1-1-1995

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DRUG PROHIBITION: AN UNNATURAL DISASTER

Steven B. Duke*

How can you conserve the basic values, how can you conserve the fabric of your life if you do not have the courage to change when what you're doing is tearing the heart out of your country? —Bill Clinton

An evil grips America, a life-sapping, drug-related habit. It beclouds reason and corrodes the spirit . . . . It's the habit of drug prohibition . . . [which is] right up there with heroin and nicotine among the habits that are hell to kick. —Barbara Ehrenreich

The idea that government should determine for its people which psychoactive drugs they are free to consume and jail them for using others is a fairly recent arrival in the United States. Except for an occasional fling with prohibition at the state level, Americans were free until 1914 to consume any drugs they chose and to buy from anyone who chose to sell them. Those rights were widely exercised. In addition to alcohol, tobacco, and caffeine, tens of millions of Americans consumed cocaine and opiates in the nineteenth century. Cocaine was

* Law of Science and Technology Professor, Yale Law School. Co-author, with Albert Gross, of AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS (1993). Many of the sources and ideas in this article are drawn from that book. Beyond any credit I may acknowledge in citations herein, I am indebted to others who have written wisely on the subject, especially James Bakalar, Randy Barnett, David Boaz, Lester Grinspoon, Ethan Nadelmann, James Ostrowski, Arnold Trebach, Steven Wisotsky, the late John Kaplan, and the late Edward Brecher. We are all indebted to Milton Friedman. I am also grateful for the assistance of Ashlie Beringer and Richard St. John, students at the Yale Law School.

2. Barbara Ehrenreich, Kicking The Big One, TIME, Feb. 28, 1994, at 70.
3. EDWARD M. BRECHER AND THE EDITORS OF CONSUMER REPORTS, LICIT AND ILLICIT
even an ingredient in Coca Cola until 1905, and opium was included in nostrums fed to colicky babies. Heroin was originally sold as a cough suppressant. Although dependence on these drugs was not uncommon, it was never as serious a problem as alcoholism. Indeed, although the proportions of the population using these drugs in the late nineteenth century was probably higher than it is now, the problems associated with their use were less serious than they are today.

In 1914, Congress enacted the Harrison Act, which was designed to medicalize cocaine and heroin by confining their distribution to health professionals. In 1919, on the eve of alcohol prohibition and doubtless influenced by prohibitionist fervor, the Supreme Court converted the Harrison Act into a ban on the distribution of such drugs, holding that prescribing drugs to addicts was not the practice of medicine and was therefore criminal. Drug and alcohol prohibition then proceeded to wreck the country. Crime, corruption, and disrespect for law grew at unprecedented rates. Because of alcohol prohibition, many Americans replaced their appetite for beer with a newly discovered preference for the cocktail, containing distilled spirits, which poisoned thousands.

Thirteen years of alcohol prohibition was enough. It was repealed in 1933 by the Twenty-first Amendment, which left alcohol regulation to the states. The repeal of alcohol prohibition coincided with the depth of the depression, when unemployment reached record levels and millions of Americans were without food, shelter, welfare, or hope. Despite this widespread misery and despair, crime rates dropped precipitously after the repeal, as did alcohol poisoning and contempt for law. Hardly anyone considers the repeal of alcohol prohibition to have been a mistake. Why, then, did we not repeal the Harrison Act at the same time? Why don’t we repeal its modern sequelae? We are addicted to drug

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9. Id. at 38-39, 41-42, 255; LONGEST WAR, supra note 6, at 87, 197.
prohibition. A manifestation of that addiction is "denial" of the harms we are inflicting upon ourselves by prohibition.

A sober analysis of prohibition requires us to acknowledge that the use of psychoactive drugs, be they tobacco, alcohol, heroin, cocaine, or any of hundreds of others, has adverse effects on the physical or mental health of some users. The nature and seriousness of adverse effects vary greatly among both drugs and drug users. Many people can consume almost any popular drug, legal or illegal, without adverse physical or psychological effects, while others become horribly addicted to almost any drug they use. Because of the terrible consequences of drug abuse to some users, it is hard to make a positive case for the increased consumption of any pleasure drug. One who believes that we should repeal prohibition so that more people will enjoy a wider variety of drugs does not speak for me nor would such a person have a sympathetic audience among a large segment of the American population. Rather, I assume arguendo that the consumption of psychoactive drugs for other than medical reasons is, on the whole, undesirable.

We must also acknowledge, however, that most Americans use psychoactive drugs on a daily basis, as did their ancestors for thousands of years, and that they will continue to do so, no matter what the state of the law. Most Americans insist, often at great personal cost, on the right to consume substances that they desire. Many of those same Americans are just as insistent that others be denied their own drug of choice. That is why tobacco, alcohol, and caffeine are permitted while only much less popular drugs are banned. The appetite for chemical intoxication is innate in humans (and most other animals as well) and indulging it has been a part of most cultures since the dawn of history. In addition to general notions of individual autonomy, a hunch that it could be dangerous to tamper with urges so "natural" may explain why we stayed out of the prohibition business for so long.

Reconsidering the problem compels us to compare the costs of drug prohibition as presently pursued with the costs of drug consumption in a hypothetical system in which prohibition has been repealed or in which enforcement is much less intense than is the case today. Most

13. Some libertarians argue that the cost-benefit comparisons are illegitimate because drug use is a fundamental aspect of human freedom and the only relevant cost-benefit calculus is intensely personal, not societal. See LONGEST WAR, supra note 6, at 146-59; see also Letters.
of the evils of drug prohibition would be drastically reduced if we simply took an attitude of benign neglect toward illicit drug consumption and distribution, which is largely what occurred until the early 1970s. The drug war is an indefensible disaster that harms almost everyone.

Let us first consider the costs and consequences of the "drug war," an approach to the drug problem that was invented and proclaimed by President Richard Nixon contemporaneous with our defeat in Vietnam. One war was a convenient substitute for the other. Unfortunately, the drug war would prove to be even less winnable than the war in Vietnam. In 1973, Richard Nixon declared "all-out, global war on the drug menace." From an original budget of less than $100 million per year, Nixon's drug budget grew enormously. The federal drug war budget is now more than 130 times that, at $13 billion. Our violent crime rates nearly doubled in the same period. The simultaneous ascents in drug war budgets and crime rates are not coincidental. The

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15. In 1973, the rate of violent crimes per 100,000 population was 417.4; in 1992, it was 757.5. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL STATISTICS 1993, at 352 (Kathleen Maguire & Ann L. Pastore eds., 1994) [hereinafter SOURCEBOOK].

16. See also the following graph comparing recent drug budget increases and murder totals:

More Spending Has Not Slowed the Killings

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![Graph showing correlation between drug budget and murder totals](image-url)
drug war causes crime—far more than most people realize. It also wastes huge sums of money, contributes to the destruction of our cities, spreads disease, destroys our liberties, tears our families apart, foments racism, and imposes most of its costs on those who do not even use illegal drugs.

I. SOME COSTS OF "DRUG WAR" PROHIBITION

A. The Criminogenics of Drug Prohibition

Contrary to what our government told us when it imposed drug prohibition, most illegal recreational drugs have no pharmacological properties that produce violence or other criminal behavior. Heroin and marijuana diminish rather than increase aggressive behavior. Cocaine—or cocaine withdrawal—occasionally triggers violence but usually does not. Very little crime is generated by the mere use of these drugs, especially in comparison to alcohol, which is causally related to thousands of homicides and hundreds of thousands of assaults annually. The major linkages between illegal drugs and crime must be found elsewhere—in prohibition.

1. Prohibition Creates Motivation to Steal and Rob

One of the main strategic goals of the drug war is to increase the costs of producing and distributing, and hence of buying, illicit drugs. As the price to the consumer is increased, demand can hopefully be curtailed and the number of users or the quantities of illicit drugs used can be reduced. The tactics for increasing producer and distributor costs include impeding production or distribution of the raw materials used in making drugs, attempting to interdict the products before they reach the consumer (with border searches, busts of stash houses, and the like), and putting smugglers and distributors of the illicit products in prison. Until recently, the strategy had considerable "success" in that prices for

17. LONGEST WAR, supra note 6, at 43-77.
18. Id. at 46-50, 53, 57-60, 64-66.
19. Id. at 73-74; see UNDERSTANDING AND PREVENTING VIOLENCE 194 (Albert Reiss et al. eds., 1993).
20. Of more than 5 million assaults known to the police in 1991, the offender was perceived to be under the influence of alcohol in 21.5 percent of the crimes. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1991, at 58 (1991); see also LONGEST WAR, supra note 6, at 38-42.
marijuana, heroin, cocaine, and other illicit drugs were quite high.21 A heroin addict would commonly need $200 or more per day to support a habit, and a cocaine user, before the era of cheap "crack," might need even more than that. Many cocaine users spent a thousand dollars a week on powder cocaine.22

There is little evidence that demand is greatly reduced by jacking up the free market price of these drugs by a factor of 100 or more, but there is strong evidence that the consumers of these products increase their participation in acquisitive crimes in order to feed their habits. In a recent survey of persons in prison for robbery or burglary, one out of three said that they committed their crimes in order to get money to buy drugs.23 Those who commit crimes for drug money also seem to commit them at a much greater rate than less strongly motivated robbers, burglars, and thieves.

In a study of 356 heroin users in Miami, James Inciardi found that they admitted to committing nearly 120,000 crimes (an average of 332 per person) during a single year.24 In another study of 573 heroin users, Inciardi found them responsible for about 215,000 offenses during the previous year. Included were 25,000 shopliftings, 45,000 thefts and frauds, 6,000 robberies and assaults, and 6,700 burglaries.25 In another study of 459 nonnarcotic drug users (chiefly cocaine), Inciardi found them to have admitted to an average of 320 crimes apiece during the previous year.26 In a survey of callers to a cocaine hotline, 45% of the callers said they had stolen to buy cocaine.27 In a survey of adolescents, the 1.3% who admitted using cocaine accounted for 40% of the admitted crimes.28 In several studies of drug use by persons impris-

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21. Street prices for cocaine and heroin are now at their lowest level in years. A rock of crack can be purchased for less than a dollar and a "nickel bag" of heroin for about two dollars. Joseph B. Treaster, Hospital Data Show Increase in Drug Abuse, N.Y. TIMES, July 9, 1992, at B1.
22. In a 1983 telephone survey of callers to Cocaine Hotline, the average caller reported spending $637 per week on cocaine the week before calling the hotline, with a range from $200 to $3,200. Arnold M. Washton & Mark S. Gold, Recent Trends in Cocaine Abuse as Seen From the "BOO-Cocaine" Hotline, in COCAINE: A CLINICIAN'S HANDBOOK 10, 13 (Arnold M. Washton et al. eds., 1987).
26. Id. at 129.
27. Washton & Gold, supra note 22, at 14.
28. B. Johnson et al., The Concentration of Delinquent Offending: The Contribution of Seri-
oned, 65% to 80% have admitted regular or lifetime illicit drug use. All this data suggests that about 75% of our robberies, thefts, burglaries, and related assaults are committed by drug abusers. Some of the crimes committed by drug abusers—perhaps one-third—would be committed in any event, but numerous studies show that drug users commit far fewer crimes when undergoing outpatient treatment or even when the prices of drugs go down. Half of America's property crime, robberies, and burglaries are probably the result of the high costs of drug acquisition created by the drug war.

2. Systemic Causes

Creating an incentive to steal in order to buy drugs is only one of many criminogenic effects of drug prohibition. The illegal drug market is itself a cauldron of criminality. Murder is employed to protect or acquire drug-selling turf, to settle disputes among drug merchants and their customers, to enforce contracts, to remediate fraud, and to steal drugs and drug money from dealers. In many cities, such as New Haven, Connecticut, at least half of the killings are drug-business related. Nationwide, between 5,000 and 10,000 murders per year are systemic to the drug business. Thus, more people are killed by the prohibition of drugs than by the drugs themselves.

Drug money is also the lifeblood of criminal gangs, members of whom kill members of rival gangs, and innocent bystanders, for almost any reason, including showing off.

3. Victimogenics

Another way in which drug prohibition causes crime is by making victims vulnerable to predators. Many drug customers have to enter crime-infested territory to get their supplies. Since they are criminals themselves, obviously in the neighborhood to "score," they have strong


30. One study found 53% of homicides were drug-related. Hardly any were related pharmacologically. Paul G. Goldstein et al., Crack and Homicide in New York City, 1988: A Conceptually-Based Event Analysis, 16 CONTEMP. DRUG PROBS. 651, 662 (Winter 1989); see also, studies cited in THE WHITE HOUSE NATIONAL DRUG CONTROL STRATEGY 23, 28 n.3 (1994) [hereinafter THE WHITE HOUSE].

31. American medical examiners report approximately 5,000 deaths per year in which heroin or cocaine may have been a causal factor. LONGEST WAR, supra note 6, at 75-76. No one knows how many of these deaths were actually caused by accidental overdose.
disincentives to complain to the police about having been robbed or assaulted. As such, they are prime targets.

4. Proliferation of Deadly Weapons

Drug prohibition also accounts for much of the recent proliferation of handguns and assault rifles (which are doubling every twenty years).\(^{32}\) Guns are essential to carrying on the drug trade, since drug dealers must enforce their own contracts and provide their own protection from predators. Even “mules” who deliver drugs or money need weapons. Due in part to its association with the glamorous drug trade, packing a gun, like fancy clothing or costly jewelry, has become a status symbol among many adolescents. In such an atmosphere, other youngsters carry guns in the hope they will provide them with some protection. As a result, disputes that used to be settled with fists are now settled with guns. A decade ago only 15% of teenagers who got into serious trouble in New York City were carrying guns. Now the rate is 60% to 65%.\(^{33}\)

The more guns there are in the hands of drug dealers and others, the more the rest of the population feels the need to have guns for self-defense. So, partly as a result of the huge black-market drug business that creates a voracious appetite for guns, many ordinary citizens are arming themselves with guns. The more people who have guns, the more people get killed. Hence, many deaths by guns—intentional killings, accidental killings, even suicides—are causally linked to the drug trade in the sense that the guns would not be there but for the drug business. There is little that gun control laws can do about this problem. Unless we can greatly shrink the black-market drug business, we can do little about the proliferation of guns in this country.

5. Corruption Costs

Drug prohibition also fosters crime by producing police corruption. The news media are full of accounts of cops caught stealing money or drugs from drug dealers and reselling the drugs, simply taking money from drug dealers in exchange for looking the other way, or providing tips about police raids or other plans. The recently released report of New York City’s Mollen Commission provides chilling accounts of drug-prohibition-related corruption in that city.\(^{34}\) Such corruption deni-

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32. \textit{Id.} at 113.
34. \textit{Commission to Investigate Allegations of Police Corruption and the Anti-Cor-
grates and demoralizes all police. It spreads like cancer into all phases of police work.

6. Distraction of Law Enforcement

The distractive effects of the drug war on the police are also indirectly but profoundly criminogenic. In many cities, half or more of the arrests are for drugs or other crimes related to drug trafficking. The energy expended by the police on drug criminals is not available to be focused on domestic violence, rape, and other nondrug offenses. As a consequence, criminals who are not directly involved in drug trafficking have a much better chance of escaping detection and punishment than they would have otherwise.35

If, as the just enacted Violent Crime Control and Law Enforcement Act correctly presumes,36 the number of police available to detect and prosecute crimes has a strong effect on the number of crimes committed, then wasting half of our available police resources on drug and drug-related crimes—effectively cutting our police forces in half—clearly causes crime. Repeal of drug prohibition would in effect add 400,000 police officers—at no cost. On that account alone, it would surely eliminate one-fourth or more of our violent and property crimes.

7. Paralyzing Our Courts

Our court system is on the verge of collapse, mainly because of drug-related cases. Criminal cases are not decided on their merits. In many cities, most people who are indicted end up having their cases dismissed.37 Only a fraction of the people charged with felonies are ever convicted of those felonies.38 There are simply too many cases for the system to handle, and at least half of them, in many courts, are drug cases or drug-prohibition-caused cases.

8. Dilution of Incarceration Resources

The drug war deeply undercuts the role of imprisonment in dealing with non-drug related crimes, such as child molesting, rape, and homicide. We now jail or imprison 1.3 million Americans, the second highest rate of incarceration in the world. Our prisons are filled beyond capacity even as our rates of incarceration are increasing faster than ever before. Forty states are under court orders for overcrowding. Funds are not available to build prisons fast enough to provide the needed space. Child molesters and kidnappers are being paroled early or having their sentences cut to make prison space for drug users and drug dealers. Many dangerous criminals don’t even make it to prison because there is no room for them. Because many drug users and dealers—most of them nonviolent—have mandatory sentences, they have priority for prison space. Repeal of drug prohibition would open up about 500,000 jail and prison spaces. The beneficial effects on crime rates can hardly be exaggerated.

9. Hypocrisy

Nancy Reagan said, “[A] casual drug user [is] an accomplice to murder.” That was a moral statement about drug use. We make those kinds of statements very dramatically when we send kids to prison for life for selling drugs. We punish many kids who sell drugs more severely than we punish repeat rapists and serial murderers. The new Federal Crime Act even authorizes the death penalty for sellers of large quantities of drugs—including marijuana! That clearly has a corrosive effect on the moral principles upon which we rest as a nation. When we equate casual drug use, or even selling drugs to a willing adult buyer, with murder, we are not only making a moral statement about casual drug use, we are also making a moral statement about murder. We are trivializing murder.

42. Longest War, supra note 6, at 106 (quoting Stephen Chapman, Nancy Reagan and the Real Villains in the Drug War, Chi. Trib., Mar. 6, 1988).
It borders on lunacy to treat consensual drug offenses as the equivalent of murder, rape, or kidnapping. Yet that is the position our country has adopted, and it must undermine the moral message we send about murder, kidnapping, and sexual violence—particularly since 48 million of us smoke tobacco and over 100 million of us use alcohol. It is preposterous to talk about drug use as if it were the kind of moral assault on the community that violent crime is. It undermines our abhorrence of violence to talk that way, and yet we not only talk that way, we act that way.

The drug war as it is currently being waged probably produces at least half of our serious crime. That is, half of our crime (not counting drug crimes, of course) simply would not occur were we not conducting a drug war. No more damning an indictment of our political leaders can be imagined than that they have affirmatively created half the crime under which we suffer. There is virtually nothing in American society that is more evil, more destructive, and more loathsome than the rates of thefts, robberies, murder, and mayhem that we are experiencing. For every victim of such crimes, hundreds live in fear. For many, living in the neighborhoods in which they, and often their parents and grandparents, grew up has become intolerable. People are fleeing the cities—and by their flight accelerating city disintegration. The main reason is crime. In some towns and cities, many people are afraid even to go downtown to shop, for the central city shopping areas are themselves heavily infested with predatory criminals.

It must be conceded that all of the prohibition-generated crime would not disappear overnight with the repeal of prohibition. Many of the street level drug dealers have no marketable skills in legitimate business and have been so corrupted by the lifestyle of drug dealing that they would be very reluctant to “go straight” even if they had the opportunity. Deprived of their income, such dealers would try to find alternative illegal methods of economic survival. A temporary surge in thefts and robberies might even occur if drug dealers were immediately deprived of their black-market livelihood. Former drug dealers would replace addicts as a cadre of predatory criminals. Theft and robbery, however, are not substitutes for drug dealing because they are not nearly as lucrative and more skill is needed to avoid getting caught. The markets for stolen cars, televisions, and hubcaps are limited, and few of our drug dealers are capable of stealing computer chips or trade secrets. That drug dealers will not simply replace their income with

44. The longer we maintain the drug war, however, the more sophisticated and entrenched
predatory crime will be even clearer when we have freed our police from prohibition and turned them loose on thieves and robbers. Over time, many former drug dealers will be absorbed into legitimate society (those that aren’t will be imprisoned). How quickly and thoroughly the assimilation occurs depends on how committed we are as a society to providing the opportunities—the training and the jobs—to replace the fruits of crime. We will have plenty of money to spend on such opportunities when we repeal prohibition.

B. Prohibition Wastes at Least $100 Billion Per Year

The federal, state, and local governments spend about $75 billion a year on law enforcement and criminal justice programs. About $20 billion of that is directly related to drug law enforcement. Roughly another $15 billion is related to crimes committed to obtain drug money or is systemically related in some way to drug commerce. Hence, about $35 billion per year spent on law enforcement can be saved by repeal of drug prohibition.

As Gore Vidal put it, “[F]ighting drugs is nearly as big a business as pushing them.” Drug legalization threatens the jobs and careers of police officers and politician-drug warriors. Defense attorneys and prosecutors, who make their living on drug cases, will also lose from drug legalization. Former Drug Enforcement Administration (DEA) officer Michael Levine exaggerated when he told CBS News: “The whole drug war is a political grab bag, in that everybody has got their arm in looking for that political jackpot that will either win them an election, win them a lucrative position as a consultant or you name it.” But

will become the drug distributing organizations and the greater the problems they will pose in a post-repeal society. How serious a problem that is likely to be is unclear. See Peter Reuter, Disorganized Crime: The Economics of the Visible Hand (1983); Nora V. Demleitner, Organized Crime and Prohibition: What Difference Does Legalization Make?, 15 Whittier L. Rev. 613 (1994).

45. Another crucial difference: the more intense the law enforcement efforts against predatory crimes, the less attractive such crimes become because the income from them—the value of the stolen product—is determined largely by the legitimate market in such goods. Where, as with drugs, virtually the entire market is illegal, the more intense the enforcement efforts, the greater the price of the product. Increasing costs, imposed by law enforcement, produce increased profits. That is not true where the goods that are black-market are largely legitimate. Thus, criminal law enforcement against theft and robbery can be a substantial deterrent whereas such enforcement against drug dealing cannot be.


48. Longest War, supra note 6, at 232 (quoting Richard Schlesinger, CBS Evening News
serious de-escalation of the drug war does threaten tens of thousands of careers that the taxpayers would no longer need to support. That is a major impediment to repeal. Nonetheless, many law-enforcement officers are well ahead of politicians in recognizing the futility and economic wastefulness of the drug war. As Robert Stutman, previously a high-ranking DEA official, stated: "Those of us who carry a badge learned a long time ago we're not going to solve the problem, and yet an awful lot of policy makers continue to depend on us, and we keep telling them we can't do it."49

Ralph Salerno, a famous organized crime expert and long-time drug warrior himself, goes further. He asserts not only that the drug war "will never work" but that police on the front line, risking their lives and their physical, psychological, and moral health, "are being lied to, just as I was lied to 20 years ago."50 Among the lies:

[Police officers and all other Americans are being told by our political leaders that if the coca crop in Peru and Bolivia can be curtailed it will be all over, ignoring the botanical fact that coca can be grown in many parts of the world. We are told that if the chemicals can be cut off from the purification plants in Colombia it will all be over. The chemicals are derivatives of the oil industry and there are wells in many parts of the world. We are told that if we can incarcerate the Medellin and Cali cartels it will all be over, and that is another lie. The Latin American narco-traficantes will be replaced by others as easily as were the American mafiosi.51

The direct public expenditures on law enforcement of drug prohibition pale in comparison to the costs of the drug war borne by individual citizens. Estimates of the yearly earnings of the illicit-drug business range as high as $100 billion. Fifty billion dollars is a safe estimate.52 Pharmaceutical cocaine costs less than one percent of the price of street cocaine. The other 99% that users pay for street cocaine is attributable to drug prohibition. Thus, if the principal recreational drugs were legal, drug consumers could be expected to save nearly $50 billion each year

with Dan Rather (Mar. 29, 1990)).
49. LONGEST WAR, supra note 6, at 232.
51. Id.
52. See THE WHITE HOUSE, supra note 30, at 105.
(less taxes government might levy on drug sales).

Although nonusers may have difficulty sympathizing with a policy that would make drug use more economical, nonusers have a large financial stake in drug price reductions. Nonusers provide much of the money spent on drugs when they are innocent victims of crime. If $10 billion of the money spent to buy drugs comes from stolen property—a rough estimate—property owners may lose $50 billion worth of property to provide the thieves with $10 billion in cash or equivalents with which to buy drugs (stolen property is sold at steep discounts). Nonusers also indirectly bear much of the cost of high drug prices when they pay for theft insurance, when they purchase security systems, when they pay taxes for police protection, and when they pay a premium to live in gated communities or suburbs. Owners of property in the inner-city pay when their tenants move out to escape the horror of their surroundings or when businesses close because of drug-related crime.

Drug users who do not live off crime spend their legitimate income on drugs. This often deprives their families of the money needed to survive. The nondrug-using public ends up paying for much of that neglect, in the form of substantial welfare and public health budgets. Much of the $50 billion or so collected by drug traffickers from customers comes indirectly from the pockets of nonusers.

Adding the money squandered on the ineffective drug-suppression activities of state and federal governments to the money we all lose as a result of the unnaturally high price of drugs, the total would come to well over $100 billion per year.53

C. Urban Blight

Drug prohibition is a major contributor to the destruction of our inner-cities. In America’s most disadvantaged neighborhoods, open-air drug markets and gang violence related to drug-turf battles make life miserable. Residents of neighborhoods where drug trade is concentrated also suffer disproportionately from the crimes generated by drug prohibition, such as crimes to get drug money. When the drug business leaves the cities, our homes, streets, and schools will become much safer. It may even become possible to educate children in urban public schools.

53. A recent study estimated that the total annual costs of crime in the United States is $674 billion. Cost of Crime: $674 Billion, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 40. If that is true, prohibition’s share must be at least $200 billion.
Prohibition is not the only source of inner-city decay and disintegration. Technological changes have created entire neighborhoods of unemployables in our inner-cities. Prohibition helps support some inner-city residents who sell drugs not only to other inner-city residents but also to white upper-class suburbanites. If the decline of our cities is to be arrested, government and private organizations will have to replace some of that urban income in the form of jobs, training programs, public assistance, and other investments in human capital. Even if the menace of drug-related crime is eliminated, the residents of the inner-city must still have jobs, housing, and quality schools in order for the cities to prosper. What repeal of prohibition offers is a climate in which such basic elements for survival—and prosperity—are possible. We can save our cities or we can retain the drug war; we cannot do both.

D. Public Health Costs

Drug prohibition makes the inevitable use of psychotropic drugs far more dangerous than would be the case under regulation. Most overdoses and drug poisonings are attributable to the operation of the illicit market. Drug analyst James Ostrowski concludes that 80% of drug-use-deaths are caused by prohibition, only 20% by the inherent qualities of the drugs. That estimate does not include the fact that needle sharing by intravenous drug users now does as much or more to spread HIV, hepatitis, and other deadly diseases as do unsafe sexual practices. Our drug war mentality has widely blocked the implementation of clean-needle programs that clearly reduce the spread of AIDS and other deadly diseases. Drug prohibition also deters drug users from seeking treatment for a myriad of other medical conditions, many of which are communicable. Ironically, the criminal status of drugs even deters drug abusers from seeking treatment for drug addiction.

55. Ending prohibition is also a way to focus national resources on other problems underlying inner-city deterioration: not drugs, but rather the absence of economic opportunities that created a vacuum which illegal drug-trafficking easily fills. See generally SAM STALEY, DRUG POLICY AND THE DECLINE OF AMERICAN CITIES (1992) (discussing the connection between the drug economy and the decline of American cities and suggesting decriminalization as the first step to a solution).
The "war" approach to drugs also makes health professionals afraid to prescribe legally controlled drugs, which are capable of curbing and controlling mental illness and making bearable much intractable pain. They fear that they will be suspected of "addicting" their patients or even of being drug dealers with a medical license.\(^{58}\) Physicians are also prohibited by law from prescribing marijuana, even though it is of unique medical utility in treatment of glaucoma, nausea resulting from chemotherapy, loss of appetite due to AIDS, and other serious medical conditions.\(^{59}\)

If prohibition were repealed, the dangers to physical health to users and to third parties from heroin, cocaine, marijuana, or other previously illegal drugs would be greatly reduced. Also, the economic factors pushing producers, traffickers, and users toward more concentrated, more deadly, and more addictive drugs would be eliminated by repeal. Before prohibition, opium was a popular drug. Under prohibition, opium has disappeared and has been replaced by a far more potent, more addictive opiate—heroin.\(^{60}\) After repeal, we could expect many users to confine their drug consumption to highly diluted forms, just as consumers of alcohol more often drank beer before and after alcohol prohibition than they did during prohibition, during which they drank liquor. Opium should make a comeback and marijuana use should increase, both increases being offset by reductions in hard drug consumption. Crack might disappear.\(^{61}\) This alone would greatly reduce the health risks and the addictive potential of drug use. Under regulation, drug purities would also be standardized and clearly and accurately labeled. Adulterants, and their risks, would also be disclosed. The risks of accidentally overdosing or being poisoned would be a fraction of what they are under the present regime.

Relegalizing heroin, cocaine, and marijuana would probably produce a net reduction in the use of tobacco and alcohol, saving thousands of lives every year, perhaps tens of thousands.\(^{62}\) This reduction would

\(^{58}\) Longest War, supra note 6, at 191-92; Gina Kolata, Study Says 1 in 5 Americans Suffers from Chronic Pain, N.Y. Times, Oct. 21, 1994, at A22.


\(^{60}\) Licit and Illicit Drugs, supra note 3, at 46.

\(^{61}\) Crack is rare in the Netherlands, where marijuana sale and use is de facto legal and laws against selling small quantities of hard drugs are seldom enforced. The Netherlands is also the only country in Europe where heroin addiction is decreasing. Dutch Drug Policies Take a Few Hits, Chi. Trib., Dec. 12, 1993, at C17.

\(^{62}\) Tobacco kills about 400,000 Americans per year and alcohol kills 100,000. Longest
come from several sources. Our present demonization of illicit drugs permits us to avoid confronting the realities of alcohol and tobacco—that they are our two deadliest popular drugs.\textsuperscript{63} Prohibition of some drugs encourages consumption of permitted drugs. As prohibitionists commonly argue, re-legalizing the illegal drugs would convey the “wrong” message—that the legal and illegal drugs are in the same socio-cultural-medical-moral family. Some of the billions of dollars that the government, and the tobacco and alcohol industries, have spent trying to convince us that illegal drugs are immoral, suicidal, treasonous, dumb, and so forth will be symbolically transferred to previously legal drugs, therefore, deterring some potential drinkers or smokers from using or abusing those drugs. Alcohol is nearly nine times as popular as all illegal drugs combined and tobacco is four times as popular.\textsuperscript{64} A significant decrement in favorable public perceptions of these two legal drugs can therefore have enormous health benefits. Any change in law that blurs distinctions in attitudes toward alcohol and tobacco on the one hand and illicit drugs on the other is likely to have positive effects on Americans' health. This would be true even if consumption of presently illicit drugs were to increase by several multiples—and even if the safety of those drugs were not to improve at all.

Wholly apart from how relegalization would affect attitudes toward alcohol and tobacco, increased availability (i.e. reductions in cost) of illicit drugs will, if it increases consumption of those drugs, almost certainly reduce consumption of alcohol, especially among alcohol abusers, with significant benefits to their health. Many of the illegal drugs are substitutes for alcohol, and vice versa. Studies demonstrate that when access to alcohol is restricted—as when the drinking age was raised from 18 to 21—there is a substantial corresponding increase in the consumption of marijuana, not otherwise explainable.\textsuperscript{65} This sup-

\textsuperscript{63} Per 100,000 users of each popular legal and illegal drug, approximately the following numbers are killed by their drug of choice each year: tobacco, 650; alcohol, 150; heroin, 80; cocaine, 4; marijuana, 0. Id. at 74-77.

\textsuperscript{64} The 1993 Household Survey estimates that among Americans over the age of 12, there were 103 million who used alcohol, 50 million who used cigarettes, and 12 million who used any illicit drug during the past month. U.S. PUBLIC HEALTH SERVICE, PRELIMINARY ESTIMATES FROM THE 1993 HOUSEHOLD SURVEY ON DRUG ABUSE, tbl. 4A (July, 1994) [hereinafter 1993 HOUSEHOLD SURVEY].

\textsuperscript{65} Peter Passell, Economic Scene: Less Marijuana, More Alcohol?, N.Y. TIMES, June 17, 1992, at D2; see also JOHN DINARDO & THOMAS LEMIEUX, ALCOHOL, MARIJUANA, AND AMERICAN YOUTH: THE UNINTENDED CONSEQUENCES OF GOVERNMENT REGULATION (1992) (analyzing the impact of increases in the minimum drinking age on the prevalence of alcohol and mari-
ports the reverse inference that increased consumption of marijuana would reduce alcohol consumption. Thus, if repeal of prohibition produced more consumption of marijuana, an offsetting benefit would be reduced consumption of alcohol—our second deadliest popular drug.66

When heroin addicts are deprived of heroin, they become alcoholics.67 When drinkers are deprived of alcohol, they turn to opiates.68 If repeal were to cause more consumption of heroin (by no means certain), some of the increase would probably represent a substitution for alcohol. To the extent heavy alcohol drinkers were to substitute opiates for alcohol, that would create significant health benefits (opiates cause virtually no physical damage to the body). Despite common misconceptions about the relative health costs of using legal and illegal drugs, health benefits could even accrue if consumers were to switch from alcohol or tobacco to cocaine or heroin.69

Public funds that could otherwise be spent for drug treatment are spent on counterproductive law enforcement. Prohibition enforcement has received about two-thirds of the drug funds spent at the federal level for many years. This is bizarre in view of the near unanimity among professionals interested in drug problems that the best use of resources in reducing drug abuse is in drug treatment, not law enforcement. A recent study by the Rand Corporation, funded by the federal government, concluded that treatment is seven times more effective than law enforcement in reducing the consumption of cocaine.70 The National Institute of Drug Abuse also concluded that every dollar spent on drug treatment saves seven dollars—four dollars in reduced costs to the public and three dollars in increased productivity.71 Nonetheless, there

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66. LONGEST WAR, supra note 6, at 34-39, 77. This estimate is not discounted for the health benefits of moderate drinking, but neither does it include the deaths caused by assaults triggered by alcohol.


68. In the late nineteenth and early twentieth centuries, when all drugs were legal but it was illegal or immoral for women to drink in saloons, most opiate users were women. LICIT AND ILLICIT DRUGS, supra note 3, at 17. After alcohol prohibition had brought women into the speakeasy and made drinkers of them, the ratios changed so that most users of opiates today are male. LONGEST WAR, supra note 6, at 56. In the early stages of alcohol prohibition, sales of morphine increased 150 percent. Id. at 88.

69. See note 63, supra. For more on drug switching, see James Ostrowski, Thinking About Drug Legalization, in DAVID BOAZ, THE CRUSES IN DRUG PROHIBITION 45, 63-64 (1990).


71. See generally MATHEA FALCO, THE MAKING OF A DRUG-FREE AMERICA: PROGRAMS
is at present treatment capacity for only a little more than half of those who need drug treatment.\textsuperscript{72} There is, however, a glimmer of hope. President Clinton's recent budgets increase the treatment shares of the budget substantially.\textsuperscript{73} An increase of $2 billion, less than 2% of the total funds wasted on the drug war, and only about one-sixth of the federal drug budget, would provide treatment for all drug abusers.\textsuperscript{74} If prohibition were repealed and treatment programs were no longer in competition with drug warriors, the additional funds would probably be reallocated to treatment.

E. Drug Prohibition Destroys Civil Liberties

Each year, as some supposed "loophole" used by drug dealers is closed, we all lose important civil liberties. Many Americans are persuaded we must sacrifice any constitutional safeguard in order to keep drug felons from escaping on "technicalities." However, the "technicalities" are the substance of our liberty, which took a revolution to establish.

Under the pressure of drug war necessity, the Fourth, Fifth, Sixth, and Eighth Amendments of the Bill of Rights have been subverted and have lost much of their meaning.\textsuperscript{75} We permit police to enter and search our houses, cars, and effects on the flimsiest of suspicion. We allow them to arrest and search minorities in reliance on racist stereotypes, euphemistically called "profiles." We let them terrorize us in our homes and even kill our children without recourse.\textsuperscript{76} We have all but destroyed the right of property with expansive notions of forfeiture. We have become so inured to daily excesses that the drug war disease is spreading to other areas. Based on drug forfeiture precedents, we are now willing to confiscate the cars of persons who cruise for prostitutes or drive under the influence.\textsuperscript{77} As a result of drug war forfeiture pre-

\textsuperscript{72} See TH\textsuperscript{AT} WORK 108-30 (1992) (discussing effective methods of treating addiction).


\textsuperscript{74} Herbert Kleber, Our Current Approach to Drug Abuse—Progress, Problems, Proposals, 330 NEW ENG. J. MED. 361, 363 (1994).

\textsuperscript{75} Lo\textsuperscript{NT}\textsuperscript{EST} WAR, supra note 6, at 122-45; Paul Finkelman, The Second Casualty of War: Civil Liberties and the War on Drugs, 66 S. CAL. L. REV. 1389 (1993); Steven Wisotsky, Crackdown: The Emerging "Drug Exception" to the Bill of Rights, 38 HASTINGS L.J. 889 (1987).

\textsuperscript{76} See LONGEST WAR, supra note 6, at 123.

\textsuperscript{77} Id. at 143.
cedents, we are now positioned in principle to take the homes and offices of anyone who commits, or permits others to commit, any crime on the premises, including tax evasion or neglect of pets. George Orwell would be astonished. Such is the effect of drug war morbidity. It is as destructive to the Constitution as AIDS is lethal to the body.

F. Drug Prosecutions Destroy the Lives of Otherwise Productive Citizens

Most users of presently illegal drugs, like most users of tobacco and alcohol, are productive and generally law abiding people. But treating their drug consumption as a serious crime makes it harder for them to be so and makes it impossible for some to be so—those who are socially and economically marginal to begin with. Legalizing drugs would greatly increase the capacity of the users of presently illicit drugs to be productive citizens.

I estimate that about 500,000 of our 1.3 million jail and prison inmates are there for illegal drug or drug-related offenses, and as many as 300,000 would not be there if drug prohibition were repealed because they would not be criminals. They would be available to their families and would have an opportunity to be useful members of society rather than embittered criminals enraged over their unjust punishment. No one who gets a prison term of any duration for using drugs or selling drugs to a willing adult buyer is likely to be persuaded that his punishment was deserved. Hundreds of thousands of Americans who might otherwise be integrated into the mainstream of society have that possibility virtually eliminated by a combination of embitterment and stigma, rendering their acceptance of and by the mainstream unlikely. This appalling waste of human lives, which itself far exceeds any plausible cost of illegal drug use, would be eliminated by repeal.

G. Prohibition Creates and Sustains Racial Mistrust and Hostility

The greatest social problem plaguing the United States near the end of the twentieth century is the same one that has plagued the continent for five centuries: racial mistrust and hostility. The drug war did not cause that problem; however, the drug war widens the hostility and deepens the mistrust between the races. By almost any measure, blacks suffer disproportionately from drug prohibition. They are not only more drug-dependent than whites, they are more likely to get AIDS, syphilis, hepatitis, and other diseases in the course of taking drugs or interacting with infected drug abusers. They are far more often the victims of drug-systemic violence than whites. It is the residents of inner-city
black and Hispanic communities who see their children seduced by drug money into a life on the street instead of a classroom; who see their children murdered or maimed; and who see their parents, children, spouses, and neighbors packed off to prison for increasingly lengthy jail terms, leaving shattered families behind. The prevalence of cocaine and heroin in inner-city communities would be a grave problem without drug prohibition, but the drug war converts a serious health problem into a pervasive series of burdens that collectively resembles a pogrom. Because whites are the major consumers of illicit drugs (and most of the consumers that come into the inner-city to buy their drugs), while the costs of prohibition fall disproportionately on members of minority groups, sinister racial inferences abound. Louis Farrakhan, head of the Nation of Islam, opines: "The epidemic of drugs and violence in the black community stems from a calculated attempt by whites to foster black self-destruction."78 His conspiracy theory is shared by many.79

A New York Times/WCBS-TV poll in late 1990 revealed that "[a] quarter of the blacks polled said that the government deliberately makes sure that drugs are easily available in poor black neighborhoods in order to harm black people."80 Another third of those surveyed believed that the availability of drugs might be the result of deliberate government activity.

Support for conspiracy theories, as they apply to drugs, seems to lie in the fact that racial minorities suffer from drugs and drug prohibition vastly out of proportion to their representation in the population, while drug dealing openly occurs on the streets of their neighborhoods, seemingly tolerated by the police.

Drug dealing and the evil that accompanies it are tolerated more in lower-class than in upper-class neighborhoods, but the explanation is not bigotry. The crimes are much more concentrated in poorer neighborhoods because the retail business is far more tempting to the poor than to the rich. Moreover, drug-enforcement police can hardly be faulted for wanting to employ their very limited resources in efforts to catch and punish "higher ups" in the drug distribution business. With dozens of street sellers on every block of a large neighborhood, the arrest and conviction of a few will have little impact on the trade.

80. Id.
The residents of the most affected communities are right in concluding that if the authorities cared enough, they could drive the drug dealers out of any neighborhood. But that possibility is much easier to conceptualize than to carry out. Experimental programs in which a neighborhood is saturated with undercover buyers and full enforcement takes place have had very limited success. The dealers adapt to the programs, sometimes by moving their drug deals or at least their deliveries indoors where they cannot be observed and danger to undercover buyers is magnified. Even if such a program drives out some of the drug dealers, it is usually only to an adjoining neighborhood where the process must be repeated, again and again. There are simply not enough police officers—and never will be—to saturate every conceivable venue where drugs might be sold.

Where there is intensive enforcement against street level drug sales, it generates virulent hostility from many of the residents of the affected neighborhoods, especially from those who are related to or financially dependent upon the drug dealer targets. Police are likely to find themselves attacked as “racist” for investigating and prosecuting drug dealing in the neighborhood. Many of the conspiracy theorists adopt the line that the drug problem can be solved by attacking drug commerce “at the source.” If drugs were not imported, the argument runs, there would be no drug problem in minority communities. It is, therefore, the nonblack growers and smugglers who should be punished rather than their black “victims,” whether the latter are consumers or distributors, or both. Thus, the more intense and committed street level enforcement is, the more some conspiracy theorists view it as evidence of the conspiracy. Given such reactions, street level enforcement is not only inefficient but frustrating and demoralizing to the police.

These sharp differences in perspectives reflect the inevitable confusion, ambivalence, and suspicion that are generated by the racial differences in patterns of drug dealing, drug consumption, and drug enforcement.

American drug prohibition also roughly resembles “entrapment” of youthful residents of minority neighborhoods. Criminal law recognizes an “entrapment” defense to a charge of crime. That doctrine holds that

82. Id. at 805-07; see also MICHÈLE SVIRIDOFF ET AL., THE NEIGHBORHOOD EFFECTS OF STREET-LEVEL DRUG ENFORCEMENT—TACTICAL NARCOTICS TEAMS IN NEW YORK (1992).
83. Such law enforcement also stirs up turf battles between rival drug traffickers.
if agents of the state cause a person to commit a crime by blandishing inducements that "create a substantial risk that such an offense will be committed by persons other than those ready to commit it," then the person who responds to such inducements cannot be convicted. America, in the 1990s, provides little hope for most inner-city youngsters of ever making a decent living unless they succumb to the omnipresent temptations, created by drug prohibition, to sell drugs. Sixty to seventy percent of the youths in many inner-city communities are unemployed and lack the skills needed to get decent jobs. Even if they had the skills, there are few such jobs in the inner-city in which they live. Even if there were such jobs, the prejudice against young black men is so palpable and pervasive that merely looking for a job is degrading.

On almost any street in an inner-city neighborhood, however, a job is waiting, a job that not only pays a decent and sometimes lavish income, but one that carries both prestige and entrepreneurial promise—dealing drugs. Such systemic pressure toward criminality is not—and should not be—a sufficient enticement to be recognized legally as "entrapment," but it resonates with the ethical underpinnings of the concept. Drug prohibition both provides the economic enticement of drug dealing and helps to eliminate other meaningful opportunities for inner-city youngsters.

More important than the contribution that this quasi-entrapment makes to racial hostility in the short run is the damage it does to the long-run prospects of inner-city youths. The black market corrupts them at an early age, diverts them from education, and all but guarantees that the lives of many will be lives of drug dependence and criminality. If we are going to bring these youngsters into the mainstream of society, we must wean them from drug money and all that accompanies it.

Ironically, Americans at every point on the political spectrum are converging in agreement that welfare dependency has become a crippling social disease. Yet most refuse to see that dependency on prohibition-produced drug money is destructive in similar ways—to many of the same people.

African-Americans are incarcerated at a rate six times that of whites. There are twice as many black males in New York’s prisons as there are in its colleges. Nationwide, one out of four black males

85. Philippe Bourgois, Just Another Night on Crack Street, N.Y. TIMES, Nov. 12, 1989, § 6 (magazine), at 53.
86. MAUER, supra note 39, at 1.
87. William Glaberson, One In 4 Young Black Men Are in Custody, a Study Says, N.Y.
in his twenties is in prison or under some form of court supervision, such as probation or parole.\(88\) (Of black males aged 18-35, the court-ennmeshed figure is 42% in Washington, D.C.\(89\) and a mind-boggling 56% in Baltimore.)\(90\) Fewer than one in sixteen white males of the same age is caught up in the criminal justice system.

As many as 70% of black men in Washington, D.C. are arrested by the time they turn 35.\(91\) Although about 77% of current illegal drug users are white and less than 17% are black, of 13,000 drug arrests in Baltimore in 1991, 11,000, about 85%, were of blacks.\(92\) Nationwide, about 45% of drug arrests are of African-Americans.\(93\)

Such gross disparities in criminal law enforcement are not necessarily racist. They are often responsive in part to demands from residents of the inner-city communities for an escalated attack on drug dealing in their neighborhoods. But some view this concentration of law enforcement—largely against young black men—as itself a manifestation of a genocidal conspiracy. Young black men are routinely sent to prison for succumbing to the temptations presented by the neighborhood drug dealer. The sentences imposed on such youths are savage. An enterprising youngster who hires a few of his friends to help him distribute drugs (even marijuana) can be convicted as a "drug kingpin" and receive a life sentence without the possibility of parole\(94\)—many have. Some states, such as Michigan, routinely hand out life no-parole sentences.\(95\) Federal law now even permits the death penalty for some

\(88\) Bill McAllister, Study: 1 in 4 Young Black Men Is in Jail or Court Supervised; Author Warns of Risk of Losing "Entire Generation," WASH. POST, Feb. 27, 1990, at A3.

\(89\) Jason DeParle, 42% of Young Black Males Go Through Capital's Courts, N.Y. TIMES, Apr. 18, 1992, § 1, at 1.


\(91\) DeParle, supra note 89, at 1.

\(92\) DeWayne Wickham, Drug "War" Is a Failure; Let's Call a Truce Now, USA TODAY, Sept. 8, 1992, at A13.


drug distributors.\textsuperscript{96}

The friends and families of many of the young people who are imprisoned for a decade or more have little respect for a criminal process that imposes such draconian penalties yet produces no apparent benefits to their communities. The young people who are punished more severely than many murderers, rapists, or bank robbers lose any opportunity for a productive life and are taken from their mates and their children. Many forces converge to produce the deplorable absence of fathers in the rearing of America's black children, but a major force is drug prohibition. The fathers are prisoners of war—our war against drugs.

Young black men make up only about 2\% of our population, but they make up nearly half of our prison population. American Civil Liberties Union lawyers John Powell and Eileen Hershenov observe:

If the goal of our nation's drug policy is to warehouse young minorities while militarizing the inner-city, it is indeed successful. Black men are now four times more likely to be incarcerated in the United States than they are in South Africa: of every 100,000 black males in the United States, 3,109 are incarcerated, while the comparable figure for South Africa is 729.\textsuperscript{97}

The taproot support for black suspicions is racial history. Blacks have suffered from bigotry, poverty, poor health, inadequate education, and disadvantage on virtually every measure of well-being in America since the first Africans were brought here in chains. Moreover, racism has been linked to drug prohibition throughout its history in America.\textsuperscript{98} The many blacks who suspect racist motivations in everything the white majority does have history on their side. Such attitudes are unlikely to disappear so long as there is plausible support for them.

When a society creates or permits the appearance of racism in its criminal process, it feeds racial hatred and mistrust. That is a major evil of drug prohibition. However it is administered, drug prohibition cannot avoid creating appearances of racism and thus fostering racial division and mistrust.

\textsuperscript{96} Violent Crime Control Act, supra note 36, at § 6002(b).
H. Nonusers Bear Most of the Costs of Drug Prohibition

In the early twentieth century, when reformers were lobbying for alcohol prohibition, they claimed that alcohol was the major cause of nearly all social problems—unemployment, poverty, business failure, slums, insanity, crime, and violence. Moderate consumption of alcohol, they claimed, was impossible and addiction was inevitable. The prohibition experiment, however, proved that there were even worse causes of social ills and one of them was prohibition itself. The experiment also proved that inevitable addiction was a myth. Drug prohibitionists now make precisely the same claims about illegal drugs that they once made about alcohol, and their claims are at least as false. Prohibitionists continue to preserve the status quo by blaming “drugs” for our problems and refusing even to discuss the evils of prohibition itself. Typical is the following statement by the National Director of Drug Control Policy, Dr. Lee Brown:

Drugs, especially addictive, hard-core drug use—are behind much of the crime we see on our streets today, both those crimes committed by users to finance their lifestyles and those committed by traffickers and dealers fighting for territory and turf . . . . Moreover, there is a level of fear in our communities that is, I believe, unprecedented in our history . . . .

If, instead of blaming all these evils on “drugs,” Dr. Brown had added two words at the beginning of his remarks, “Prohibition of,” he would not only have been correct, the political reverberations would have been deafening. That explains Dr. Brown’s blindness to reality, but much of the press is equally in denial. In a recent twenty-page analysis of crime in the United States, the staff of U.S. News and World Report, after consulting dozens of experts, offered a list of causes and cures for the crime problem. Prohibition of drugs or their legalization was not even mentioned. Similarly, in a thirty-page special report on homicide, Newsweek discussed drug dealing but the only mention of prohibition

100. Dr. Lee P. Brown, Statement to the Congressional Black Caucus (Jan. 13, 1994).
was in connection with the proposed prohibition of guns.\textsuperscript{102} So much for the “free” press. If Americans ever discover the costs they are paying because of prohibition, they will demand repeal.

Although there may be as many as twenty-five million occasional or more frequent users of illegal drugs in America, the number of those who use “hard” drugs is much smaller, and the number who use such drugs more often than casually, i.e., at least weekly, is far smaller still. There may be as few as one million weekly users of cocaine or heroin.\textsuperscript{103} Considering this latter group as a fair approximation of the numbers of illegal drug “abusers” in America, 260 million Americans are imprisoning themselves through fear of crime, wrecking their Constitution, their courts, their economy, their cities, their health, and their safety in a failed effort to deter fewer than one-fourth of one percent from damaging themselves with drug abuse. We could eliminate most of the damage to ourselves and still be more successful in protecting users from themselves if we allowed drug users to bear more of the cost of their own use.

We should, of course, hold drug users responsible for the harm they cause to others while intoxicated on drugs, legal or illegal. We should try to help any drug abuser who wants help. We should make treatment available at no cost to any abuser who wants it, whether the drug is heroin, cocaine, alcohol, tobacco, toad sweat, paint fumes, correction fluid, or formaldehyde. But we should not pretend that we can keep drugs out of the hands of those who want them or that we can, by force of law, prevent them from using or abusing drugs. If the risks or ravages of drug abuse itself are not a sufficient deterrent, nothing will be. In any event, we cannot solve the problem by externalizing the costs of drug use.

We have good reasons as a nation for feeling guilty about the wretched conditions in which many Americans are struggling and from which some seek temporary escape through drugs, but punishing ourselves with crime, corruption, disease, and urban rot is not the answer.

\textsuperscript{102} Murder: A Week in the Death of America, NEWSWEEK, Aug. 15, 1994, at 20-49.

\textsuperscript{103} The 1993 National Household Survey on Drug Abuse estimates that only 476,000 Americans were weekly users of cocaine in 1993. 1993 HOUSEHOLD SURVEY, supra note 64, at tbl. 15A. Estimates of weekly heroin users are not given, but an estimate of only 80,000 users of heroin in the “past month” is projected. Id. at tbl. 4A. These estimates are almost certainly underestimates, perhaps by 50% or more. A recent Rand Corporation study, for example, asserts that there are 7 million users of cocaine, of which 1.7 are weekly users. RYDELL & EVERINGHAN, supra note 70, at xi n.1. It is possible, therefore, that the total number of heavy users of cocaine and heroin is as high as 2 million.
It will not assuage but will exacerbate our guilt.

II. THE DUBIOUS BENEFITS OF DRUG PROHIBITION

The costs of drug prohibition are undeniably huge. But what of the benefits? Sadly, there probably are none to the society at large. Drug dealers owe their livelihoods to prohibition, as do thousands of drug warriors. Prison builders benefit, as do politicians who owe their careers to their opposition to demon "drugs." Inner-city morticians who dress bodies of victims of drug war turf battles, car dealers and jewelers who sell their goods to drug distributors, and other satellite entrepreneurs benefit from drug prohibition, but only those who make money from the drug war benefit from it. Everyone else suffers greatly.

The only conceivable benefit to society from drug prohibition, consistent with its avowed purpose, is a reduction in the consumption of prohibited drugs. Yet the likelihood that the total consumption of prohibited drugs is suppressed by prohibition cannot be counted as a benefit without more analysis. Drug consumption is undesirable only insofar as the consumption has adverse effects, of some kind or another, on consumers or others. While the numbers of users of illicit drugs are almost surely reduced somewhat by prohibition, the consumption of harmful drugs is almost as certainly increased. Consumers of black market drugs get poisoned; they get overdosed, and they are induced by prohibition to buy and consume stronger, more addictive drugs than would be the case in a legalized state. As Richard Cowan notes, "The more intense the law enforcement, the more potent the drugs will become." We should have learned this during alcohol prohibition when beer was largely replaced with the hard liquor cocktail, a trend which was immediately reversed when prohibition was repealed.

When I began collaborating with Albert Gross on America’s Longest War about five years ago, I did not believe in drug legalization,

104. Richard C. Cowan, How the Narc's Created Crack, NAT'L REV., Dec. 5, 1986, at 26, 27. What Cowan calls the “iron law of prohibition” results from the fact that concentrated, potent drugs are more efficiently smuggled, transported, and sold and are easier for the consumer to conceal, transport, and consume without detection. The consumption of cocaine or heroin also has an advantage over marijuana in that it can be detected by tests only a few days after ingestion whereas marijuana may remain in the system for a month or more. Another advantage of potent drugs for the seller, but a disadvantage for the buyer, is that potent drugs can more easily be “cut” with other chemicals that resemble the real thing. Often these dilutants are poisons. See LONGEST WAR, supra note 6, at 195-97.

105. LONGEST WAR, supra note 6, at 197. Although the trend toward hard liquor was reversed by repeal, we are still recovering from it. Even today, consumption of beer and wine is gaining popularity over hard liquor.
although I was firmly committed to the need to de-escalate the drug war. I believed then, as I do now, that drug abuse is a dreadful problem in America. I also believed then that at least prohibition had the virtue of reducing drug usage and therefore mitigating the damage from drug abuse. I discovered, however, that my basic assumption was false: rather than reducing the harm to users and others from recreational drug consumption, prohibition makes even that aspect of the problem worse. In short, there are no benefits to American society from drug prohibition as it is administered today.

Any analysis of drug consumption that disregards the differences between marijuana and heroin or between cocaine and butane and treats all illegal drugs as equivalent makes no sense outside the realm of theology. If government has any business prohibiting the use of drugs, it can only be justified by the fact that we are preventing concrete, identifiable harm, although the harm from using drugs varies greatly. Prohibition increases the attractiveness of legal drugs, like alcohol and tobacco, both of which are far more dangerous than marijuana and, arguably, more damaging to abusers than cocaine or opiates.\(^{106}\) Likewise, the market for drug substitutes—household products like butane, Scotchguard, and paint—is propped up by prohibition, because these products are cheap and easily available, yet few more harmful “drugs” can be imagined.\(^{107}\) The more “effective” prohibition is, the more prohibition encourages consumption of synthetic substitutes for cocaine or heroin, such as methamphetamine and fentanyl. These synthetics can be manufactured locally, even in some basements.\(^{108}\) Both synthetics are far more dangerous than the plant-based drugs for which they are substitutes.\(^{109}\) If drugs were legalized, the consumption of marijuana, our least harmful illegal drug, would be an attractive substitute for stronger, more harmful, addictive drugs, and we would all benefit from that. Since all legal drugs would be regulated and the potency and purity of all would be disclosed on their labels, poisonings, allergic reactions, and overdoses would be greatly reduced, and all users would be honestly informed of the residual harms and risks associated with the use of

\(^{106}\) Id. at 77.

\(^{107}\) In New Haven, CT, youngsters have taken up a new discovery which they call “illy.” The key ingredient in this smoking concoction is embalming fluid or formaldehyde. Susan A. Zavatsky, The Horror of Illy, NEW HAVEN REG., Sept. 22, 1994, at A1. More recently, they have discovered jimson weed, with equally ghastly consequences.

\(^{108}\) LONGEST WAR, supra note 6, at 220.

\(^{109}\) Id. at 220-21.
each drug. Even if consumption of legalized drugs increased tenfold under a repeal regime, the physical harms associated with drug use could be less than under prohibition. Prohibition probably discourages the use of less harmful, less addictive illegal drugs more than it discourages the use of more potent more harmful illegal drugs. Given the relative inelasticity of demand for intoxication, therefore, prohibition causes consumption of more harmful drugs than would be the case under repeal. Only if prohibition were able to curb massively the entire appetite for psychoactives could it be beneficial to a society. Yet, there is no basis for believing that prohibition ever has had or ever could have that effect.

III. A NATION OF ZOMBIES?

I could be wrong about the previous claim—that even an inconceivably huge increase in consumption of presently illegal drugs following repeal would still be less harmful than the consumption that now exists under prohibition. So, let us consider in some detail the common assumption that drug prohibition greatly suppresses the use of prohibited drugs and the corollary claim that the use of such drugs would soar if prohibition were repealed.

During most of its history, this country had no drug prohibition, and drug abuse was never worse than it is now.110 There are few, if any, countries in the history of the world who ever had a majority of their adult populations addicted to any drug other than tobacco, and if any approached that condition, the drug was alcohol. Drugs are still at least de facto legal in much of the world, as they have been throughout most of human history, yet if there is or ever has been a country that has ten percent of its population abusing cocaine or heroin, I have not heard of it. Although there are legal prohibitions against drug trafficking in our neighbor to the south, Mexico, there is no serious enforce-

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110. The number of Americans who use illicit drugs casually has been decreasing for about fifteen years. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS, CRIME, AND THE JUSTICE SYSTEM 30-31 (1992). However, as noted earlier, murder and other violent crime rates are at or near all-time highs. Moreover, cocaine and heroin-related emergency room episodes are at or near all-time highs. 1994 NATIONAL DRUG CONTROL STRATEGY, supra note 72, at 14-15. A Rand Corporation study also concluded that the number of heavy users of cocaine has actually increased during the period when casual use was declining and is as high now as it has ever been. Accordingly, the quantity of cocaine actually consumed in America in the past fifteen years has remained constant. RYDELL & EVERINGHAN, supra note 70, at xi; see also Joseph Treaster, Echoes of Prohibition; 20 Years of War on Drugs, and No Victory Yet, N.Y. TIMES, June 14, 1992, § 4, at 7.
ment against local distribution or consumption. Mexico is a major source of marijuana and heroin and a major transhipment point for cocaine. The country is awash in inexpensive drugs. Yet our own State Department says that Mexico "does not have a serious drug problem." Regular, heavy use of strong psychoactive drugs is either an effort to self-treat mental illness or an effort to escape pain and despair, or both. The notion that any drug, if freely available, will enslave an entire population is prohibitionist fantasy.

Recent experience in the Netherlands suggests that abandoning suppression efforts need not even produce new users. That country de facto decriminalized marijuana. While possession and use of marijuana technically is still a crime in Holland, one can purchase hashish and marijuana there with impunity. Some Amsterdam cafés feature various forms of cannabis on their menus, and municipal recreational facilities for teenagers can sell as much as 30 grams to their young patrons without being prosecuted. According to a 1989 report by the United States Embassy in the Hague and a 1985 report by the Dutch government, marijuana consumption in the Netherlands has decreased substantially since the decriminalization.

At various times, eleven American states more or less decriminalized the possession and use of marijuana. Yet marijuana consumption declined at approximately the same rate in the states that decriminalized it as consumption has declined elsewhere in the United States. It did not increase anywhere.

Marijuana use has decreased in the Netherlands and in other states that decriminalized its use for the same reasons it has declined in places that have retained prohibition. People stopped using marijuana, or use it to a lesser extent, because "pot smoking" is simply less fashion-
able than it once was, because recreational drug use in general has been declining for about fifteen years, and because other more harmful drugs have been substituted. What these experiences demonstrate is that extra­legal, psycho-social forces account for changes in patterns of drug consumption far more than do prohibition efforts, and that official suppression—or lack thereof—is a relatively uninfluential factor in drug use trends and patterns. This is corroborated by a random telephone survey of 1,401 American adults conducted in 1990. Of those Americans polled, fewer than 1 in 100 who had not tried cocaine would do so if it were legal.\textsuperscript{117}

Since greatly shrinking the black market in drugs is the main object of prohibition’s repeal, drug prices under a system of regulation, even though taxed, must be kept much lower than they are now. When most commodities become cheaper, more people use them and those who used them before use more of them. That is true to some extent when the commodity is a pleasure drug. We observed that the invention of crack in the mid-1980s, which drastically reduced the cost of a cocaine high, brought in hordes of new users. In July 1992, the \textit{New York Times} reported that due in part to the recent abundance of heroin and cocaine (despite decades of drug war aimed at preventing it), drug dealers had cut the price of a $10 or “dime” bag of heroin to $5 and, in some parts of the city, reduced the price of a dose of crack to an all-time low of 75 cents.\textsuperscript{118} New York authorities believed that the reduced prices also accompanied increases in the numbers of both new users and abusers of cocaine. Heroin use also increased as prices declined because users could afford to snort heroin rather than inject it and thus avoided the risk of AIDS and several other diseases related to intravenous drug use. Several studies show that the price of cigarettes—our most addictive drug—has a measurable impact upon consumption, especially long term: the higher the price, other things being equal, the less tobacco is smoked.\textsuperscript{119} Reducing the money it takes to buy a dose of a drug is not the only cost reduction to the user contemplated by legalization. The legal user will no longer be a felon for

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\item \textsuperscript{117} Richard J. Dennis, \textit{The American People Are Starting to Question the Drug War, in Drug Prohibition and the Conscience of Nations} 217, 217-18 (Arnold S. Reback et al. eds., 1990).
\item \textsuperscript{118} Joseph B. Treaster, \textit{Hospital Data Show Increase in Drug Abuse, N.Y. Times}, July 9, 1992, at B1.
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using drugs and will no longer feel the need to commit crimes in order to pay for the drugs used. Thus, in a broad sense, the "price" of drug use under legalization will be vastly reduced.

Legalizing the use of a drug that was previously criminal is also likely to have some effect on increasing consumption in addition to the effects resulting from increased availability of drugs. Prohibition laws still have some impact upon the consumption choices of some citizens, even if such laws are widely disregarded by large segments of society. While legalizing drugs is not a statement that using drugs is desirable—governments regularly propagandize against many activities that are legal, including tobacco smoking, dropping out of school, unsafe sex, and so forth—legalization can be interpreted by some potential drug users as withdrawing condemnation, even as morally equating the use of newly-legalized drugs with those already legal, such as tobacco and alcohol. This too can have a contributing influence on the consumption of previously illegal drugs (and, as noted earlier, a negative influence on consumption of previously legal drugs).

We should not, however, overlook the fact that illegality also encourages consumption of illegal drugs in some ways and that such encouragement would disappear with repeal. The black market resulting from illegality glamorizes the retail drug trade. The money acquired from dealing drugs provides dealers with otherwise unobtainable cars, jewelry, fancy clothing, and other accoutrements of "success." Inevitably, the product that helps produce such riches is itself glamorized. A plentiful supply of cocaine is a badge of wealth and success even more impressive in some subcultures than a new BMW. Children who are recruited to work in drug distribution organizations are under psychological pressure to sample the product and to share it with others whom they wish to impress. Retailers, moreover, are motivated to aggressively sell their products to others, some of whom would not have bought it on their own initiative.

There is, nonetheless, a substantial likelihood that, all other things remaining equal, legalization will be accompanied by an increase in the consumption of newly-legalized drugs. But there is also little reason, and no support in what followed the repeal of alcohol prohibition,\(^{120}\)

\(^{120}\) Since the distribution of alcohol was illegal during Prohibition, there are no real data on alcohol consumption. An excellent recent analysis of drunkenness arrests, death rates from cirrhosis of the liver, death rates from alcoholism, and hospital admissions for alcohol psychosis concludes that although alcohol consumption fell sharply after Prohibition went into effect, it soon began to rise and continued to rise until it reached about 60-70 % of its pre-Prohibition
to suggest that legalizing illicit drugs would produce a huge increase in the numbers of users of pleasure drugs. One who neither smokes tobacco nor drinks alcohol is extremely unlikely to be a user of any of the other pleasure drugs, caffeine aside, and even less likely to become an abuser. The major reasons why people desist from smoking tobacco and drinking alcohol—health concerns, social stigma, morality, aesthetics, etc.—are also applicable to other pleasure drugs.

The potential new users of legalized drugs are therefore people who are presently deterred by the price of these drugs or by the criminality of their use, but who nonetheless drink or smoke cigarettes. To the extent that such persons were to substitute newly-legalized pleasure drugs for tobacco or alcohol, they would improve their bodily health and the health of those with whom they come into contact. Cocaine or heroin users do not pollute the air and rarely beat their mates or children while intoxicated on those drugs.

Most people who would abuse cocaine or heroin if it were legalized, but who do not now use these drugs, are already abusing alcohol, killing themselves and others by the tens of thousands every year. They would be less likely to kill themselves with drugs if they used less alcohol, even if they used more cocaine or heroin, and would also be much less dangerous to the rest of us.

Apart from the symbolic effects on perceptions of drugs, mentioned earlier, increased consumption of marijuana or heroin would likely result in a reduction in the consumption of alcohol. Among a large number of users, the psychoactive effects of such drugs are so sufficiently similar to alcohol that they are to a substantial extent substitutes. It is less clear that such a relationship exists between cocaine and alcohol. A great many cocaine users also consume alcohol while taking cocaine; the two drugs are apparently complementary, the former being a depressant and the other a stimulant. Alcohol, which is cheap, may

level. "The level of consumption remained virtually the same immediately after Prohibition as during the latter part of Prohibition, although consumption increased to approximately its pre-Prohibition level during the subsequent decade." Jeffrey A. Miron & Jeffrey Zwiebel, Alcohol Consumption During Prohibition, 81 AM. ECON. REV., May 1991, at 242.

121. Many nonusers—even though they smoke or drink alcohol—may presently be deterred by the health risk of drug use, which would be greatly reduced under any rational system of legalization. Offsetting that factor, however, is that drugs would contain labels warning of the dangers of using the particular drug. Thus, drugs would be safer under legalization and their residual dangers would be better known.

augment the effects of cocaine, which is costly. Alcohol thus seems to play a role similar to that of Hamburger Helper. It is not the real thing, but it helps to stretch out the real thing with tolerable diluting effects. It seems likely, however, that increased use of cocaine will not be accompanied by an increased use of alcohol but rather a reduction. If cocaine is inexpensive, as it would be under legalization, there would be little incentive to use alcohol to augment the effects of cocaine. More important, perhaps, combining either heroin or cocaine with alcohol is dangerous. Most deaths from "overdoses" of cocaine and heroin are probably overdoses of alcohol (or barbiturates) and cocaine or heroin (or both). Users would be better informed about the risks of drug synergy under legalization. The sensation that alcohol adds to cocaine would not be worth its risks in a legalized system since cocaine itself would be approximately the same price per intoxicating dose as alcohol.

The very substantial reductions in numbers of alcohol and tobacco users over the past few decades demonstrates that people are capable of avoiding drugs that they know are bad for them, even if the government says they are legal and they are widely advertised as the keys to success and happiness. As United States District Court Judge Robert W. Sweet observed in a 1989 speech urging drug legalization, "If our society can learn to stop using butter, it should be able to cut down on cocaine." We should not forget, although we often do, that what we should be concerned about when contemplating the repeal of prohibition is not increased use of drugs but increased abuse. Very few abuse marijuana today and there is no reason to think that will change. Most who use cocaine today suffer no ill effects from it and are not addicted.

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125. According to NIDA's most recent household survey, 23 million Americans have used cocaine but only 3 million continue to use it "occasionally" and only 476,000 used it in the "past week." See 1993 HOUSEHOLD SURVEY, supra note 64, at tbls. 4A & 15A. This means that nearly 87% of those who have used cocaine do not use it at all now and only about 2% use it weekly, which is a rough proxy for those who are addicts. Ironically, representatives of the tobacco industry recently argued that tobacco is "not addictive" because about 50% of the smokers who are still alive have quit smoking. See Letters of William I. Campbell & James W. Johnston to the Editor, N.Y. TIMES, Mar. 15, 1994, at A5.
feeling produced by a drug. It takes two things to make a drug addict: (1) a feeling strongly associated with use of a drug and (2) a consumer who is susceptible to addiction to that feeling. 126 Given the ubiquity of drugs in the society and the fact that tens of millions of Americans have experimented with illegal drugs, there is no reason to fear that there are vast numbers of unformed addictive relationships just waiting for legalization in order to be consummated.

Whether Americans choose to avoid recreational drugs in the first place or to quit using or abusing them is linked to the quality of their lives and their perceived prospects for a rewarding life without drug use or abuse. This is clearly demonstrated by recent data about illegal drug use. Illegal drug use has been reduced drastically in the past few years among white middle and upper classes but hardly or not at all among ethnic minorities who largely inhabit our impoverished inner-cities. 127 Many of those users see nothing but a bleak future before them. They have little to lose by drug abuse, and thus, they proceed to lose it.

In sum, the drug market is already saturated with a combination of legal and illegal drugs. Virtually everyone who now wants to get high already does so. Legalization may significantly alter market shares among the now legal and illegal drugs, but it is unlikely to create a strong surge in new demand for psychoactive drugs. It is even less likely to create a new population of drug abusers. As Michael S. Gazzaniga, professor of neuroscience at Dartmouth Medical School, puts it, "There is a base rate of drug abuse, and it is [presently] achieved one way or another." 128

Thus, I conclude that while the use of drugs that are legalized will probably increase following repeal, especially in the short run, the increases will be mostly in the use of much safer, less addictive drugs like marijuana, and will be offset by reductions in the use of more dangerous drugs like alcohol. We will certainly not become a nation of zombies.

IV. SOME OTHER CLAIMS AND CONCERNS

126. See STANTON PEELE, DISEASING OF AMERICA 145-71 (1989). According to Alan Schwartz's analysis of the evidence, few if any drugs are enslaving in the sense that they produce addictive behavior by physically changing the body. Rather, one becomes "addicted" to the feelings generated by a drug only because and so long as those feelings are worth the user's consumption costs. Whether that is true is mainly a matter of the user's "character," not his biology. Alan Schwartz, Views of Addiction and the Duty to Warn, 75 VA. L. REV. 509 (1989).

127. LONGEST WAR, supra note 6, at 161-62.

A. The "Moral Equivalent of Genocide"

Dr. Lee Brown, our Director of Drug Control Policy, has asserted that legalization would be the "moral equivalent of genocide." The victims, presumably, would be inner-city African-American communities. But to believe that members of a particular race of Americans are incapable of making their own decisions about what they want to put into their bodies is reminiscent of the attitudes that underlay a system of slavery. Urban blacks are disproportionately users and abusers of both crack and heroin. But it does not follow that there is something in their genes or in black culture that preordains such drug usage. It is the pain and poverty of inner-city life that accounts for the self-medication by inner-city residents, not their genes, their culture, or the continuing effects of slavery. Prohibition cannot improve these underlying causes of drug use, but a caring society, using funds freed by repeal, can certainly do so. Drug abuse can produce terrible disabilities with resultant neglect of children, jobs, health, and other responsibilities, but drugs are not viruses or even bacteria: they are substances that people choose to take into their bodies. The first step in reducing drug abuse is to make sure that those who take drugs are aware of the risks of doing so. (This was not the case with crack; the epidemic was well under way before the addictive qualities of crack were widely known.) The second step is to provide a society in which the risks of abusing addictive drugs exceed the benefits because life has more to offer than a chemical high. The notion that African-Americans lack the capacity to resist their own self-destruction is preposterous, yet it is just beneath the surface in prohibitionist polemics linking legalization and genocide. In addition to their painful lives, a major reason why inner-city blacks are heavy users of cocaine and heroin is that their streets and homes are inundated by these drugs and their distributors and users. Prohibition also glamorizes the prohibited drugs, especially in neighborhoods where they are sold by black market entrepreneurs. That artificial status would disappear after repeal.

America's drug war is systematically destroying the character, the will, the hope, the health, and, increasingly, the lives of African-American

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130. For an intelligent anti-prohibitionist analysis of drugs and race, see Thomas Szasz, Our Right to Drugs 112-24 (1992).
residents of our inner cities. It is drug prohibition, not legalization, that deserves comparison to genocide.

B. Increased Safety Hazards

Another worry is that, if use of newly-legalized drugs became far more widespread than at present, there would be greatly enlarged safety risks to nonusers. Automobiles, trucks, airplanes, and factory machinery would be operated by people whose capacities were significantly impaired by drugs.

Major impairments are produced by alcohol, but they are not comparably produced by other drugs. Marijuana is a likely suspect since it distorts the perception of time. However, a comprehensive recent study funded by the National Highway Safety Administration found no positive correlation between the presence of marijuana in the blood of drivers in fatal accidents and driver culpability. The only correlation with fault was found with alcohol. If legalization diverts users from alcohol, we may even have safer highways and airways as a result. But it is, in any event, possible to prohibit driving and piloting by drug-impaired persons in a state of legalization. In fact, it would be less difficult to regulate under legalization because impaired operators would have less reason than they now do—when mere use of the drugs is a serious crime—to hide their condition. Drug testing is now commonplace—far more so than I would like—but in a state of legalization, drug testing by employers and traffic police would be much less objectionable since it would not expose the person tested to a charge of a serious felony. Moreover, modern technology is capable of producing portable devices to test cognitive, perceptual, and motor capacities. Such tests are far more relevant to one’s ability to operate machinery than a test to determine the presence, or even the quantity, of drugs in one’s blood, breath, or urine.

Legalizing drugs does not require that impaired driving also be made legal. Drivers who are seriously impaired, for whatever reasons, should not drive and should be punished if they do so.

C. “Crack Babies”

It is sometimes said that legalization will produce more “crack babies” or other infants whose health is seriously damaged by their mother’s drug use during pregnancy. But much, and perhaps most, of the damage done to such babies comes from their mother’s neglect of nutrition and hygiene, combined with the fact that many of them have no prenatal medical care. Fear of criminal prosecution keeps many such mothers away from prenatal care when it is available. Moreover, most drug treatment programs, believe it or not, refuse access to pregnant mothers! Such idiocy would stop under any rational system of legalization.

Repealing prohibition would enable us to develop a comprehensive policy dealing with women who ingest substances that are harmful to their fetuses or to their babies. No such policy exists today.

D. Exposing Our Children to Drugs

The high cost of illegal drugs might be a significant deterrent to drug experimentation by America’s teenagers. If this cost were drastically reduced, a substantial segment of such detersables might experiment with newly-legalized drugs and become hooked. But children who do not drink alcohol or smoke tobacco will not use cocaine or heroin, however cheap it is. Many of those who do drink or smoke, and are interested in expanding their use of drugs, already have tried marijuana, and many have tried cocaine. The price of experimental quantities of illegal drugs is already well within the reach of most teenagers and the drugs can be bought from their classmates. Moreover, as difficult as it may be for some to contemplate, even if legalization of the adult market produced a substantial increase in juvenile experimentation with marijuana, heroin, or cocaine, the juveniles themselves, and the rest of society, might still be better off, if that experiment meant less juvenile

132. See A.M. Rosenthal, On My Mind, Captive Neighborhood, N.Y. TIMES, July 10, 1992, at A29. Many of the claims about “crack babies” have been widely exaggerated. “There is little evidence that the vast majority of infants exposed to cocaine during pregnancy have permanent brain damage or suffer other irreparable harm. Certainly no effect of cocaine on the fetus has been shown to be as severe and as common as fetal alcohol syndrome.” James B. Bakalar & Lester Grinspoon, The War on Drugs—A Peace Proposal, 330 NEW. ENG. J. MED. 357, 359 (1994).

use of tobacco and alcohol.

There is another family of legal drugs that is in competition with illegal drugs, that is popular among youngsters, and is especially dangerous: inhalants. Four times as many young people regularly abuse inhalants as abuse cocaine. At least twenty-two youngsters have died since 1989 from inhaling Scotchguard, a product used to protect fabrics. Other popular inhalants are paint thinner, air fresheners, typewriter correction fluid, ammonia, refrigerants, hair sprays, glue, nail polish, automobile gasket sealer, and propane. While the use of other drugs is down among high school students, use of inhalants has apparently held steady or even increased in recent years. One in five high school seniors has used inhalants.

The use of inhalants can produce sudden fatal heart attacks. It may also permanently damage the brain, lungs, and other organs. Youngsters use these drugs because they are legal and cheap. In many cases, the inhalant itself has no intoxicating qualities, it merely replaces oxygen in the brain and results in temporary oxygen starvation, which produces a high much like strangulation. A system of drug regulation that effectively discourages the use of inhalants would have much to commend it. Prohibition of such valuable household products is impossible. Legalization of other, safer drugs, is possible.

I would continue to criminalize the distribution of drugs, including tobacco and alcohol, to children. And since drug use among adults would be lawful, we could concentrate our law enforcement resources on purveyors of drugs to children, and could be far more successful in that endeavor, having narrowed our focus, than we are today. It is not true that anything a society permits adults to do cannot effectively be denied children and that, as a result, adults who encourage children to engage in such “adult” activities cannot be condemned. Sex between

135. Id.
136. Surveys suggest that teenagers are using slightly more illicit drugs in the past few years than they did previously, but the primary increases have been in marijuana use. Moreover, illicit drug use among teenagers is still far below what it was in the late 1970s and early 1980s. See Michael Janovsky, Drug Use Rising Among Teen-Agers, Study Says, N.Y. Times, Dec. 13, 1994, at 1.
138. Sobering, supra note 137.
139. Zorn, supra note 134.
adults and children is severely condemned in America while sex between unmarried adults is not even a misdemeanor in most states. I would treat the distribution of drugs to children like the child abuse that it is and put flagrant violators in prison for it. However, this rarely happens due to the overbroad focus of today's drug war.

V. APPROACHING REPEAL

Eliminating or greatly reducing almost any one of the costs associated with prohibition discussed above itself warrants a declaration of drug peace. When the benefits of reducing or ridding ourselves of all of them are combined, the case for repeal becomes overwhelming. If legalization is too large a leap, courageous governors and a courageous president could give us some of the benefits of repeal simply by de-escalating the war. Cut the drug law enforcement budgets by two-thirds (as President Clinton cut the personnel of the "drug czar"), stop civil forfeitures, grant executive clemency to most of the nonviolent drug violators stuffing our prisons, and much of the evil of prohibition will disappear. When the benefits of de-escalation are experienced, the nation will then be ready for de jure reform.

The meekest among us must admit that the case for relegalizing marijuana is unanswerable. Jimmy Carter was right when he proposed decriminalization of marijuana during his presidency. All Americans would be better off if he had succeeded. Marijuana poses some health risks, but far fewer than any other pleasure drug, with the possible exception of caffeine, and it substitutes for and, therefore, competes with all psychoactive drugs. Pending the legalization of marijuana, our nation's chief executives and law enforcement officers should end all prosecution for marijuana possession or trafficking and open the prison doors for all who are there solely for such offenses. Even an ardent prohibitionist ought to join in this proposal. Everyone agrees that cocaine and heroin are worse drugs, by any standards, than marijuana. If marijuana is legalized, drug warriors can then focus their resources on the war against "hard" drugs.

Should we retain the prohibition of hard drugs but reduce the penalties for distributing them, treating drug trafficking as just another vice, like prostitution or illegal gambling? That would be a great improvement over our drug war approach, but I don't think it is the answer.

140. Jean Seligman & Lucy Howard, Easing the Pot Laws, NEWSWEEK, Mar. 28, 1977, at 76.
The slight benefits we might get from such a parsimonious retention of prohibition—deterring those whose consumption patterns are highly responsive to legal norms—would not be worth what we would give up—regulation of the distribution of drugs and control over the content of the product, the packaging, the distributors, and the informational flow about them. What we gain in a safer, less addictive product would greatly exceed the minor deterrent value of a largely symbolic prohibition. Moreover, if we were to roll back drug prohibition to something defensible, ignorant or unprincipled politicians would soon seize the opportunity to escalate the drug war all over again. Drugs are too convenient a scapegoat for demagogues to resist.

Drug prohibition has clearly eclipsed alcohol prohibition as the nation’s costliest, most catastrophic social program. It has been such a colossal failure that even to question it has become political heresy. Too much has been spent, too much crime created, and too many lives destroyed by it to allow us to consider its merits. We have fried our brains not with drugs but with their prohibition.