal of strengthening the English economic system by extraction of taxes from the American colonies. The laws were then carried out against the colonists by the English law enforcement feature, the military (a sub-system).

To justify extracting taxes from the colonists, England declared its actions to be what was best for English society, and therefore the colonists (Divine, et al., 1987:I). Through its social system communications, England asserted that its use of legal instrumentalism was justified because it was what was best for the colonists. The actual effect of England's use of legal instrumentalism - as England's taxation frenzy increased to hysterical proportions - was to effect a government of tyranny and oppression upon the American colonists.

In response to England's social system communications, the American colonies began to engage in anti-social system behavior. Non-compliance to England's communications from the English social system can be seen in such acts of anti-social system communications as the Boston Tea Party of 1773 – in which the colonists dumped 340 chests of tea from British ships into the Boston harbor (Divine, et al.,1987:I). This was only one of numerous actions of anti-social system behavior engaged in by the colonists (persons) prior to the culmination of the ultimate action of anti-social system communication - the American Revolution.

Each act of rebellion against England's social system communications expressed a relation exclusion from England's social system. Each act of a separate colony joining its independent system preservation goals together with other colonies for each independent colony's system survival expressed acts of relation selection. These acts of

relation selection by the American colonies would result in each separate colonial state breaking open its own social system boundaries to join together into the new, larger social system model, the United States of America.

As shown by Luhmann's statement concerning social systems "…social systems come into being whenever an autopoietic connection of communication occurs and distinguishes itself against an environment by restricting the appropriate communications; therefore social systems are not comprised of persons and actions, but of communications" (Luhmann, 1989: 144).

By connecting together through autopoietic communication – expressed as dissent against England's social system's communications - the American colonies joined together and distinguished themselves against England's social system's communications environment. The colonists restricted England's communications being expressed against the colonists through England's law creation and law enforcement by engaging in actions of dissent.

Tyranny and oppression, then, when viewed from autopoietic concepts applied to the American Revolution, occur when one social system (such as England) uses law creation as an instrument of power against other social systems (such as the colonies) to satisfy only the oppressing system's environmental purposes and goals (in England's case, to extract taxes in order to pay down England's war debts).

Tyranny and oppression are an inherent danger of the use of legal instrumentalism. When a social system (such as England) creates law for only its own system preservation goals - and then uses the law enforcing feature triggered by such creation of law to silence other social systems' (such as the American colonies) dissenting communications (expressed by verbal and non-verbal acts of dissent by persons) – if fail-safe mechanisms are not present in the complex state of affairs to stop the oppressing system's extinguishments of other social systems' communications via the law enforcement feature, other social systems in the complex state of affairs can be eliminated from the complex state of affairs by an oppressing system.

Post-Revolution: The Framers of the Constitution Attempt To Create A

Government Free From Tyranny & Oppression

After the Revolutionary War was over, it was clear the Framers of the new American government wished to create a government free from tyranny and oppression. It was clear the Framers felt two features were necessary to protect future Americans from tyranny and oppression. First, to protect acts of dissent (verbal and non-verbal). And second, to make sure the law was truly representative of the voice of the people, and not just the voice of any future ruling elite groups.

The representative government born from the American Revolution was intended to - theoretically - prevent one social system from ever dominating another to the point of tyranny and oppression. To the Framers of the U. S. Constitution, the key to the prevention of tyranny and oppression was the permanent protection of certain inalienable rights, by permanent law, of even the smallest element in the complex state of affairs. In America, the protection of inalienable rights is commonly called the Bill of Rights, but also includes foundational concepts inherent within the Constitution. For the purposes of the study, autopoietic application focused on the inalienable rights of individual privacy intended by the Framers with the creation of the Fourth Amendment (Parker, 2003).

Luhmannian Concepts Utilized For Analysis of The American Drug Wars

A fundamental concept that emerged from the four hundred year historical review was a feature of legal systems in all societies that became an important tool for application of Luhmann's concepts concerning the binary nature of law. In any legal system, law gives to the legal system a power that is not granted to other systems within a complex state of affairs. Regardless of how the law comes into being – whether it is from a monarchial government, a democratic government, a dictatorship, or other models of government – a companion feature of law is law enforcement.

Although regulatory features exist in other systems, such as policies or procedures that those in other systems are to obey as actors in the system, no other systems have the same degree of power of regulatory enforcement as those generated from the laws of a government. Typically, law enforcement in any government has the power to investigate, arrest, interrogate, fine, seize the assets of, imprison, and kill[11] for violations of the laws of a government (Parker, 2003).

This unique characteristic of the legal system becomes important in application of Luhmann's concept of the binary nature of the law. Not only does the law distribute power to other systems in the complex state of affairs by empowering the communications of one system's communications by legally declaring them to be "right" (legal) through court ruling, and disempowering another system's communications by declaring such system's communications to be "wrong" (illegal) through court ruling, but law can also engage in punitive acts against those systems and actors within such systems who dissent against the communications of those systems declared by court ruling to be right, or legal. Once a system's communications have been declared legal through the power distribution feature of the legal system, opposing systems risk significant punitive measures if they attempt to engage in dissenting acts to the system's communications, which have been declared legal.

Accessing the legal system, then, to have a system's communications declared right (legal) not only vindicates that system's communications, but it also gives that system's communications the potential ability to access law enforcement to extinguish the communications of opposing systems through law enforcing mechanisms. Even the implied threat of such law enforcing mechanisms profoundly affects the growth potential of opposing social systems.

The communication suppression power of the law enforcement mechanism in a given complex state of affairs is important in historical analysis of social phenomena. How oppressive law enforcement has become in given areas of a society can be a red flag in the analysis to potential areas of skewed distributions of power - and potential

[11] Although the death penalty has been significantly reduced in modern global society as a tool of law enforcement.

oppression - especially when analyzing a government that declares itself to be operating under a representative government.

Another important tool in application of Luhmann's concept of the binary nature of the law is analysis of how the laws of a society are coming into being, or more importantly, by whom. The law enforcement mechanism of a government is not engaged until a law is created; therefore, how or by whom the laws are generated becomes important to the analysis. If it appears the law enforcement mechanism of a society is being applied in abnormally high concentrations to certain social groups or areas of a society, this can also be a red flag indicating potentially skewed distributions of power in a society.

A final tool in application of Luhmann's concepts to historical review of social phenomena is observation of other methods by which the communications of systems are extinguished. How communications are disseminated throughout a society, or a complex state of affairs, becomes an important tool to measure potential oppression by power groups who are accessing – or controlling – what communications are received by other systems in the system environment.

By access of the media - or control of the media through, for example, financial purchase of media distribution channels - oppressive power groups can reproduce only their own social system communications (or other certain systems whose communications support the oppressive social system's goals) while extinguishing the communications of those systems that might threaten the oppressing social system's survival in the complex state of affairs.

The Precursor to the American Drug Wars – The Origins of the Severely Skewed Distribution of Wealth in American Society, 1790 to 1900

A critical precursor to the originations of the American drug wars occurred shortly after the American Revolution in the 1790's when Alexander Hamilton, the Secretary of the Treasury under President George Washington, decided to steer the

American economic system into one based upon industrialization rather than one based upon expansion of the existing agrarian-barter economic system that had been in existence in America since the 17th century. Thomas Jefferson, Secretary of the State, preferred expansion of the agrarian-barter economic system. Jefferson felt it would protect individual autonomy through self-employment and self-sufficiency, which would in turn protect the sovereignty of the individual.

The agrarian-barter economic system naturally distributed power more evenly among the population. An industrialized system would tend to skew distribution of power. American law in existence at this point in American history had incorporated pre-Revolutionary English legal precedent in regards to property and business interests. With property and business ownership came the legal protections afforded concurrently with such property and business ownership, as dictated by old English law that had been incorporated into developing American law since the 17th century. As long as property and business ownership remained fairly evenly distributed among the population, the concurrent legal protections (and power from such legal protection) afforded such property and business holdings would likewise be distributed more evenly among the population (Parker, 2003).

Through various incentives to enrich his friends by steering the American economy into the direction of industrialization - and by the power of his position as Secretary of the Treasury - Hamilton was able to enact legislation (law) that would steer the new American economic system into the direction of industrialization. Jefferson and others vehemently opposed this direction. Jefferson had seen what industrialization in England had done to the independent spirit of people in England. Jefferson's opinions about Hamilton's plans to institute an economic system based upon industrialization was that it would "tie the nation's future to the selfish interests of a privileged class – bankers, manufacturers, speculators" (Divine, et al., 1987: 189).

Hamilton also wanted to institute the creation of a national bank similar to the Bank of England in which the bank would be privately owned but funded in part by the federal government. James Madison, Jefferson, and others argued that such a banking

system fashioned like England would create "a large monied interest" in the country, and would create a situation in which "personal liberties would be at the mercy of whoever happened to be in office" (Divine, et al., 1987: I: 190).

Hamilton also succeeded in having legislation enacted concerning the massive amounts of debt America had incurred to fund the Revolutionary War. These legislations were designed to financially enrich speculators (Parker, 2003). In 1790, Hamilton revealed in a report to Congress that the nation's outstanding debt was fifty-four million dollars. Loan certificates had been issued to fund the war. Speculators had purchased almost eighty-percent of the loan certificates at distressed prices from soldiers and citizens who were desperate for cash during the 1780's. Additionally, the States collectively owed about twenty-five million dollars (Divine, et al., 1987: I).

Hamilton's plan was to fully fund all foreign and domestic debt, and for the federal government to assume full responsibility for all outstanding state debt. Many of Hamilton's friends - as well as members of Congress - had engaged in speculation by purchasing large amounts of public securities at the very low distressed prices. In the end, Hamilton's legislations passed, and many of these speculators became very wealthy from Hamilton's legislative enactments (Divine, et al., 1987: I). By enriching the few at the expense of the masses – many of the few being legislators or people who could influence the creation of law in America – the natural progression of law from this point forward in America would be law that would benefit this small ruling elite that had been created and enriched by Hamilton's legislations (Parker, 2003).

Along with the enrichment of a small elite group who had access to the creation of law (and its companion feature, law enforcement), industrialization now received the monetary backing necessary for the American economic system to be steered in the direction of industrialization, rather than expansion of the existing agrarian-barter economic system that Jefferson had sought to preserve in order to protect the independent spirit of individual Americans.

The building of the railroads in America provided the first major expansionist move of the early 1800's to further enrich the small ruling elite group that was created in

the 1790's by Hamilton's legislative enactments. The first railroads in America appeared in the early 1800's. To hasten the expansion of the railroads, the federal government granted massive amounts of land grants and loans to railroad venture capitalists, which continued throughout and long after the Civil War. While the railroads were being built, the agrarian-barter economic system naturally expanded westward with the enactment of the Homestead Law of 1862, which encouraged the establishment of 20,000 farms westward (Adams, 1933; Parker, 2003).

But the massive push by the federal government to create a coast-to-coast railroad system encouraged the spread of industrialization across America. Industrialization slowly began to displace the naturally occurring agrarian-barter economic system that was spreading westward. The small, ruling elite group of bankers, manufacturers, and speculators accessed the railroad system as a method of further financial enrichment, not only by pushing industrialization westward, but also by establishing a national network to ship massive amounts of manufactured goods around the country. The railroad system also provided a means to institute a nationalization of the media by way of shipment of media outputs such as pamphlets, newspapers, and other types of media nationwide (Parker, 2003).

The Civil War provided another major source of enrichment for the small ruling elite group rising in financial wealth during the 19th century in America. At the end of the Civil War, the nation had to deal with the massive amount of war bonds and greenbacks[12] issued to fund the war. The winning war bonds were owned primarily by financiers and commercial interests in the Northeast, such as in New York. The common man was the primary holder of the greenbacks. Because of losing the war, the South's bonds – being enemy bonds – became worthless to their holders (Adams, 1933; Parker, 2003).

The Republican-led Congressional solution to the war debt problem was to vote to assure winning bondholders payment in gold. The issue of the $356 million in greenbacks was indefinitely deferred by lack of Congressional action. The greenbacks were never retired for their full value in gold, and $346,681,000 of the greenbacks were

[12] Previously issued U. S. Dollars (Parker, 2003).

left floating in the American economy even to the year 1933 (Adams, 1933). The South received very little financial benefit from the Congressional solution to the problem (Parker, 2003).

The fortunes made by the railroad venture capitalists, the winning of the Civil War by the North, and the resultant legislative (legal) solution to the war debt problem created an abundance of Northern millionaires. Several hundred millionaires were created in New York City alone. By 1863, Cornelius Vanderbilt, W. B. Astor, and A.T. Stewart were estimated to be earning upwards of $1,800,000 per year (Adams, 1933) at a time when the average American was earning at best approximately $200 per year (Brown, 1979).

The Civil War also brought to light other socio-economic phenomena occurring in American society as a result of Hamilton's legislative enactments that favored the rise of a small, ruling elite group of bankers, manufacturers, and speculators – corruption, and abuse of workers. During the Civil War, corrupt manufacturers would bribe Congressmen to win government contracts to make uniforms, guns, and other military supplies for the war, and then make shoddy products for the soldiers at greatly inflated prices (Adams, 1933). To further increase profits, manufacturers engaged in the growing trend of abuse of workers that had been rising in the manufacturing establishments in the nation. By working their workers longer and longer hours - at lesser and lesser wages - the manufacturers could "skim off" maximum profit from the government war contracts (Parker, 2003).

Corruption came to light concerning the construction of the railroads. It was learned that many men had become very wealthy skimming profits off of government contracts to build the railroads. After skimming off the profits, they would leave the railroads facing bankruptcy. The government and the rest of Americans were left to bail the railroads out of their troubles.

As the railroads and industrialization spread across America, the agrarian-barter economic system slowly fell under the crushing weight of the capitalists' profit-making ventures. The independent tradesmen and women who were the hallmark of those who

rose up to fight the Revolutionary War would slowly watch as their means of self-sufficiency, self-autonomy, and sovereign individuality disappeared (Parker, 2003).

Now these same tradesmen and women would be locked into economic enslavement in large industrial or agricultural concerns where they and their children would be worked for the longest hours possible, for the cheapest wages possible, and in the most abusive conditions in order for the capitalist owners to skim off as much profit as possible from their "human capital" (Parker, 2003).

Anti-ethnic, anti-racial, and anti-cultural hostilities and hysteria were constantly generated from the ever-present desperate economic battle for jobs created by the growing industrialized economy, and the massive arrival of immigrants into the country. The view of the capitalists that workers were nothing more than human capital to be hired, used, discarded, and replaced at will was supported at every turn by legislators and the courts in the United States from old English legal precedent dominating developing American law.

As the nation approached the 20th century, the means by which the common man could have held on to their sovereign individuality through the legal protections granted concurrent with self-employment and self-sufficiency through business ownership and property rights – as the elite could – were nearly gone, swept up into massive monopolies owned by the small ruling elite group of bankers, manufacturers, and speculators created by the Hamilton economic plan of more than a century before. Strikes, violence, and warring between races, ethnic groups, and cultures for less-than-survival wages jobs would mark the country's entrance into the 20th century (Parker, 2003).

By 1900, one-percent of the American population would own nearly one-half of the nation's wealth (DeLong, 1998) creating a systemic distribution of wealth and power in the American complex state of affairs that was severely and abnormally skewed (Parker, 2003). As Madison, Jefferson, and others had warned just over a century before, creating a banking system that was privately owned, pushing for an American economic system based upon industrialization, and passing legislation that would financially benefit speculators, had tied the nation's future to "the selfish interests of a privileged class –

bankers, manufacturers, speculators" and had created a "large monied interest" in which the situation created for the masses of Americans would be one in which "personal liberties would be at the mercy of whoever happened to be in office" (Divine, et al,1987, I:189-190; Parker, 2003).

The massive amount of the nation's wealth in the hands of only one-percent of the population also caused an additional indirect depreciation of the legal power of the individual in American society. As stated earlier, the American states (and their treasuries) had acquired the powers of sovereignty (and sovereign immunity) of the hated English kings through the Court's ruling in 1890 in Hans.

The state (and federal) treasuries relied on taxation for their existence. Since a large portion of taxation revenue was generated directly or indirectly from the small ruling elite group in America, the state and federal treasuries became tied to the interests of the small group of ruling elite. As a result, the state (and federal) treasuries (through their legislators) silently cooperated with the political agendas of the ruling elite as a necessity for their own system self-preservation (Parker, 2003).

By 1900, the power of the individual had become subservient to the system preservation goals of the small ruling elite, as well as to the system-preservation goals of the state and federal treasuries that were dependent upon the monies of the elite through taxation revenue. This joining of the elite's system-preservation goals with the state and federal treasuries' system-preservation goals gave the ruling elite leviathan power to make the rights of the individual subservient to the elite's system-preservation goals

The ruling elite's influence over the creation of law and law enforcement would continue to benefit and reproduce the communications of the ruling elite, while slowly extinguishing the communications of those who dissented to the oppression occurring in America by the ruling elite. The ruling elite who controlled nearly half the nation's wealth by 1900 would later be termed "the robber barons" (DeLong,1998:1). Their legal stranglehold over the direction of the American economic system, over the lives of the masses of the common man, their influence over the creation and interpretation of law to their benefit, their influence over state and federal treasuries, and their financial ability to

access the legal system to benefit their own self-preservation and reproduction goals would be poignantly characterized by Supreme Court Justice Louis Brandeis who would state in reference to the robber barons in 1913 that "They control the people through the people's own money" (DeLong, 1998:10-11).

The Historical Roots of the American Drug Wars

The earliest constructions of the current day American war on drugs can be traced back to the financial motivations of a small association called the American Medical Association (AMA) that was formed in 1847 by a small group of self-described "elite" physicians. This small physician group had been distrusted, feared, and shied away from by the majority of Americans since the 17th century because of their medical practices of bloodletting, poisonous purgings with such toxins as mercury and arsenic, amputations, and human dissection (Parker, 2003).

The long-term system preservation goal of this small physician group, and their AMA, was to completely take over control of the centuries long practice of Americans of self-management of their own mental and physical pain. Historical documentation revealed the strategic goal of the AMA and their small physician group was first to displace the self-management medical community Americans had relied on for centuries, and then to use legal instrumentalism to block access to pain relief substances Americans used - except by legal payment of a fee to them by way of forced legal purchase of written prescriptions from them to buy such pain relief substances.

During the three centuries prior to the 20th century drug wars, the majority of Americans accessed the services of midwives, herbalists, homeopathic physicians, and physicians who did not engage in the bloodletting, poisonous purgings with such toxins as mercury and arsenic, amputations, and human dissection practices of the AMA's small physician group. When Americans went to physicians concerning medicines to use, it was for consulting purposes only. Americans were free, and had been free for centuries,

to purchase preparations of the types listed in the Appendix[13] without a written prescription.

Any assertion to an adult American prior to the 20th century American drug wars that they would be legally required by the government to get written "permission slips" from doctors to legally purchase these same products they had been purchasing at the local apothecary for centuries, would have been viewed not only as insane, but also as being completely heretical to the foundational principles of individual autonomy, individual freedom, and especially the individual sovereignty of the individual that was fought for in the American Revolution. Such an assertion to adult Americans prior to the drug wars of the 20th century would have been viewed as an egregious act of governmental intrusion into one of the most sacred and private domains of the individual – the self management of their own physical and mental pain (Parker, 2003).

The AMA And Their Physician Group Join Forces With The Ruling Elite To Accomplish Their System Preservation Goals

Between the early 1800's and 1900, approximately 400 small medical schools were founded in the nation mostly organized by small groups of the "non-elite" group of physicians who learned their medical skills as apprentices, and who gave lectures to prospective medical students for fees. By the late 1800's, the massive amounts of medical schools in America had produced a ratio of one physician for every 568 people in America, compared with Germany's ratio of one physician for every 2,000 people. The saturation of the market had reduced the average yearly income of physicians from a range between $200 per year up to a top value of $30,000 per year for a very few number of physicians. Most physician incomes were at the lower rather than the higher end of the financial spectrum (Brown, 1979; Parker, 2003).

The saturation of the market was proving especially hard on the AMA's small physician group, not only because of the saturation of the market, but also because of the

[13] Appendix, Table I: Common Preparations Used By Americans Pre &Post-Revolution, Pre-Drug Criminalization Era.

practices they engaged in. The AMA and their small physician group made it quite clear how they viewed their patients. At their first convention in 1847 in which they published their Code of Ethics, one of the commandments was "The obedience of a patient to the prescription of his doctor should be prompt and implicit" and the patient "should never permit his own crude opinions as to their fitness influence his attention to them" (Brown, 1979:66; Parker, 2003).

Even when this physician group's practices such as bloodletting, or poisonous purging with such toxins as mercury and arsenic resulted in the death or physical injury of their patients, this small physician group made it quite clear they demanded absolute and total obedience from their patients to whatever practices they performed upon them. During times of competitive warring with other medical sects in America during the 1800's, this small physician group intensified their amount of bloodletting such that many patients lost consciousness or died. To further compete, these same physicians began to increase the amount of mercury they used in purgings, which resulted in many patients losing their teeth and jawbones. After such mercurial purgings, patients would be invigorated with arsenic solutions. Some of these practices did not cease until the 1920's (Young, 1961; Brown, 1979; Parker, 2003).

By the late 1800's, the competition between the abundant medical sects in America that was driving physicians' incomes down – and the shunning of their medical practices by the majority of Americans - caused the AMA and their small physician group to look elsewhere for other methods to increase their earning potential. To solve the problem, the AMA and their physician group began a concerted effort to infiltrate medical education and medical licensing. The AMA courted state licensing officials and influenced the appointment of men to the state licensing boards. By influencing the appointment of men to the state licensing boards, the AMA began to influence the contents of the state licensing board examinations (Brown, 1979; Parker, 2003).

The AMA then sent its council of officers out to all 160 of the country's medical schools to inspect them for their success in passing the AMA's now-controlled state medical licensing exams. After conducting their inspection, the AMA promptly published

a list in their publication – the Journal of the American Medical Association (JAMA) – of the percentage of each school's graduates who failed the AMA-influenced exam. This tactic meant certain death for many of the remaining medical schools. By 1910, the number of remaining medical schools had now fallen to 131 (Brown, 1979; Parker, 2003).

During these same years, the AMA and its physician group also sought assistance from the ruling elite and their fortunes, in order to assist them in the displacement of the medical community the majority of Americans had relied on for three centuries for self-management of their own mental and physical pain. The AMA and their small physician group forged an alliance with the Carnegie Foundation, the Rockefeller General Education Board, and the Rockefeller Institute for Medical Research to accomplish the task (Brown, 1979; Parker, 2003).

By 1893, John Davidson (J.D.) Rockefeller had accumulated nearly seventy major investments totaling twenty-three million dollars in such areas as the railroads, banks, mining, and manufacturing, in addition to his Standard Oil company. Rockefeller's income per year was approximately ten million dollars (Brown, 1979). By 1901, Andrew Carnegie had amassed such a fortune from his capitalist ventures that he sold his steel mills to J. P. Morgan for $480 million dollars ("Andrew Carnegie," 1999) at a time when the average American worker's yearly wages had only risen to about $579 per year (Divine,et al., 1987:I).

Naturally, to any investment-minded capitalist, the financial benefits of taking over complete legal control of the pain relief substance market would be far more profitable than any steel mill, railroad, mining, or oil venture. Capturing legal control over the pain relief substance market would produce a perpetual source of never-ending great wealth, since there would always be human beings suffering from some form of physical and mental pain until the end of time (Parker, 2003).

Collaborating with the AMA and their physician group, the Carnegie Foundation provided the funding to send Abraham Flexner, brother of Dr. Bernard Flexner (director of the Rockefeller Institute) out to conduct an in-depth study of all of the medical schools

in America. Abraham Flexner had no medical training. However, Dr. N.P. Colwell accompanied Abraham on his mission. Colwell had conducted the inspections for the state medical licensing survey conducted by the AMA in which an abundance of the AMA and their physician group's competition had been shut down with the JAMA publication (Brown, 1979; Parker, 2003).

Abraham reported the findings of the survey in a publication called "The Flexner Report." The report declared that the country was overcrowded with doctors, and there needed to be fewer of them. Strict educational limits[14] would have to be instituted to limit the number of physicians in the country. The driving motto of the AMA as to the number of physicians available to the public would be "the fewer the better" since the fewer there were, the more money they could charge for their services (Brown, 1979: 157; Parker, 2003).

The effects of the AMA's infiltration of state medical licensing, and the subsequent publication of The Flexner Report accomplished what the AMA, their small physician group, and the capitalists set out to accomplish. Between 1904 and 1915, ninety-two medical schools closed their doors. The effects of The Flexner Report were especially hard on black medical colleges. Five medical schools for blacks closed because they were cut off from funding based upon The Flexner Report (Brown, 1979: 154; Parker, 2003). By 1930, the AMA and its small physician group would have fully displaced nearly all other medical sects in the United States (Brown, 1979; Parker, 2003).

The AMA and their physician group were promoting the creation of a "new scientific medicine industry" that would be controlled by themselves and the capitalists.[15] For the next step in their strategic plan, they began to promote legislation that would criminalize the pain relief substances Americans had relied on for self-management of their own mental and physical pain. As a result of the sequential criminalization of the

[14] The educational requirements proposed were so financially unattainable to most Americans, historian William Rothchild would observe that their requirements "…would have closed down practically every medical school in the country, and would have depleted the ranks of formally educated physicians in a few years" (Brown, 1979:65).

[15] John D. Rockefeller would eventually contribute sixty-five million dollars to the creation of the new scientific medicine industry (Brown, 1979; Parker, 2003).

substances, the AMA, their small physician group, and the capitalists would create the drug criminalization industry of the 20th century, and cause severe social trauma to millions of Americans through the resultant drug wars. The AMA and their small physician group would amass such great wealth, status, and power for themselves from the accomplishment of their strategic goals, that by the 1970's they would have raised their perceived status in American society to be equivalent to that of a U. S. Supreme Court justice (Brown, 1979).

Creating The Drug Criminalization Industry

The first step to attempt to criminalize pain relief substances occurred during efforts to pass the Food and Drugs Act of 1906.[16] The AMA and their physician group forged an alliance with Dr. Wiley – the Chief Chemist of the Department of Agriculture – to go after the patent medicine industry. The goal of their alliance with Dr. Wiley was to have Wiley propose that the final bill of the Food and Drugs Act of 1906 require a provision that no patent medicine remedy containing alcohol or cocaine could be sold except by doctor's prescription (Young, 1961; Parker, 2003). Considering that the majority of patent medicines contained alcohol - since they were tinctures as most herbal remedies were (Young, 1961) - such a provision would have made it illegal for any American to purchase almost any patent medicine without a written prescription from the now closing ranks of available physicians (Parker, 2003). The Committee on Legislation noted to Dr. Wiley and his compatriots at the AMA that "Such a law would practically destroy the sale of proprietary medicines in the United States" (Young, 161:226).

A subsequent amendment to the Food and Drugs Act of 1906 – the Anti-Opium Smoking Act of 1909 – was enacted as a method to economically depreciate the presence of Chinese-Americans in the labor market at a time when tremendous warring for jobs was occurring in the American job market of the capitalists' monopolistic empires. The subsequent passage of the Harrison Narcotic Act in 1914 would reveal the discriminatory

[16] The Food and Drugs Act of 1906 would later be changed to The Food and Drug Act (Parker, 2003).

nature of the Anti-Opium Smoking Act of 1909. The Harrison Narcotic Act of 1914 would still allow patent medicines to contain two grains of opium, one-fourth grain of morphine, and one-eighth grain of heroin, per ounce. The majority of the white population who used opium products in America used the oral consumption method of opium products, as opposed to the smoking method used by Chinese-Americans (Parker, 2003). The passage of the Harrison Narcotic Act of 1914 provided the AMA and their physician group with their first small victory by giving them legal written prescription control of all patent medicines that contained opium, morphine, or heroin in dosages greater than those stated above.

The Harrison Narcotic Act of 1914 was also used as a method to economically depreciate the African-American presence in the warring job environment of the early 1900's. African-Americans had been newly trained in the art of manual labor in educational institutions funded by the capitalists, to provide the capitalists with a cheap source of trained manual labor. However, African-Americans then became a threat to other Americans for jobs in the desperate competitive warring job environment created by the capitalists' monopolistic empires.

It is not surprising, then, that one of the drugs to be criminalized in the Harrison Narcotic Act would be coca products. Coca products had become a preferred source of pain relief substance by African-Americans to help them tolerate the physically demanding manual labor jobs they endured for long hours each day – as coca products had for thousands of years to laborers in South American cultures (Parker, 2003).

While the Harrison Narcotic Act of 1914 was pending in Congress, massive false hysteria was generated in the press about African-American males. The press reported that African-American males gained superhuman powers under the influence of coca products such that they could withstand speeding bullets from policemen's guns. Hysteria was also generated through the press to create fear for the protection of white women from the "'cocaine-crazed' Negroe brain" ("History of Prohibition," 2002) in order to swing the vote for the passage of the Harrison Narcotic Act (Parker, 2003). By gaining legal written prescription control over coca products with the passage of the

Harrison Narcotic Act, the AMA and their physician group found another victory for their system-preservation and reproduction goals.

The greatest victory for the AMA and its physician group came with the Eighteenth Amendment to the U.S. Constitution – more commonly called Prohibition. The swing vote used to criminalize alcohol came by accessing anti-German hysteria generated by President Wilson to gain support for World War I.

The Anti-Saloon League had been trying to criminalize all alcohol products since the latter part of the 1800's. In the early 1900's, John D. Rockefeller provided financial backing to the Anti-Saloon League, shortly after he established the Rockefeller Institute for Medical Research in 1901. A senate investigation into the purported alliance between beer brewers in the United States (most of whom were of Teutonic ancestry) and pro-German, anti-American activity in the United States was used to swing the vote to criminalize alcohol. This was the most financially beneficial victory for the AMA and their physician group to date. Prohibition gave them legal written prescription control over whiskey and wine. After prohibition was enacted, legal possession of alcohol was only allowed for religious purpose, and by written prescription from a physician (for a fee) (Parker, 2003).

Although the AMA and its physician group found some victory with the passage of the Harrison Narcotic Act, it was Prohibition that created the national drug criminalization industry in America. The Harrison Narcotic Act and the Anti-Opium Smoking Act targeted specific ethnic and racial minority groups, but Prohibition affected all social groups in America. The passage of Prohibition created the most powerful black market in a drug that America had ever known, and one of the most powerful governmental bureaucracies that America had ever known. Although the Food and Drugs Act of 1906 created the first federal department – the Food and Drug Administration – to give interstate control over food and drugs, its purpose was simply to provide consumers with informed choice, not to control their choice.

Prohibition was set up to prevent use of a drug – alcohol – a drug used by nearly every social group in America. After the enactment of Prohibition[17] in January 1920, the incomes of physicians and druggists[18] (the only legal retailers of whiskey and wine) skyrocketed in the United States, as did the incomes of the black market, and the federal bureaucracies created to enforce Prohibition and to fight the black market in alcohol (Parker, 2003).

Repeal of Prohibition – The Drug Criminalization Industry Seeks A New Illegal Substance For System Preservation

At the time of the repeal of Prohibition in 1933, the drug criminalization industry consisted of the scientific medicine industry, the Prohibition Bureau (which included the Bureau of Narcotics), and the black market. These three systems were the financial beneficiaries of the criminalized status of substances that had formally been used legally by Americans during the three centuries before the American drug wars. These three systems had especially benefited financially from the criminalization of the drug alcohol. The financial benefits of alcohol's criminalized status markedly contributed to the system self-preservation and reproduction of each of these systems. Such reproduction also gave these systems, including the black market system, significant wealth and power over the complex state of affairs in American society, including the legal, political, and economic sub-systems in America.

Repeal of Prohibition significantly threatened the system self-preservation goals of these three systems; however, these three systems would soon benefit from joining in autopoietic connection with the most powerful system in America – the ruling business elite who feared an economic threat from a commercialized hemp industry. A commercialized hemp industry could essentially reverse the ruling business elite's

[17] The Prohibition Era in America – when manufacture, distribution, sale, or possession of alcohol without legal explanation was illegal – lasted from 1920 to 1933 (Parker, 2003).
[18] "Druggists" were what were formerly called apothecaries (Parker, 2003).

monopolistic, capitalist position in the economic hierarchy in America, as well as their legal control of the masses of the common man below them (Parker, 2003).

To solve their system-preservation dilemma, the law and the media would be accessed again to create a new criminalized substance - marijuana. Marijuana use had grown very popular during Prohibition, and was widely used in America as a substitute for the drug alcohol (O'Brien, 1984; Parker, 2003). To criminalize marijuana - a substance that was safer than alcohol - incredible myths and hysteria about marijuana use were feverishly propagated in the media channels of the nation, chiefly by the ruling business elite and the government bureaucracies who formerly had enforcement control over alcohol while it was illegal (Parker, 2003).

Creating fantastic myths that users of marijuana would turn into wild beasts where their one big thought would be to kill others, marijuana was cleverly portrayed in the media by these threatened systems as a fiendish drug that would turn its users into chronically-psychotic beasts who would need to be locked away in insane asylums. Coincidentally, at this same time in America, mandatory sterilization of the insane was being promoted, and had recently been validated by the U. S. Supreme Court in the case of Buck v. Bell (1927). The ruling elite group who feared economic displacement by a commercialized hemp industry had also been promoting the sterilization, and potential killing, of large groups of people as a means of cleansing America of undesirable human beings through what was commonly called the Eugenics Movement[19] (Parker, 2003).

To further guarantee the criminalization of marijuana - and the destruction of the coming commercialized hemp industry that was threatening the ruling business elite's economic hierarchy - these systems also linked the use of marijuana to Mexican-Americans. Ethnic hatred of Mexican-Americans[20] had risen dramatically in America in the severely depressed economy of the Great Depression.

---

[19] The Eugenics Movement promoted the mandatory sterilization of the feeble-minded, the insane, criminals, delinquents, the wayward, the blind, the seriously-visually impaired, the deformed, the dependent, orphans, ne'er-do-wells, the homeless, tramps, and paupers, as well as promoting the idea that killing of the mentally unfit was a healing act (Parker, 2003).

[20] Hispanic-Americans

The Marihuana Tax Act of 1937 – and the fantastic myths and hysteria promoted by the ruling elite - destroyed the coming commercialized hemp industry that threatened the elite's economic hierarchy, by taxing and harassing the hemp industry out of existence. It preserved the Bureau of Narcotics after it broke away from the Prohibition Bureau and was faced with severe budget cuts from the effects of the Great Depression. After facing severe system entropy upon the repeal of Prohibition, the drug criminalization industry found new life with the criminalization of marijuana.

The Drug Criminalization Industry's Effect On Modern Fourth Amendment Law

As more and more drug laws were enacted during the 20th century in America to benefit the drug criminalization industry, law enforcement's use of militaristic electronic surveillance equipment also increased, and became more technologically advanced. By the end of the 20th century, the surveillance capability of law enforcement – with a warrant – would breach nearly every possible area of human privacy. The natural privacy barriers available to those living at the time of the American Revolution from doors, walls, space, and time, had long fallen victim to advanced surveillance technology's ability to pry into any "…secret region of a man's life at will" as noted by the Court in 1966 in Osborn (Osborn, 1966:440; Parker, 2003).

The danger from this privacy-violating capability lies in the inherent danger of the use of legal instrumentalism. As shown before, tyranny and oppression are an inherent danger whenever one social system accesses creation of law to engage the law enforcement feature – including the use of warrants - to silence the dissenting communications of other social systems in the complex state of affairs.

The myths and hysteria used by the drug criminalization industry to enact drug laws for their own system preservation, and then to engage the use of law enforcement's surveillance weaponry to silence their dissent in order to proliferate only their own system's reproduction - has not only unfairly caused great social trauma to millions of

Americans, but it has also contributed significantly to the perception by the legal sub-system that law enforcement's violation of an individual's natural zone of privacy with the use of militaristic surveillance equipment, with a warrant, is somehow "normal."

The Drug Criminalization Industry Silences the Voice of the People

In 1969, the Court ruled in the case of Leary v. U. S. - concerning the Marihuana Tax Act of 1937 - that the provision of the Act that required unregistered marijuana users to give their name and address (in order to pay the tax on the marijuana), rather than to just let them pay the tax, was unconstitutional. After Leary, drug laws would no longer be based upon taxation principles; instead, the 1970 Controlled Substances Act (CSA)[21] was passed, and a method was executed by which the drug criminalization industry - acting through the Executive Branch of the American government - would retain nearly perfect, unchecked control over who would become drug criminals in America. Provisions of the CSA make it nearly impossible for any drugs - including drugs that are less than or equal in danger to alcohol, such as marijuana - to be removed from the Schedules by anyone except the drug criminalization industry itself.

By Congress' granting to the Executive Branch – one of the members of the drug criminalization industry - such a powerful arbitrary control over the citizenry, Congress abdicated its role as the representative voice of the people in complete violation of one of the requisite requirements the Framers of the government felt was necessary to prevent tyranny and oppression in American society. The CSA effectively silenced the voice of the people - and almost all dissenting social systems to the drug criminalization industry - in the complex state of affairs. By extinguishing the voice of the people, the drug criminalization industry became an almost perfectly closed, impenetrable system able to reproduce itself to leviathan form by the end of the 20th century.

The Fourth Amendment became a powerful tool to the drug criminalization industry in its reproduction of itself to its leviathan form. As stated prior, the Katz

[21] The Controlled Substances Act was not a taxation based drug law, as drug laws had been until then.

privacy analysis dictates what will or will not be considered a violation of Fourth Amendment law. First, the individual must prove to the majority of the Court that he or she exhibited an expectation of privacy. But more importantly, secondly, they must prove the expectation of privacy is one that society is prepared to accept as reasonable.[22]

The societal prong of the Katz analysis inadvertently aided the drug criminalization industry by legally validating its system's communications, thereby allowing it to reproduce itself to its leviathan form by the end of the 20th century. Even though drug laws were no longer based upon taxation "defrauding the government" legislation after the CSA was enacted, old English based taxation search and seizure legal theory from the taxation-based drug laws of the Prohibition Era were slowly incorporated into the societal prong of the Katz analysis.

The Olmstead legal precedent[23] – the public domain of society – would be used to interpret what society was prepared to recognize as a reasonable place for law enforcement to conduct surveillance. If law enforcement used its militaristic electronic surveillance weaponry in the public domain of society, the Court majority would generally conclude that society was not prepared to recognize the public domain as a place where an individual could have an expectation of privacy. The moment an American stepped outside of their home, they were now wide open to electronic surveillance by law enforcement. This has contributed to the unprecedented trend in Court rulings favoring law enforcement, post-Katz (Parker, 2003).

Conclusion

Application of Luhmannian concepts to the origins and effects of the American drug wars revealed that tyranny and oppression are the inherent danger of legal instrumentalism. Creation of law engages law enforcement. Social systems that gain abnormally skewed ability to create law can use law enforcement to legally silence the communications of other social systems in the complex state of affairs. By legally

[22] This second part of the privacy analysis will be referred to as the societal prong of the Katz analysis.
[23] A precedent based upon a taxation based drug law.

silencing the dissent - or anti-social system communications of other social systems in the complex state of affairs - such systems can then reproduce themselves to leviathan form.

The drug criminalization industry in America had already grown to significant proportions by the late 1960's using myth and hysteria to create drug laws for system self-preservation and reproduction. Passage of the CSA in 1970 allowed the drug criminalization industry - acting through the Executive Branch of the government - to become a nearly perfectly closed, impenetrable system by the CSA's silencing of the representative voice of the people. Legally empowered by the ability to create drug criminals at will, drug laws proliferated, as did the drug criminalization industry itself.

The Katz privacy analysis - which was created to provide maximum protection to the individual from the increasing and obsessive use by law enforcement of militaristic electronic surveillance weaponry - inadvertently aided the drug criminalization industry's autopoiesis, and caused an unprecedented trend of rulings in favor of law enforcement. By incorporation of old English taxation-based search and seizure law from the Prohibition Era into post-Katz legal rulings – the Court would slowly allow the public domain of society to dominate interpretation of the societal prong of the Katz analysis. As long as law enforcement utilized its militaristic electronic surveillance weaponry in the public domain, the majority of the Court would generally conclude in the last three decades of the 20th century that they could legally do so.

The drug criminalization industry's relentless access of law creation, its effective extinguishment of the representative voice of the people with the passage of the CSA in 1970, its access of the most innovative militaristic electronic surveillance equipment to force compliance to its system preservation and reproduction goals, and the incorporation and reproduction of the taxation-based search and seizure laws of America's former oppressors into post-Katz Court majority ruling, has caused America – the declared land of the free - to paradoxically endure one of the highest incarceration rates in global society. The Fourth Amendment - which was intended by the Framers to provide all future Americans with the maximum privacy protection they would need to shield themselves from potential tyranny and oppression – has now been rendered one of the

most useless Amendments to the U.S. Constitution for protection of the individual in America from the tyranny and oppression of oppressive social systems.

REFERENCES

Adams, J.T. (1933) *The March of Democracy: A History of the United States, Volume III: Civil War and Reconstruction*. New York: Charles Scribner's Sons.

"Andrew Carnegie: Rags to Riches Timeline." (1999) *PBS Online*. Retrieved from: http://www.pbs.org/wgbh/amex/carnegie/ timeline/timeline2.html Accessed 09-26-02.

Asbury, H. (1950) *The Great Illusion: An Informal History of Prohibition.* New York: Doubleday & Company, Inc.

Brown, E. Richard. (1979*) Rockefeller Medicine Men: Medicine and Capitalism in America.* California: University of California Press, Berkeley.

Buchan, Dr. W. *Domestic Medicine*. (1785) Retrieved from: http://www.american revolution.org/med2/3.html. Accessed 10-18-02.

Bureau of Justice Statistics. U. S. Department of Justice – Office of Justice Programs. "Summary Findings – Prosecution." (2003) Retrieved from: http://www.ojp.usdoj. gov/bjs/fed.htm Accessed on 04-19-03.

Cole, G. F., and C. E. Smith. (2001) *The American System of Criminal Justice.* 9th Edition. California: Wadsworth/Thomson Learning.

Cotterrell, R. (1992) *The Sociology of Law: An Introduction*. London: Butterworths.

Decisions of the Supreme Court. (1965-2002) New York: The Lawyers Cooperative

Publishing Company.

DeLong, J. B. (1998) "Robber Barons." University of California at Berkeley. Retrieved from: http://econ161.berkeley.edu/Econ_Articles/carnegie/DeLong_Moscow_paper2.html. Accessed 09-05-02.

Divine, R.A., Breen, T.H., Fredrickson, G. M & H. R. Williams. (1987). *America Past And Present. Volume One to 1877*. 2nd Edition. Illinois: Scott, Foresman, and Company.

Freking, K. "DEA Sees Big Jump In Arrests." (2001). *Arkansas-Democratic-Gazette*, August 20, 2001. Retrieved from: http://www.drugtext.org/library/press/2001/[08-20-01][]%20us%20drug%20sentences%20ge…" Accessed on 04-17-03.

Gilliard, D.K. (1999) "Prison and Jail Inmates at Midyear 1998." Washington, D.C.: *Bureau of Justice Statistics Bulletin,* U.S. Dept. of Justice.

"History of Prohibition." (2002) Retrieved from: http://www.drugpolicy.org/race/ http://drugpolicy.org/race/historyofpro/Accessed 11-20-02.

Luhmann, N. (1985) *A Sociological Theory of Law*. Translated by Elizabeth King and Martin Albrow. London, England: Routledge & Kegan Paul.

Luhmann, N. (1989) *Ecological Communications*. Translated by John Bednarz, Jr., IL: The University of Chicago Press.

Miller, J. M., and L. H. Selva. (1994) "Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs." *Justice Quarterly* 11: 313-335.

O'Brien, R., and S. Cohen., M.D. (1984) *The Encyclopedia of Drug Abuse.* New York: Facts On File, Inc.

Parker, L. A. (2003) "The Discriminatory Origins of the American Wars, The Creation of the Drug Criminalization Industry, and the Effect on Modern Fourth Amendment Law." Master's Thesis, Tennessee State University/Middle Tennessee State University Joint Criminal Justice Master's Program.

Tera Media. (2000) "Hooked-Illegal Drugs And How They Got That Way." (Film) New York: New York.

"2001 Supplementary Survey Profile, United States." (2003) Retrieved from: http:// www.census.gov/acs/www/Products/Profiles/Single/2001/ss01/Tabular/010/01000451.htm Accessed 04-26-03.

U. S. Census Bureau."U. S .Population Demographic Estimates." (2003) Retrieved from: http://eire.census.gov/popest/data/national.php Accessed on 04-19-03.

U.S. Controlled Substances Act of 1970 (Title II of The Comprehensive Drug Abuse Prevention & Control Act of 1970), Public Law 91-513. (1970)Retrieved from: http://www.doj.gov/dea/pubs/csa.html Accessed 09-05-02.

"U. S. Prison Number Hits Two Million." (2003) Retrieved from: http://www.drcnet. org/wol/282.html Accessed on 04-19-03.

Young, J. H. (1961). *The Toadstool Millionaires: A Social History of Patent Medicines Before Federal Regulation.* New Jersey: Princeton University Press.

Cases Cited

Buck v. Bell, 274 U.S. 200 (1927) Retrieved from: http://
www.government.sbc.edu/apt/docs/buckvbell.html
Accessed on 11-11-02.

Carroll v. U. S., 267 U.S. 132 (1925).

Hans v. Louisiana, 134 U.S.1 (1890).

Iske v. U.S., 396 F. 2d 28 (1968).

Katz v. U.S., 389 U.S. 347 (1967).

Leary v. U. S., 395 U.S. 6 (1969) Retrieved from:
http//:www.druglibary.org Accessed 05-20-02.

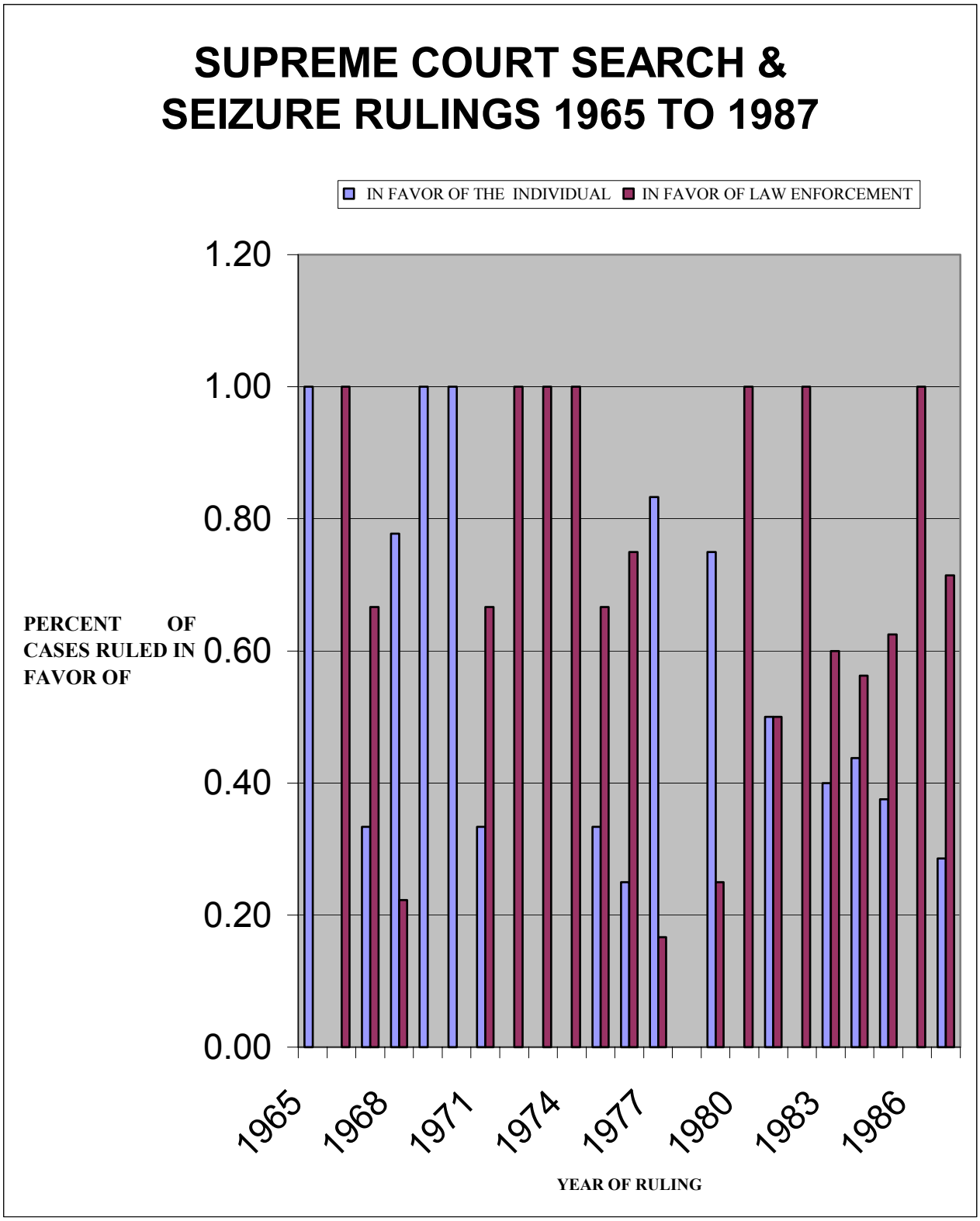
Olmstead v. U.S., 277 U.S.438 (1928)

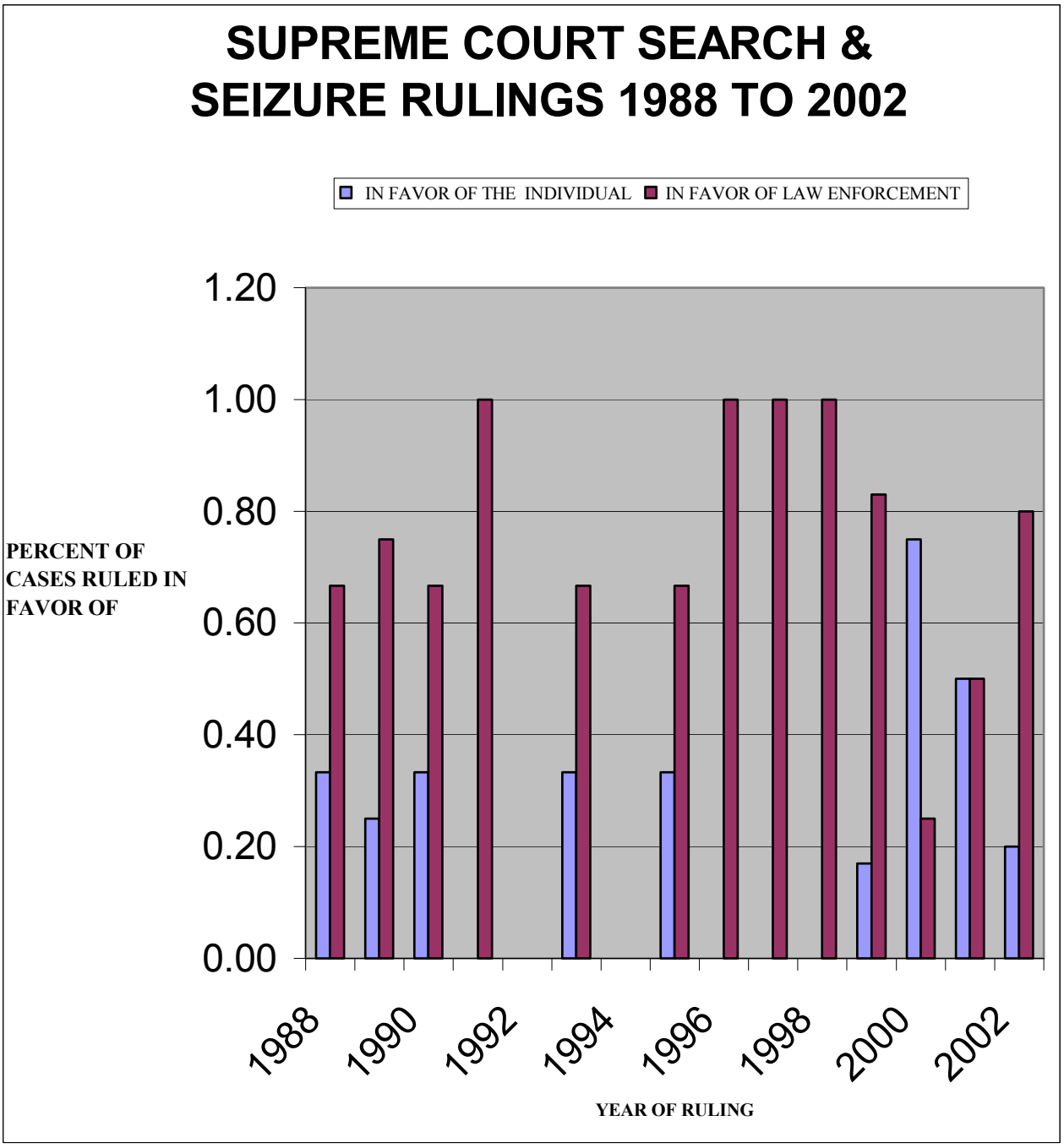
Osborn v. U.S., 385 U.S.232 (1966)

Parrish v. Johnson, 800 F. 2d. (6th Cir. 1986)

U. S. v.Cusumano, 67 F.3d 1497 (10th Cir.1995).

APPENDIX


SUPREME COURT SEARCH & SEIZURE RULINGS 1965 TO 1987
IN FAVOR OF THE INDIVIDUAL
IN FAVOR OF LAW ENFORCEMENT
PERCENT OF CASES RULED IN FAVOR OF
1.20
1.00
0.80
0.60
0.40
0.20
0.00
1965
1968
1971
1974
1977
1980
1983
1986
YEAR OF RULING



Source Data For Graphs: *Decisions of the Supreme Court* (1965-2002)

TABLE I: COMMON PREPARATIONS USED BY AMERICANS PRE & POST-

REVOLUTION, PRE-DRUG CRIMINALIZATION ERA

Name of Preparation	**Ingredients**	**Ailment Prepared For**
Compound Tincture of the Bark	Peruvian bark, Seville-orange peel cinnamon, brandy	Intermittent fevers, especially of the slow, nervous, or putrid kind
Tincture of Black Hellebore	Black hellebore root, proof spirit (alcohol), cochineal (for color)	For obstruction of menses; taken with camomile or penny-royal tea twice-a-day
Tincture of Opium (or Liquid Laudanum)	Two ounces crude opium, spirituous aromatic water, mountain wine. Twenty five drops contains about a grain of opium; the common dose from twenty to thirty drops	Various ailments and preparations
Compound Tincture of Senna	Senna, jalap, coriander seed, cream of tartar, French brandy, sugar	Purgative. Equal in purpose to that of *Elixir salutis* and *Daffy's Elixir*
Tincture of Spanish Flies	Spanish flies, powdered; spirit of wine	Acrid stimulant for external use of the palsy or chronic rheumatism
Tincture of the Balsam of Tolu	Balsam of Tolu; spirit of wine	Coughs, or other complaints of the breast
Tincture of Rhubarb	Rhubarb, cardamom seeds, brandy	Stomach problems, indigestion, laxity of intestines, fluxes, colic
Paregoric Elixir	Flowers of benzoin ½ oz, opium, two drachms, volatile aromoatic spirit, one pound. Adult dose is 50 to 100 drops.	To ease pain; to allay coughs; difficult breathing; and in disorders of children such as the hooping cough

Sacred Elixir	Rhubarb, succotorine aloes, cardamom seeds, French brandy	Stomach purge
Camphorated Spirit of Wine	Camphor, rectified spirits	Embrocation in bruises, palsies, chronic rheumatism, and for preventing gangrenes
Vinegar of Squills	Dried squills, distilled vinegar, proof spirits (alcohol)	Disorders of the breast, promotion of urine discharge, purgative
Styptic Water	Blue vitriol and alum, oil of vitriol, water	Nosebleeds, and other hemmorages.
Cinnamon Water	Cinnamon bark, brandy, water	Diluent for other medicine

Name of Preparation	Ingredients	Ailment Prepared For
Anodyne Balsam	White Spanish soap, opium, wine, camphor	To ease the pain of violent strains, rheumatic complaints
Vulnerary Balsam	Benzoin, balsam of Peru,hepatic aloes, wine	To remove coughs, asthmas, and other complaints of the breast, colic, kidney cleansing
Collyrium of Lead	Lead, crude sal ammoniac, laudanum	Cure of sore eyes (eyes are washed with the mixture)
Anodyne Fomentation	White poppy-heads, elder flowers	Relief of acute pain
Common Fomentation	Wormwood, camomile flowers, brandy	Same as with Aromatic Fomentation
Infusion of the Bark	Bark, brandy	Weak stomach
Diuretic Mixture	Mint-water, vinegar of squills, sweet spirit of nitre, ginger	Diuretic
Laxative Absorbent Mixture	Magnesia alba, Turkey rhubarb, cinnamon water, syrup of sugar	Laxative/Infant Acidity
Mercurial Ointment	Quicksilver, hog's lard, mutton suet	Ointment for skin wounds, sores
Issue Ointment	Spanish flies (dried/powdered), yellow basilicum ointment	Dressing blisters
Liniment for the Piles	Emollient ointment, liquid laudanum, egg yolk	Hemorrhoids
Composing Pill	Purified opium, ten grains; Castile soap (to make 20 pills)	Stomach disorder, up to 3 pills per episode
Mercurial Pill	Quicksilver,honey, Castile soap, liquorice.	Alterant, salivation
Mercurial Sublimate Pill	Corrosive sublimate of mercury, crude sal ammoniac, bread	Venereal disease, worms, alterant
Anodyne Plaster	Adhesive plaster, powdered opium, camphor	Acute pains, especially of the nervous kind
Diuretic Powder	Gum Arabic, purified nitre.	Venereal disease
Simple Syrup of Laudanum	Water, Sugar, 25 drops of Laudanum	Various ailments

Source: (D. Buchan, *Domestic Medicine,* 1785)