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FACTS DO MATTER: A REPLY TO PROFESSOR WISOTSKY

Steven B. Duke*

Although he agrees that the "drug war is an indefensible disaster that harms almost everyone," Professor Wisotsky opines that my article, Drug Prohibition: An Unnatural Disaster1 is "the wrong argument at the wrong time," because, he says, the issue has nothing to do with facts.2 A "rational approach" has no "potential to make a difference" where drugs are concerned because "people, even policy makers, are not driven by fact and knowledge, but by values and symbols."3 "[T]he drug debate," he declares, "is not and has never been about facts or evidence."4 "[D]ecades of relentless anti-drug propaganda have deprived the public and its officials of their powers of critical thinking on this subject."5

Should those of us who believe the drug war is a disaster surrender to its craziness and ignore its catastrophic destructiveness? Apparently so, implies Wisotsky, unless we can "create [an intellectual] breakthrough" and invent "a new paradigm." Until we can do that, he says, we are merely "imitating intellectual hamsters running in a wheel to nowhere."6

I share Wisotsky’s frustration both with our inability to persuade policymakers to agree with us and with the relentless escalation of the drug war in its most extreme imbecilities. But I have little faith that anyone will invent a "new paradigm" that will persuade people who are otherwise incapable of absorbing facts or knowledge. If I agreed with

* Law of Science and Technology Professor, Yale Law School. I am grateful for the assistance of Ashlie Beringer, Grant Vinik, and Richard St. John, students at Yale Law School.

3. Id. at 642.
4. Id. at 643.
5. Id. at 649.
6. Id. at 650.
Wisotsky that facts are irrelevant, I would surrender to the drug warriors and sit by and watch them destroy what is left of our country and our Constitution. I disagree with that extreme assessment, however. Upon what evidence does Wisotsky base his opinion about the futility of facts and pragmatic arguments? He suggests that many others long ago made the basic arguments that are repackaged in my article. He is correct. As I implied in the first footnote of the article, many, including Wisotsky, preceded me as published anti-prohibitionists. Our intellectual father on drug prohibition was Milton Friedman, who has been eloquently stating our case for decades. Friedman, of course, was influenced by Frederich Hayek, John Stuart Mill, Adam Smith, and so on. Outside the realm of science, good ideas are rarely original. That intellectuals have been debating drug prohibition for centuries, however, does not establish that today’s general public has heard the arguments and rejected them or even, as Wisotsky asserts, “that the issue of legalization or decriminalization of drugs has been hotly debated for at least three decades.”

What has been debated for at least three decades by many Americans is the proper legal approach to marijuana. It may not even be a great stretch to say that marijuana decriminalization has been “hotly debated” for that period of time. But the marijuana debate was not totally ineffective. Eleven states decriminalized marijuana during the 1970s and a Presidential candidate, Jimmy Carter, was elected on a promise to seek decriminalization of marijuana at the federal level. There have, of course, been reversals on the marijuana front since the 1970s, and the government is now back to lying about the “deadly” nature of marijuana much as Harry Anslinger lied in the 1930s. But the main reason for marijuana’s loss of ground is the drug warriors’ belief that the marijuana battle will determine the outcome of the entire war: if their past lies about marijuana are recognized as such, and marijuana is legalized, the entire drug war belief system could collapse. I think that view is mistaken, but such fears clearly fuel the war on marijuana.

7. Id. at 640.
9. See LONGEST WAR, supra note 8, at 249.
That the marijuana debate has engaged the public, study groups, and commissions for several decades does not establish that the broad issue of drug prohibition has long occupied either the minds of Americans or their media. Marijuana prohibition is wrong because marijuana is a relatively benign drug, far less harmful even than legal recreational drugs—and undeniably so. It is also an important medicine whose prohibition denies tens of thousands of sick people its medical benefits. The prohibition of opiates and cocaine is wrong for somewhat different, more complex, and more debatable reasons. The costs, consequences, and justifications for drug prohibition in general have not been widely debated even for a decade.

Criticism of drug prohibition in America before 1988 was infrequent and usually buried in articles and books that nobody read. Until then, anti-prohibitionist argument rarely penetrated the popular media. In 1988, however, a large number of articles on the subject appeared in the popular press. Baltimore Mayor Kurt Schmoke created a stir when he proposed decriminalization to the conference of mayors in April 1988. Ethan Nadelmann’s influential article appeared in *Science* in 1989, and Judge Robert Sweet’s legalization proposal was delivered in 1989. Public debate exploded. Network talk shows took up the subject. A question about legalization was even asked during the 1992 presidential debates. There was a flurry of new discussion after December 1993, when the former Surgeon General, Joycelyn Elders, suggested legalization should be "studied."

Increasingly, as leaders and organizations publicly oppose the drug war, the press covers the announcements. Usually, however, the press reports a pro-legalization position by a public figure or prominent intellectual as if it were a peculiarity or a quirk—similar to the way it reports gossip. The popular media do not yet take the issues seriously. As I noted in my article, when the press undertakes to deal seriously

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with the crime issue, drug prohibition is rarely even mentioned as a possible contributor to America's high crime rates.

That Milton Friedman favored drug legalization two decades ago\(^\text{15}\) and William F. Buckley, Jr. did so a decade ago,\(^\text{16}\) hardly justifies Wisotsky's claim that the American people have heard and rejected the arguments. Many Americans don't even know who was President when the atomic bomb was dropped on Japan. Some don't even know who is President now. Friedman and Buckley were far from the political mainstream when they took their positions on drugs. Friedman's 1962 book, *Capitalism and Freedom*,\(^\text{17}\) was so extreme when it appeared that it wasn't even reviewed by major newspapers or magazines.\(^\text{18}\) Moreover, it wasn't until a decade after that book that Friedman thought drug prohibition was a problem that needed his intellectual scalpel. When he did turn to the drug problem, Friedman did so with vigor and conviction. He is not only against drug prohibition, he wants to abolish the Food and Drug Administration entirely,\(^\text{19}\) along with professional licensing.\(^\text{20}\) He thinks barbers and carpenters should be permitted to practice law, or medicine, or both. As right as Friedman was about drugs—although even I think he goes too far—he could hardly hope to persuade many Americans when he preceded his ideas about drugs with his other extreme libertarian positions.

Although the popular media still regard drug legalization as marginal, if not frivolous, the subject is rapidly acquiring more respectability. Six federal judges now publicly favor legalization or repeal of federal drug prohibition; about fifty senior federal judges refuse to take drug cases. The recently-elected President of the American Bar Association (ABA) has declared himself a legalizer, as has the head of the American Civil Liberties Union (ACLU), former Secretary of State George Schultz, and a bevy of prominent pundits.\(^\text{21}\) Politicians are even finding the courage, occasionally, to repudiate the drug war. Kurt Schmoke was reelected Mayor of Baltimore despite his outspoken positions and Representative Barney Frank of Massachusetts has all but embraced the

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18. The book has since sold 600,000 copies.

19. See various essays by Milton Friedman in *DRUG LEGALIZATION*, supra note 10, at 49-52, 57-59; see also *LONGEST WAR*, supra note 8, at 251.

20. FRIEDMAN, supra note 17, at 137-60.

21. They include Hodding Carter III, Pete Hammel, Lewis Lapham, and Gore Vidal.
"L" word. 22

Since 1987, the Drug Policy Foundation (DPF) has been holding international conferences on drug reform and publishing pamphlets and monographs on the subject. Recently, the DPF has been sending out a newsletter. It also recently published full-page ads in newspapers and magazines decrying the drug war. 23

Perhaps the strongest new evidence of respectability is the fact that Lee Brown, the "drug czar," now argues against legalization 24 rather than simply dismissing it as the "moral equivalent of genocide." The Drug Enforcement Agency (DEA) has even published a booklet, "How to Hold Your Own in a Drug Legalization Debate," 25 and persuaded the Heritage Foundation to publish a pamphlet, "Why Americans Should Resist the Legalization of Drugs." 26 Nothing comparable to these developments—all in the past few years—has occurred regarding drug prohibition since the Twenty-first Amendment.

In the past year and a half, I have discussed drug policy on at least one hundred radio talk shows around the country. In many cases, the radio programs or stations described themselves as "Christian." Most of the talk show hosts were sympathetic to my views, and the majority of callers who spoke favored drug legalization. In January 1994, I debated Joseph Califano briefly on NBC's Today Show. After the debate, NBC invited viewers to call a 900 number and register their opinion on "Should Drugs be Legalized?" The "yes" votes were 42,685, the "no" votes 39,178. Many Americans are beginning to deal with facts.

I agree with Wisotsky that decades of pervasive propaganda, most of it generated by government officials with professional, political, and economic interests in perpetuating or strengthening the status quo, have made our job a difficult one. I also agree that most Americans, as a


result of the propaganda—and the immense social costs that prohibition has imposed—are deeply resistant to radical change. A characteristic of humans is that when we have singly or collectively made an investment—in people, property, governmental policy, or anything else—we find it difficult to reevaluate its merits. Our reluctance is related to the size of the investment that reconsideration may require us to write off. Drug prohibition is one of the nation’s largest investments and may be the costliest mistake that it has ever made.

If Wisotsky had been studying alcohol prohibition during the late 1920s, he would presumably have joined those who thought Prohibition a mistake but believed its repeal was impossible. At least one prominent law professor of that era took that position: ex-president, Yale Law Professor William Howard Taft. “There isn’t the slightest chance that the [Prohibition] amendment will be repealed,” he said.27 “You know that and I know it.”28 Had such views prevailed, we would still have speakeasies.

Repeal of alcohol prohibition had a special burden: prohibitionists had written their preferences into the Constitution, so it would take another constitutional amendment to repeal Prohibition. Three-fourths of the states would have to agree. A mere 5% of the population, distributed in the smaller states, could have prevented repeal.29 Then, as now, large bureaucracies stood to gain from maintaining Prohibition. Al Capone and other organized criminals also supported the status quo. Millions of Americans, then as now, believed that consuming the prohibited drug was a mortal sin and that doing so was certain to destroy the user’s physical and moral health.

Throughout the 1920s, Billy Sunday preached that repealing Prohibition was no more likely than “repealing the Thirteenth Amendment and restoring slavery.”30 As late as 1930, Senator Morris Sheppard of Texas asserted, “There is as much chance of repealing the Eighteenth Amendment as there is for a hummingbird to fly to the planet Mars with the Washington Monument tied to its tail.”31 Only three years later, however, both houses of Congress had voted for the Twenty-first Amendment by more than a two-thirds vote and thirty-six of the forty-

27. DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 32 (1979) [hereinafter REPEALING PROHIBITION].
28. Id.
29. Id. at 2.
eight states had ratified it. Alcohol prohibition at the federal level was over. The arguments that persuaded Americans to acknowledge the error they made concerning alcohol were essentially the same as those we now make against drug prohibition: crime, corruption, disrespect for law, deaths from poisoning, waste of money, and so forth. Prohibition was not repealed because somebody invented a "new paradigm"; it was repealed because it had proven to be a mistake.

In all questions of governmental policy, money is a major force. The entire law enforcement apparatus in place today has an economic interest in prohibition, as do most politicians now in office, as do the liquor and tobacco industries. Until recently, there was almost no money behind the anti-prohibitionists. That is beginning to change. Just as the DuPonts and John D. Rockefeller and their money were major factors in obtaining repeal of Prohibition, George Soros has recently given financial support to the critics of drug prohibition. He has given $6 million to the Drug Policy Foundation and an equal sum to the Lindesmith Center, headed by Ethan Nadelmann. Compared to the money supporting prohibition, these are pittances, but compared to what had been available, they are huge. More money will surely follow.

Major factors in getting the alcohol prohibition repeal campaign in high gear, in addition to the millionaires who joined the movement, were academics, ex judges, the former Solicitor General, and, eventually, the ABA, among others. We now have academics, judges, a former Secretary of State, the President of the ABA, the head of the ACLU, and a pro-legalization report by a Committee of the staid Bar Association of the City of New York.

Anything that any of us can say on the subject now is at best fine-tuning. But there is virtue in repetition. Indeed, it is essential to reform. Most Americans surely sense that something is badly wrong with the drug war and that new directions must be taken. Demagogic politicians will tell them that the answer is more prisons and more death penalties for drug dealers. Those of us who have secure jobs and no political ambitions must continue to tell the truth: that such solutions are doomed and destructive, racist and unjust. We must repeatedly expose

32. See Harry G. Levine & Craig Reinaman, From Prohibition to Regulation: Lessons From Alcohol Policy For Drug Policy, in DRUG POLICY, supra note 10, at 163; REPEALING PROHIBITION, supra note 27, at 25-35.

33. See REPEALING PROHIBITION, supra note 27.

those politicians for what they are until the voters get the message. We must also support public servants like Kurt Schmoke and the former Surgeon General, Joycelyn Elders, who have the courage to admit that the DEA doesn't have the answers to the drug problem and that fundamental rethinking is needed.

Our main task is to convince the majority of Americans of two things: (1) repeal of prohibition is a respectable position to take; and (2) repeal, or at least drastic reform, of drug prohibition is a serious possibility. We have almost succeeded with the first task, but we have made little progress on the second.

Most people are too busy with immediate problems to expend much intellectual energy studying abstract propositions. Only if they can be convinced that radical reform is actively being considered by people with power will many of them seriously listen and consider the facts. If we can accomplish that task, reform can take place, and quickly. Defeatist demands that we await a "new paradigm" are not helpful.35

Americans have become addicted to drug prohibition, but with effort and persistence, even addictions can be conquered.

35. For elaboration of what Wisotsky means by a "new paradigm," see STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS 197-222 (1990). He concludes his book by suggesting, "It is only a matter of time before the gap between the political/legal and cultural realities widens to unbridgeable dimensions, when the cognitive dissonance between the two becomes an unbearable cacophony. When that occurs, the War on Drugs will become an idea whose time has finally gone . . ." Id. at 222. I agree. What apparently divides us is my belief that criticism of present policies can help to produce the "unbearable cacophony." Despite his cogently argued articles and books (or perhaps because of their failure to produce the enlightenment that their contents warranted), Wisotsky doubts that we have such persuasive powers. I think that events tend to move ideas more than ideas move events, and I also believe that academics often overestimate the power of their ideas. Still, facts and ideas do count. If they didn't, there would be no hope for humanity, much less for drug reform.