

1990

The Moral and Practical Case for Drug Legalization

James Ostrowski

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

Ostrowski, James (1990) "The Moral and Practical Case for Drug Legalization," *Hofstra Law Review*. Vol. 18: Iss. 3, Article 5.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol18/iss3/5>

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

THE MORAL AND PRACTICAL CASE FOR DRUG LEGALIZATION

*James Ostrowski**

INTRODUCTION

This article presents a comprehensive argument for the legalization of consciousness-altering drugs. In Part I, the methodology of drug policy analysis is explored, drug prohibition is defined as the initiation of physical force against persons engaged in non-violent actions and voluntary transactions involving prohibited drugs, and legalization is defined as the removal of such force to a greater or lesser degree depending upon the form of legalization adopted in a particular state or nation.¹

In Part II, a moral argument for drug legalization is presented.² The theories of two contemporary philosophers, Douglas Rasmussen³ and Hans-Hermann Hoppe⁴ are discussed. Despite the fact that Rasmussen and Hoppe start from different premises, both arrive at the conclusion that individuals have a moral right of self-ownership.⁵

Part III presents a cost-benefit analysis of drug prohibition. The major costs of prohibition include categories of crime costs, medical costs, economic costs, and miscellaneous costs.⁶ Prohibition stimulates a tremendous amount of crime and reduces the ability of the criminal justice system to deal with truly violent criminals. Prohibition, by its very nature, threatens civil liberties and destroys the social structure of the poorest neighborhoods.

* Associate Policy Analyst, Cato Institute, Washington, D.C.; B.A. State University of New York at Buffalo, 1980; J.D. Brooklyn Law School, 1983. The author wishes to acknowledge the research assistance of Mark Phillips, Gilbert Moore Fellow in Law & Philosophy; M.A. New York University 1984; J.D./Ph.D. candidate, State University of New York at Buffalo, and Rachel M. Kane, B.A. State University of New York at Buffalo, 1986.

1. See *infra* notes 12-75 and accompanying text.
2. See *infra* notes 76-154 and accompanying text.
3. See *infra* notes 89-99 and accompanying text.
4. See *infra* notes 100-13 and accompanying text.
5. See *infra* notes 114-22 and accompanying text.
6. See *infra* notes 155-98 and accompanying text.

The paradox of prohibition is that it fails to deter those who need it most—the hard core users. The “protection” it provides the rest of the population is redundant; they do not need it. The illusion of prohibition is that it takes from us the responsibility to make the choice to use or not to use. But in fact, the drugs are there if we want them and the media is constantly and inadvertently advertising them. Technology is continually creating new and potent mind-altering drugs. As individuals, we must exercise responsible choice in these matters — with or without drug laws. We must awaken out of our child-like slumber and accept the fact that one of the difficult tasks adult human beings must perform is to decide the role that drugs will play in their lives.

Wars against drugs fail because drugs and drug profits are more powerful motivators than drug laws.⁷ Drug dealers usually prevail because they are ruthless entrepreneurs fighting government bureaucrats who are paid whether they stop drug dealing or not. While the police struggle with the paperwork from the last bust, the dealers busily market new drugs produced by the latest technology.

Policy alternatives to prohibition are diverse, ranging from the medical model of Great Britain to the alcohol model.⁸ If the goal of reform is elimination of the black market in drugs, the best option for reform is non-prescription adult availability which leaves very little room for a black market. If we repeal prohibition, the benefits would be immediate and substantial: streets would become safer, law enforcement would become unburdened, and the black market in drugs, together with its many ill effects, would be destroyed. The risk of legalization is significantly less than the risk of continuing the availability of cigarettes,⁹ alcohol¹⁰ and cholesterol. Many innocent victims of prohibition—including many drug abstainers—would no longer be sacrificed in the futile attempt to protect self-destructive people from themselves.

7. See *infra* notes 349-50 and accompanying text.

8. See *infra* notes 351-70 and accompanying text (discussing legalization and the other policy alternatives).

9. See U.S. DEP'T. OF HEALTH AND HUM. SERV., THE HEALTH CONSEQUENCES OF SMOKING, NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL (1988); see also *Appendix, infra* notes 380-85 and accompanying text.

10. See *Patterns of Alcohol Consumption and Alcohol-Related Morbidity and Mortality*, 35 MORBIDITY AND MORTALITY WEEKLY REP. 2SS (1986) (detailing alcohol related health problems); U.S. DEP'T. OF HEALTH AND HUM. SERV., SIXTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH FROM THE SECRETARY OF HEALTH AND HUMAN SERVICES (1987) (stating that in 1980 there were 97,000 deaths attributable to alcohol abuse); see also *Appendix, infra* notes 380-85 and accompanying text.

I. METHODOLOGY

A. *The Rules of the Game*

When two football teams take the field to play a game, there is usually animosity between them. Regardless of the dislike each team feels for the other, they agree on one thing—the rules of the game; each team can field eleven players at one time; a field goal is worth three points; the team with the most points wins.

Even this minimal level of agreement is lacking between the opposing “teams” in the drug legalization debate. There is yet no agreement on the rules of the game, that is, how the debate is to be conducted and what will determine the winner. As a result, there has been much talk and much shouting about legalization, but less careful analysis than needed. It seems that many talk about legalization, yet fewer actually *think* about it. Thus, before presenting an argument for legalization, it is necessary to propose some rules of the game.

B. *Defining Prohibition and Legalization*

Drug prohibition is the lawful restriction of the production, distribution, sale, and use of certain mind- and mood-altering drugs (“drugs”). Laws are *enforceable* rules of conduct designed to promote certain values. Drug laws prohibit actions in which individuals desire to engage and prohibit transactions to which both parties consent. The purpose of drug laws is to prevent drug users from doing harm to themselves or others. Persons suspected of violating criminal drug laws (“drug suspects”) are forcibly arrested, at gun point if necessary, and brought before courts of law. If convicted of drug law violations, these persons (“drug convicts”) are forcibly penalized by fine, imprisonment or coercive supervision.

Drug prohibition is, therefore, the initiation of physical force against persons engaging in non-violent actions and voluntary transactions involving prohibited drugs. By definition, drug suspects and drug convicts have not been arrested or convicted for having initiated force against the police or private citizens. They would be suspected or convicted of robbery, rape, murder, etc. if they had initiated force against others.

Legalization is simply the repeal of drug prohibition. The repeal of prohibition would leave adult drug users or sellers relatively or absolutely free from the initiation of physical force by the state, depending upon the form of legalization adopted in a particular state

or nation.¹¹

C. *Approaches to the Issue*

The rules of the game differ depending upon the basis of one's position either in favor of or in opposition to prohibition. There are two main bases for supporting prohibition or opposing it—the moral and the practical.¹² “Prohibitionists” support drug prohibition because they believe that drug use is immoral and that the state should enforce this rule of morality.¹³ Most of those who morally oppose legalization also believe that, as a practical matter, it would cause more problems than it would solve.¹⁴

Those who take a moral position against legalization must prove three propositions; first, drug use is immoral; second, government has the right to prohibit immoral conduct even when such conduct does not directly harm others; and third, that government is effective in this effort without generating problems more serious than drug use per se.

Proponents of legalization (“legalizers”) fall into two groups. Some favor legalization because they believe prohibition violates the individual's right to liberty.¹⁵ Others support legalization because they believe that prohibition causes more harm than it prevents.¹⁶ In general, the moral opponents of prohibition rely on the practical failure of prohibition, but consider the moral argument more weighty than the practical argument.

For simplification in the discussion that follows, I assume that prohibitionists adopt both a moral and practical stance against legalization, and that legalizers adopt both a moral and practical stance

11. See *infra* notes (Part III Policy Alternative) and accompanying text.

12. See generally E.J. DELATTRE, CHARACTER AND COPS: ETHICS IN POLICING 123-37 (1989) (discussing moral and public policy arguments for and against the legalization of drugs).

13. See, e.g., *id.* at 128. This argument is based, in part, on the proposition that the negative effects of drug use on families and society in general gives the government “a rightful interest in prohibition.” *Id.*

14. See, e.g., *id.* at 128-29. Prohibitionists point to such problems as the failure of legalization to reduce illegal trafficking, widespread increases in drug use and the resulting consequences, and the negative message that might be sent to the youth about drug use. *Id.*

15. See, e.g., *id.* at 125-26. Advocates of legalization point to such problems as the intrusive conduct of drug investigators, the advent of drug testing, and the corruption of government officials. *Id.*; see also notes 76-154 and accompanying text (presenting a moral argument for legalization).

16. See, e.g., E.J. DELATTRE, *supra* note 12, at 126-27 (listing some of the benefits cited by legalization advocates); *infra* notes 155-236 (presenting a cost-benefit analysis of drug prohibition).

against prohibition.

D. *The Burden of Proof*

Burden of proof is a useful principle in law and debate that specifies which party in a lawsuit or debate will prevail in the event of a "tie." Generally, the burden of proof lies with the party who urges a change in the status quo. Since legalizers seek to change the status quo, it is reasonable to place the burden of proof upon them. As a practical matter, there is no way around this since most people oppose legalization. Legalizers must either concede defeat or convince many of these persons to change their minds—and most people will not change their minds if the evidence on each side appears even.

Assuming legalizers have the burden of proof, there is good reason to believe they have already met it. In the last few years, a number of books, reports and articles have detailed the failure of prohibition and the merits of legalization.¹⁷ A prior study by the author concluded that drug prohibition is responsible for at least 8,250 deaths¹⁸ and eighty billion dollars in economic loss each year,¹⁹ as well as pervasive corruption, systematic destruction of civil liberties, clogged courts and prisons, and a general breakdown of social order and community, particularly in the cities.²⁰ The benefits of legalization would outweigh any conceivable increase in drug use which might occur as a result.²¹ This study was widely distributed to public officials and the media, and "challenge[d] advocates of prohibition to rise above the level of platitudes and good intentions and to present hard evidence that prohibition, *in actual practice*, does more good than harm."²² After the study was published, one commentator wrote: "[this study] clearly demands an answer;"²³ while another wrote "it demands a response from those favoring the drug status

17. See e.g., DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL (R. Hamowy ed. 1987) [hereinafter DEALING WITH DRUGS] (presenting a number of essays on the topic); A. TREBACH, THE GREAT DRUG WAR (1987); S. WISOTSKY, BREAKING THE IMPASSE IN THE WAR ON DRUGS (1986); Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCI. 939.

18. See *infra* note 225 and accompanying text; *infra* Table 1.

19. See *infra* notes 229-36 and accompanying text.

20. See *infra* notes 237-82 and accompanying text.

21. See *infra* notes 293-330 and accompanying text.

22. Ostrowski, *Thinking About Drug Legalization*, in CATO INSTITUTE POLICY ANALYSIS 8 (1989).

23. Wolf, *Thinking About Drug Legalization*, Fin. Times, Sept. 4, 1989, at 19.

quo."²⁴ To date, no response has been forthcoming. There is simply no comprehensive cost-benefit analysis supporting prohibition.

Thus, legalizers *have* met their burden of proof while prohibitionists have failed to rebut the case for legalization *using proper methodology*.²⁵ In September 1989, *The Economist* noted that "[t]wo senior politicians, Mr. William Bennett (President Bush's drug tsar) and Mr. Douglas Hurd (Britain's home secretary), have been stirred to join the [drug legalization] debate," but that "neither Mr. Bennett nor Mr. Hurd offers any positive evidence that prohibition works."²⁶

Notwithstanding that legalizers have met their burden of proof, there is ample reason to doubt that the burden of proof ever really shifted away from those who support prohibition. While longstanding policies which were well considered initially may deserve respect, drug prohibition is not such a policy. Why was prohibition put into effect in the first place? Surely, before prohibition, American society had been marked by drug-crazed criminals and drug-paralyzed workers. Actually, the opposite was true. Drugs in one form or another were legal for thousands of years before they became the subject of regulation under the Harrison Act of 1914.²⁷ However, the period of greatest availability was the 19th century, during which opium, morphine, and cocaine were legal and inexpensively available without a prescription through the mail or at drug and grocery stores.²⁸

Regarding the impact of pre-prohibition drug use in the United States, Edward Brecher has stated the following:

[T]here was very little popular support for a law banning these substances. "Powerful organizations for the suppression . . . of alcoholic stimulants exist throughout the land . . ." but there were no similar anti-opiate organizations.

The reason for this lack of demand for opiate prohibition was quite simple: the drugs were not viewed as a menace to society and . . . they were not in fact a menace.²⁹

24. Scates, *Provocative Report Calls for End to Prohibition of Drugs*, Seattle Post-Intelligencer, June 29, 1989, at A14, col. 2.

25. See *infra* Elements of the Case.

26. *Talking of Drugs*, *The Economist*, Sept. 16, 1989, Editorials, at 13.

27. Harrison Act of 1914, ch. 1, 38 Stat. 785 (amended 1918).

28. E. BRECHER, LICIT AND ILLICIT DRUGS 3-7 (1972) (discussing drug availability during the nineteenth century). Brecher noted that the nineteenth century has been referred to as a "dope fiend's paradise." *Id.* at 3.

29. *Id.*, at 7 (quoting *The Opium Habit*, 33 CATHOLIC WORLD 828-34 (1881)).

A search through the New York Times Index for 1895-1904—years of peak drug use and minimum legal controls—for articles about the negative effects of cocaine use, found none.³⁰ In contrast, there were 1,657 articles about the cocaine problem during the peak years of the drug war—1979-1988.³¹ The situation in 19th-century England was remarkably similar:

[C]onsumption under conditions of free supply in effect plateaued out [I]ncapacity from use of opium was not seen as a problem of such frequency and severity as to be a leading cause for social anxiety. The prime image of the opium user was dissimilar to that of the wastrel and disruptive drunkard. Opium users were not lying about in the streets, or filling the workhouses, or beating their wives. It seems fair to conclude that at the saturation level which the plateau represented, opium was not a vastly malign or problematic drug in terms of its impact on social functioning.³²

If there was no catastrophic drug problem before drug prohibition, why was prohibition enacted? Alcohol prohibition should have taught us not to expect sublime rationality in drug control legislation. In 1926, after eleven years of narcotic prohibition, an editorial in the *Illinois Medical Journal* stated:

The Harrison Narcotic law should never have been placed upon the Statute books of the United States. It is to be granted that the well-meaning blunderers who put it there had in mind only the idea of making it impossible for addicts to secure their supply of "dope" and to prevent unprincipled people from making fortunes, and fattening themselves upon the infirmities of their fellow men.

As is the case with most prohibitive laws, however, this one fell far short of the mark. So far, in fact, that instead of stopping the traffic, those who deal in dope now make double their money from the poor unfortunates upon whom they prey

The doctor who needs narcotics, used in reason to cure and allay human misery, finds himself in a pit of trouble. The law-breaker is in fact in clover It is costing the United States more to support bootleggers of both narcotics and alcoholics than there is good coming from the farcical laws now on the statute books.

As to the Harrison Narcotic law People are beginning to

30. However, one article suggested that firemen not use cocaine in their eyes to fight the effects of smoke because it might become habit-forming. N.Y. Times, Jun. 25, 1897.

31. See N.Y. Times Index 1979-1988.

32. V. BERRIDGE & G. EDWARDS, *OPIMUM AND THE PEOPLE: OPIATE USE IN NINETEENTH CENTURY ENGLAND* 262, 264 (1987).

ask, "Who did that, anyway?"³³

Actually, the most important "who" was Secretary of State William Jennings Bryan, "a man of deep prohibitionist and missionary convictions and sympathies. He urged that the law be promptly passed to fulfill United States obligations under the new international [drug control] treaty."³⁴

Some of the other reasons underlying the Harrison Act included the association of opium and its derivatives with a scorned minority group—Chinese Americans³⁵ and lobbying by physicians and pharmacists eager to gain a legal monopoly over the distribution of narcotics and other drugs.³⁶

Similarly, when marijuana was first banned in 1937,³⁷ no medical testimony was presented to Congress.³⁸ Thus, drug prohibition was not originally based on careful analysis and research.

Finally, in spite of the fact that legalizers urge a change in the status quo, prohibitionists should bear the burden of proof because

33. See E. BRECHER, *supra* note 28, at 52 (quoting *Stripping the Medical Profession of Its Powers and Giving Them to a Body of Lawmakers: The Proposed Amendment to the Harrison Narcotic Act—Everybody Seems to Know About Doctoring Except Doctors*, 49 ILL. MED. J. 447 (1926)).

34. *Id.* at 49. Brecher noted that the Harrison Act supporters "said little . . . about the evils of narcotics addiction in the United States. They talked more about the need to implement the Hague Convention of 1912." *Id.* The Hague Convention of 1912 was an international agreement to help solve drug problems in the Far East, which required that each consenting nation enact domestic legislation for narcotics control. See Musto, *The History of Legislative Control Over Opium, Cocaine, and Their Derivatives*, in *DEALING WITH DRUGS*, *supra* note 17, at 47-51.

Brecher also argued that the Harrison Act was merely intended as "a law for the orderly marketing of opium, morphine, heroin, and other drugs . . ." E. BRECHER, *supra* note 28, at 49. He concluded from this that legislators would not have "realized in 1914 that the law Congress was passing would later be deemed a prohibition law." *Id.*

Arnold Trebach disagrees with Brecher's analysis. See A. TREBACH, *THE HEROIN SOLUTION* 118-43 (1982). He believes that drug control was the motive behind the bill. *Id.* at 121. But even Trebach admits that the congressional discussion of the bill was "limited" and that, "on its face, the Harrison Act was a tax law." *Id.* at 120. Furthermore, Trebach believes that the bill was not intended to deprive physicians of the power to prescribe opiates. *Id.* at 123. Finally, Trebach does not present evidence that opiate use at the time was a major social problem, beyond the fact that it might have been disapproved of by some people; nor does he present evidence that the likely consequences of prohibition were carefully considered by Congress. See, *id.* at 118-24.

35. E. BRECHER, *supra* note 28, at 42-45.

36. See D. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 56-59 (1973); Hamowy, *Introduction: Illicit Drugs and Government Control*, in *DEALING WITH DRUGS*, *supra* note 17, at 14.

37. Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551.

38. E. BRECHER, *supra* note 28, at 416. Ironically, the only physician to testify at the Congressional hearings opposed the passage of the bill. *Id.*

they are continually *reasserting* that prohibition is a good policy—explicitly in debates over legalization and implicitly at annual budget hearings at the federal and state level.³⁹ Prohibitionists are continually reasserting that billions of dollars annually should be spent on prohibition and that thousands of Americans should be imprisoned under prohibition for engaging in voluntary transactions with others.⁴⁰ In a free society, it would be wise to place the burden of proof on those who advocate policies with such results. If that many people are going to be imprisoned for doing things which were not illegal for most of our nation's history, there had better be good reasons.

E. *The Elements of the Case*

Regardless of which side has the burden of proof, it will be useful to specify the elements of the case that each must establish.

Prohibitionists must prove both the moral and practical elements of their case. The mere fact that the state may have the moral right to prohibit drugs is an inadequate basis for prohibition, without a showing that the state can effectively do so, and do so without jeopardizing values as substantial as the elimination or reduction of drug use. For example, if you are standing near the rapids of Niagara Falls and a man suddenly slips and falls into the Niagara River, most people would agree that there is a moral value to rescuing the man. However, most people would also agree that no attempt to achieve this moral value should be made if the chances of success are zero percent, while the chances of causing an additional death are 100 percent.

In contrast, legalizers need only prove that one part of their argument is correct. If individuals have the right to freedom of choice in drug consumption or abstention, then we need not and must not engage in a cost-benefit analysis concerning the consequences of respecting this right, for the same reason that a cost-benefit analysis of slavery is inappropriate. One way of looking at rights in this context is that a rights doctrine is a kind of mega cost-benefit analysis which concludes that the value of rights outweighs whatever costs occur as

39. See N. CAPALDI, *THE ART OF DECEPTION* 120 (1971). If a proposition is deemed true unless someone can *disprove* it, then the fallacy of appeal to ignorance is committed. *Id.*

40. See Ostrowski, *supra* note 22, at 2 (asserting that “[t]he leaders of the war on drugs are apparently unable to defend on rational cost-benefit grounds their 70-year-old policy, which costs nearly \$10 billion per year (out of pocket), imprisons 75,000 Americans, and fills our cities with violent crime.”).

a result of the enforcement of those rights.

For example, an ill person generally has the right to refuse medical treatment even when such treatment is necessary to preserve that person's life. Individuals have the right to refuse treatment because the value of controlling one's own destiny outweighs the economic, social and emotional costs of a premature death. It is precisely the point of rights doctrines to "render most legal cost-benefit calculations superfluous and . . . avoid tragically wasteful (and often irreversible) social experimentation."⁴¹

Naturally, should legalizers fail to establish a valid rights doctrine, they may still prevail in the argument by justifying legalization on cost-benefit grounds.

Much of the confusion surrounding the cost-benefit side of drug policy discussions could be alleviated by asking the right question initially. The question that must be addressed in determining whether to legalize drugs on practical grounds is this: do drug laws cause more harm than good?

The focus here is not how dangerous drugs are or how much damage drug users inflict upon themselves.⁴² If these factors were decisive, then surely alcohol and tobacco would be banned. Rather, the proper focus should be how effective are drug laws in preventing damage from drugs, compared with the amount of injury the laws themselves cause.

With this emphasis in mind, the respective burdens of proof resting upon the parties to the debate can be specified. Supporters of prohibition must demonstrate *all* of the following:

- (1) the use of currently illegal drugs is immoral;
- (2) the state has the right to enforce this moral rule;
- (3) the state can effectively enforce this moral rule without creating additional problems as serious as drug use itself; that is:
 - (a) that drug use would increase substantially after legalization;
 - (b) that the harm caused by any increased drug use would not be offset by the increased safety of legal drug use;
 - (c) that the harm caused by any increased use would not be offset by a reduction in the use of dangerous drugs that are already legal (e.g., alcohol and tobacco); and
 - (d) that the harm caused by any increased drug use not offset

41. Barnett, *Curing the Drug-Law Addiction: The Harmful Side Effects of Legal Prohibition*, in *DEALING WITH DRUGS*, *supra* note 17, at 100.

42. See e.g., *infra* notes 213-28 and accompanying text.

by (b) or (c) would exceed the harm now caused by the side effects of prohibition (e.g., crime and corruption).

In the absence of data supporting these propositions, neither the theoretical danger of illegal drugs nor their actual harmful effects, are a sufficient basis for prohibition. Even if it were proven that drug use would rise if legalized, such proof would be insufficient to support prohibition. Prohibitionists face a daunting task—one that no one has yet accomplished or, apparently, even attempted.⁴³

The case for legalization is sustained if *any* of the following propositions is true:

- (1) regardless of whether the use of currently illegal drugs is immoral, the state has no moral right to enforce this moral prohibition because doing so would violate individual rights;⁴⁴
- (2) prohibition has no substantial impact on the level of illegal drug use;⁴⁵
- (3) prohibition increases illegal drug use;⁴⁶
- (4) prohibition merely redistributes drug use from illegal drugs to harmful legal drugs;⁴⁷ or
- (5) even though prohibition might decrease the use of illegal drugs, the negative effects of prohibition outweigh the beneficial effects of reduced illegal drug use.⁴⁸

43. Note that a 1984 study by the Research Triangle Institute on the economic costs of drug abuse, HARWOOD, NAPOLITANO, KRISTIANSEN, & COLLINS, *ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS* (1984) has been erroneously cited in support of drug prohibition. Kerr, *The Unspeakable is Debated: Should Drugs be Legalized?*, N.Y. Times, May 15, 1988, §1, at 1, col. 1, 24, col. 3; Kondracke, *Don't Legalize Drugs*, NEW REPUBLIC, June 27, 1988, at 17; Church, *Thinking the Unthinkable*, TIME, May 30, 1988, at 12, 14-15. This report, which estimates the cost of drug abuse at \$60 billion for 1983, is not, and was not intended to be, an evaluation of the efficacy of prohibition or the wisdom of legalization. It does not mention the terms "legalization" or "decriminalization" and makes no attempt to separate the costs attributable to drug use per se from the costs attributable to the illegality of drug use. The study seems to include some costs of *legal* drugs in its estimates. See HARWOOD, NAPOLITANO, KRISTIANSEN & COLLINS, *supra*, at 49-50. Many of the costs cited are clearly the result of prohibition, for example, interdiction costs (\$677 million). Furthermore, the report considers only costs that prohibition has failed to prevent, making no attempt to measure the costs prevented—or caused—by prohibition. The study is therefore almost entirely irrelevant to the issue of legalizing drugs.

44. See *infra* notes 85-154 and accompanying text.

45. See *infra* notes 166-93 and accompanying text.

46. The analysis in this Article does not rely heavily upon this point. For an analysis of historical evidence on this point, see E. BRECHER, *supra* note 28, at 521-22.

47. See *infra* notes 307-11 and accompanying text.

48. See *infra* The Cost-Benefit Analysis.

F. *The Four Types of Drug-Related Harm*

Any cost-benefit analysis of prohibition must separate the four categories of harm related to illegal drug use. The distinctions between these categories have often been blurred in the legalization debate. These categories are:

- (1) harm caused by prohibition;
- (2) harm prevented by prohibition;
- (3) harm not prevented by prohibition;
- (4) harm which is related to, but not caused by, drug use.

1. *Harm caused by prohibition.*— This category includes all the problems caused by the law enforcement approach to the drug problem. Obvious examples include: drug enforcement costs, law enforcement officers killed in drug enforcement, and police corruption related to drugs. Less obvious examples include: crime committed by people as a result of the diversion of resources away from violent crime enforcement and toward drug enforcement, drug-related AIDS, black market violence and drug-related street crime.⁴⁹

2. *Harm prevented by prohibition.*— This category includes all of the harm that people *do not* do to themselves or others because drugs are illegal and thus less available. By and large, these are people who (a) are not currently abusing a serious legal⁵⁰ or illegal drug, (b) would suddenly start heavy use of a newly legalized drug, and (c) would, in spite of warning labels, quality controls and objective education, recklessly cause harm to themselves or others after legalization. It is primarily for the benefit of such people that the war on drugs is fought.

That the harm prevented by prohibition is quite large is the main practical argument for prohibition. Strictly speaking, this category is unknowable, since human beings cannot accurately predict the future. One reason for this is that predictions themselves can affect future behavior.⁵¹ For example, dire predictions of heavy drug use after legalization could well stimulate anti-drug educational, cultural and treatment efforts, which if successful, might actually lead to a reduction in drug use.

49. See *infra* notes 205-36 and accompanying text (discussing each of these harms).

50. See *infra* notes 304-30 and accompanying text (discussing the switching from one drug to another with the same type of effect as a consequence of drug legalization).

51. See M.N. ROTHBARD, *INDIVIDUALISM AND THE PHILOSOPHY OF THE SOCIAL SCIENCES* 33 (1979) (describing how predictions of price inflation in the United States affect future inflation).

It is generally believed that the uncertainty argument favors the status quo. The notion that we should not legalize drugs because we are not certain what would happen has become the favored argument of many prohibitionists.⁵² Rather than providing cost-benefit evidence in support of their policy, prohibitionists latch onto the uncertainty argument in the same way that criminal defense lawyers whose clients are clearly guilty latch onto the presumption of innocence. Prohibitionists use the uncertainty argument as a substitute for evidence that they apparently do not possess, secure in the knowledge that no one predicting the future can ever be refuted in the present.

Does the uncertainty argument really favor the status quo? As previously discussed, the main practical benefit of prohibition is its alleged harm-prevention value. That is, without prohibition, harmful drug use would increase. Thus, the inability of prohibitionists to prove that harmful drug use would increase after repeal of prohibition also means that they are unable to prove that prohibition provides any practical benefit. The lack of evidence in favor of prohibition, combined with the major problems which are undeniably caused by prohibition, makes a persuasive argument for repeal.

It must be insisted that the prevention of mere drug use, without evidence of actual harm, does not qualify as harm prevented by prohibition. While mere drug use may violate norms of morality prohibitionists believe the state must enforce, such drug use cannot be considered in a cost-benefit approach because such an approach considers only harmful consequences of drug use. Prohibitionist literature is filled with references to levels of drug use in certain places and times of legal availability, but without evidence demonstrating any actual harm caused by this use.⁵³ Probably more attention is paid to this category of drug use—use without actual harm—than any other. Yet, it is logically irrelevant to the issue.

Another severe methodological hurdle for prohibitionists is the drug-switching/addiction-switching problem. It is not controversial to argue that people use drugs either to make themselves feel better

52. See E.J. DELATTRE, *supra* note 12, at 129 (noting that prohibitionists argue that legalization experiments are "extremely difficult to reverse [and] the likelihood of adverse consequences is too great to risk.>").

53. See, e.g., Bennett, *A Response to Milton Friedman*, Wall St. J., Sept. 19, 1989, at A30, col. 3 (arguing for continued drug prohibition without discussing the harm which drug legalization may cause); Lewis, *The Opium War*, N.Y. Times, Oct. 29, 1989, at E23, col. 6 (discussing the nineteenth century Opium War but failing to discuss the harm caused by opium use).

than they already do, or to take away bad feelings they have.⁵⁴ Prohibition at best reduces the availability of certain types of drugs, but does nothing to make people feel better or take away bad feelings. Thus, presumably, people who are deprived of certain drugs by prohibition will seek out legal drugs as a substitute (drug-switching) and/or will engage in addictive forms of behavior which do not involve drugs (addiction-switching), such as gambling or overeating. This means that to prove some level of harm has been prevented by prohibition, it also has to be shown that harmful illegal drug-taking behavior has not been replaced by harmful legal drug-taking behavior or by harmful non-drug addictive behaviors.

3. *Harm not prevented by prohibition.*— Obviously, prohibition has failed to prevent all acts of illegal drug use occurring today in spite of prohibition. But we must be extremely careful to separate, to the fullest extent possible, the harm caused by drug use per se from the harm caused by the fact that drug use is illegal. For example, if a man smokes marijuana today, any harmful consequences of marijuana smoking (which would occur even if marijuana was legal and quality controlled, etc.) would fall into the category of harm not prevented by prohibition. If the man is arrested and put through criminal court proceedings, all the financial and other costs of this proceeding fall into the category of harm caused by prohibition. Now, if unknown to the smoker, the marijuana was laced with paraquat sprayed on it by law enforcement agents with resulting injury to the smoker, this again would amount to harm caused by prohibition.

Thus, we can conclude that any harm resulting from the use of illegal drugs falls into the category of either harm caused by prohibition or harm not prevented by prohibition. From this, we can further conclude that no evidence of the harm caused by current illegal drug use, by itself, can be utilized as evidence in support of prohibition. Without additional data showing that the repeal of prohibition would increase the level of harmful drug use, evidence of current harm from illegal drug use—even excluding harm caused by prohibition—is of no use to the prohibitionist argument. What prohibitionists must do is (1) demonstrate that legalization would lead to some level of increased use; then (2) use evidence of harm from existing use to show the extent of the harm that would be caused by legalization. To engage in step (2) without step (1) is meaningless.

54. See, e.g., Barnett, *supra* note 41, at 78-79 (arguing that the "prime motivation for the drug user's behavior is to alter his state of mind—to get 'high.'").

4. *Harm related to, but not caused by, drug use.*— Prohibitionists often fall into the trap of scapegoatism. They blame a seemingly endless list of human problems such as violence, child abuse, prostitution, spouse abuse, laziness, joblessness, irresponsible pregnant women—most of which have been around for thousands of years—on the use of illegal drugs. Prohibitionists have presented very little evidence that drug use per se is the cause of these problems. It is more likely that drug use is a correlative of most of these problems⁵⁵ and that both drug use and the other problems have separate causes—the personality, character and values of the drug user or perhaps adverse social conditions.

This point can be illustrated by a thought experiment.⁵⁶ If a hundred nuns and a hundred congressmen smoked crack, how many would become violent and murder someone? Most reasonable people would answer none. In fact, there is a dearth of evidence that wealthy persons or physicians become violent after using cocaine, although many thousands of them have used the drug. This suggests that too often the blame for antisocial conduct is placed on the drug and not the person. As Stanton Peele writes, “it is a mark of naivete—not science—to mistake the behavior of some drug users with the pharmacological effects of the drug, as though addictive loss of control and crime were somehow chemical properties of substance.”⁵⁷

In summary, the cost-benefit argument hinges upon whether prohibition causes more harm than it prevents. But prohibitionists have rarely sought to supply evidence that meets this criterion. Rather, prohibitionists have mainly supplied evidence of harm that prohibition has failed to prevent. They have also been guilty of smuggling into their argument various types of harm caused by prohibition and harm related to, but not caused by, drug use.

G. *Prohibitionist Pitfalls*

The case for prohibition has a number of contradictions and

55. See generally Peele, *A Moral Vision of Addiction: How People's Values Determine Whether They Become and Remain Addicts*, 17 J. DRUG ISSUES 187 (1987) (discussing the importance of value orientations in the development and expression of drug addiction).

56. See, e.g., C. MURRAY, *LOSING GROUND* (1984) (using a thought experiment in analyzing welfare reform; that is, imagining certain facts and hypothesizing a result based on common sense and human experience).

57. Peele, *Does Drug Addiction Excuse Thieves and Killers from Criminal Responsibility?*, in *DRUG POLICY 1989-1990: A REFORMER'S CATALOGUE* 204 (A. Trebach & K. Zeese ed. 1989).

pitfalls:⁵⁸

(1) The moral argument for prohibition faces the difficulty that prohibition sacrifices people who do not use drugs,⁵⁹ and imposes costs on drug users who harm no one with their drug use.⁶⁰

(2) Prohibitionists must face the fact that there is no general consensus in American society on the morality of using conscious-altering drugs.⁶¹ Some people reject all of these; some embrace all; some reject some, but not all; and still others accept all if used in moderation. Since there is little hope of social consensus on the morality of drug use, we should consider that Thomas Szasz is correct when he argues that the war on drugs is essentially a religious war: a war about ultimate values.⁶² Our past wars of religion were resolved only when freedom of religion was declared. The solution to the drug war is to declare the "right to self-medication."

(3) As a corollary to the previous point, prohibitionists must answer the following question: why should some dangerous drugs be banned, when others are not, and when other forms of self-destructive behavior are not? The narrow focus on certain illegal drugs which happen to be associated with minority races and religions,⁶³ seems to suggest that the Szaszian view of prohibition is correct: that the drug war is fundamentally a religious war.

(4) Prohibitionists emphasize the addictive nature of illegal drugs, but at the same time argue that law enforcement will dissuade people from trying or repeatedly using drugs. That is, prohibitionists believe that in general, people are not reasonable enough or strong-willed enough to avoid being seduced by drugs, but at the same time, they believe that people will make a rational cost-benefit decision to avoid illegal drugs because of the penalties involved, or because of the high price. To so argue compels one to admit that illegal drugs may not be so addictive after all.

58. The contradictions and inconsistencies in the case for legalization will have to be addressed by another author.

59. See *infra* notes 195-204 and accompanying text (discussing street crimes, including murder, committed by addicts).

60. See *infra* notes 213-28 and accompanying text (discussing drug related AIDS infection, which causes drugs to become more dangerous).

61. Conscious-altering drugs include, for example, alcohol, cocaine, marijuana, tobacco, valium, caffeine, and heroin. See generally *The Morality of Drug Controls*, in *DEALING WITH DRUG*, *supra* note 17, at 327 (discussing the pros and cons of characterizing drug use as a moral issue).

62. T. SZASZ, *CEREMONIAL CHEMISTRY* x-xii (1985).

63. See, e.g., E. BRECHER, *supra* note 28, at 42-46 (arguing that the prohibition against opium started in San Francisco and was directed against the Chinese).

(5) Prohibitionists simultaneously argue that (a) drugs are great, and (b) drugs are terrible. That is, drugs make you feel great, but after a while, they make you feel terrible. Given the well known tolerance and withdrawal syndrome,⁶⁴ there is certainly some truth to this scenario. However, there is still an inconsistency, since if drugs eventually make you feel terrible, there is reason to doubt that large numbers of people will use them repeatedly.⁶⁵ There is reason to doubt the necessity of law enforcement if the satisfaction derived from drug use eventually subsides. In sum, drug tolerance and withdrawal serve as a natural check on drug abuse.

H. *Limitations of the Cost-Benefit Approach*

The problem with all forms of cost-benefit and utilitarian analysis is that no ethical, economic or mathematical mechanism exists which would allow social costs and benefits to be measured and weighed.⁶⁶ Harm, value, cost, and happiness are subjective concepts pertaining to purely mental phenomena. These phenomena are not subject to any objective interpersonal measurement or mathematical calculation.⁶⁷

This thesis can be confirmed by examining the methods used to resolve two public policy controversies: abortion and the minimum wage. Each controversy was decided by an institution with ample financial resources and access to some of the finest analytical minds in the country—the Supreme Court in the case of abortion, and the Congress in the case of the minimum wage. Presumably, if a method existed to resolve conflicts of interest (abortion) or to weigh social costs (minimum wage), we would have seen this method used in these cases.

1. *Minimum wage.*— A very brief summary of the minimum

64. See, e.g., E. BRECHER, *supra* note 28, at 65 (noting that “an addicting drug is one that produces both withdrawal symptoms and tolerance.”).

65. See Murphy, Reinerman & Waldorf, *An 11-Year Follow-Up of a Network of Cocaine Users*, 84 BRIT. J. ADDICTION 427 (1989) (discussing a study which found that “addiction is not a uniform outcome of sustained use and that long-term controlled use is possible.”). There is evidence that the desire of cocaine users to continue to use cocaine moderately and pleasurable is a strong deterrent to heavy cocaine use, which very quickly turns cocaine use into an unpleasant experience. *Id.* at 432-33.

66. M. ROTHBARD, *TOWARD A RECONSTRUCTION OF UTILITY AND WELFARE ECONOMICS* 9 (1977).

67. *Id.* “Psychological magnitudes cannot be measured since there is no objectively extensive unit—a necessary requisite of measurement. Further, actual choice obviously cannot demonstrate any form of *measurable* utility; it can only demonstrate one alternative being preferred to another.” *Id.*

wage debate is as follows:

(a) *pro-increase*—many people who receive the minimum wage have families to support; they *desire* and “need” more money.

(b) *anti-increase*—the minimum wage would reduce the total number of people employed; the least skilled workers would be *hurt* the most.

Those in favor of an increase in the minimum wage offer no proof that the desire of some for more money outweighs the desire of others not to lose their jobs.⁶⁸ Those in opposition to an increase offer no proof that the desire of some people for more money was outweighed by the desire of others to be employed at all.

2. *Abortion*.— In *Roe v. Wade*, Justice Blackmun stated that “our task . . . is to resolve the issue by constitutional *measurement*, free of emotion and of predilection.”⁶⁹ As a first premise in his argument, Justice Blackmun rejected the argument that a “woman’s right [to privacy] is absolute.”⁷⁰ Thus, the Court was required to balance the woman’s right to privacy against “important state interests in regulation.”⁷¹ It turns out that the Court’s use of the word *measurement* was purely metaphorical. Nowhere in the majority decision is there even an attempt to define a method of measuring or weighing rights or interests, nor are there any citations in that direction.

The actual method of the Court is to discuss, sometimes in great detail, the nature of the competing interests and the various factors involved; then to simply announce which interest will prevail. How these interests are weighed and measured is not discernable to the reader. The best guidance the Court offers is statements such as: “At some point in pregnancy, [the state’s] interests become sufficiently *compelling* to sustain regulation of the factors that govern the abortion decision,”⁷² and “it is *reasonable and appropriate* for a State to decide that at some point in time another interest, that of . . . potential human life, becomes significantly involved.”⁷³

In spite of the (extreme) limitations of cost-benefit analysis, it

68. Rosenbaum, *Bush and Congress Reach Accord Raising Minimum Wage to \$4.25*, N.Y. Times, Nov. 1, 1989, A22, at col. 1.

69. 410 U.S. 113, 116 (1973) (emphasis added).

70. *Id.* at 153.

71. *Id.* at 154.

72. *Id.* (emphasis added).

73. *Id.* at 159 (emphasis added).

is, nevertheless, utilized to argue for legalization for the following reasons:

- (1) to persuade those who reject a rights approach;
- (2) to check the correctness of the rights approach (we are not omniscient); and
- (3) to show the unity of theory and practice between abstract rights and real world events.⁷⁴

In the cost-benefit analysis in Part III, the argument is put forth that prohibition kills more people than it saves, costs more dollars than it saves, and causes all sorts of problems not amenable to mathematical calculation.⁷⁵ There can be no attempt to combine these factors into a grand formula because no such formula exists.

II. THE MORAL ARGUMENT FOR LEGALIZATION

In addition to the argument that prohibition causes more harm than it prevents, legalization is also justifiable on the grounds that individuals have the right to control their own lives and bodies and thus the right to ingest mood- and mind-altering chemical substances.⁷⁶ As Thomas Szasz wrote:

I believe that we also have a right to eat, drink or inject a substance—any substance—not because we are sick and want it to cure us, nor because a government-supported medical authority claims that it will be good for us, but simply because we want to take it; because the government—as our servant rather than our master—hasn't the right to meddle in our private dietary and drug affairs.⁷⁷

It should be stressed that what is asserted here is not simply a narrow right to use drugs, but a generalized right of self-determination; a right to engage in any action which is peaceful; which does not deprive others of their right to free action. The right to use and sell drugs is simply one aspect of the general right to freedom.

It is not asserted here that the general right to freedom of control over one's own life is to be found in the United States Constitu-

74. See *infra* note 161 and accompanying text.

75. See *infra* notes 155-350 and accompanying text.

76. This section of the Article will not explicitly rebut the prohibitionist position on the morality of drug use. Rather, the Article will assume *arguendo* that the use of illegal drugs may be considered immoral, but will argue that the state does not have the right to enforce this moral principle.

77. T. SZASZ, *THE THERAPEUTIC STATE: PSYCHIATRY IN THE MIRROR OF CURRENT EVENTS* 271 (1984).

tion.⁷⁸ The Supreme Court has implicitly rejected such a view.⁷⁹ It is not a legal right, but a moral right. It is a right which exists regardless of whether or not it is recognized in various legal codes and constitutions. Rather, it is to such rights that the drafters of constitutions and legal codes should refer. It is such rights which serve as the basis for criticizing the legal acts of governments which are alleged to violate the rights of individuals. Such rights are referred to as "natural rights" because they are usually justified by reference to the nature of man or the natural state of man, and are to be distinguished from "positive rights" which are those rights actually recognized in legal codes and constitutions.

The doctrine of natural human rights, as formulated by John Locke and other philosophers,⁸⁰ was influential in eighteenth century America and was adopted by Thomas Jefferson in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.⁸¹

The doctrine of natural rights subsequently came under attack from a variety of sources including the Humean fact-value dichotomy.⁸² In a now famous remark, Jeremy Bentham, the great Utilitarian theorist, called natural law "nonsense on stilts."⁸³ But natural law theory has tremendous resiliency. It seems to possess something of the character of an axiom since its opponents tend to smuggle natural law concepts, such as human nature, back into their own theories. This tendency led Heinrich Rommen, paraphrasing French philosopher Etienne Gilson, to remark, "[t]he Natural Law always buries its undertakers."⁸⁴

78. *But see id.* (noting that a constitutional amendment was necessary to outlaw drinking, and suggesting that the ingestion of drugs could also be considered a constitutional right).

79. *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (stating that "[t]he Court has refused to recognize an unlimited right [to do with one's body as one pleases] . . ."). There is no intent here to deny that intelligent legal arguments for a right to self-medication can be made.

80. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26-31 (1967).

81. The Declaration of Independence, para. 2 (U.S. 1776).

82. *D. Hume, A Treatise of Human Nature* 469 (L.A. Selby-Bigge ed. 1988).

83. J. BENTHAM, *ANARCHICAL FALLACIES* 489, 501 (1962).

84. H. ROMMEN, *THE NATURAL LAW* 267 (1947).

A. *Individual Rights Theories*

In this section, two contemporary theories of human rights are discussed which provide a moral basis for the policy of drug legalization. Douglas Rasmussen, building on theories of Aristotle and novelist-philosopher Ayn Rand, constructs an argument for libertarian natural rights.⁸⁵ Hans-Hermann Hoppe, an economist and philosopher, develops a non-natural law rights doctrine utilizing a neo-Kantian method of *a priori* reasoning.⁸⁶ Interestingly, Hoppe concedes that it is not “impossible to interpret my approach as falling in a ‘rightly conceived’ natural rights tradition,”⁸⁷ and Rasmussen admits that his method of deriving rights “has been called ‘transcendental’ because of Kant’s arguments about ‘what is necessary for the possibility of experience.’”⁸⁸

1. *Douglas Rasmussen.*— Douglas Rasmussen has developed a rigorous argument for a natural human right to liberty. His first premise is that “life of the sort of thing a human being is—man’s life *qua* man—[is] the ultimate moral value, the *summum bonum*.”⁸⁹ Proving this premise relies on the technique of axiomatic demonstration.⁹⁰ This involves a showing that all persons who deny its truth are engaging in self-contradiction.⁹¹ Rasmussen believes that just as Aristotle’s principle of non-contradiction can be justified “by showing it to be necessary not only for the very possibility of its being denied, but even for the denier’s thought, speech and action,” so the first premise of natural law can be defended.⁹²

Rasmussen argues that every human choice contains within it an implicit choice to value one’s own life.⁹³ Since “to be a living

85. See generally Rasmussen, *A Groundwork for Rights: Man’s Natural End*, 4 J. LIBERTARIAN STUDIES 65 (1980); see also T. R. MACHAN, *INDIVIDUALS AND THEIR RIGHTS* (1989) (espousing a theory of neo-Aristotelian rights); M.N. ROTHBARD, *THE ETHICS OF LIBERTY* (1982); H. VEATCH, *HUMAN RIGHTS* (1985); Mack, *Egoism and Rights Revisited*, *PERSONALIST* (July 1977).

86. See generally Hoppe, *From the Economics of Laissez-Faire to Libertarian Ethics*, in *MAN, ECONOMY, AND LIBERTY: ESSAYS IN HONOR OF MURRY N. ROTHBARD* 56 (1988). For other neo-Kantian rights theorists, see A. GEWIRTH, *REASON AND MORALITY* (1978); Pilon, *Ordering Rights Consistently: On What We Do and Do Not Have Rights To*, 13 GA. L. REV. 117 (1979).

87. Hoppe, *supra* note 86, at 58.

88. Rasmussen, *supra* note 85, at 67.

89. *Id.* at 73. This has traditionally been referred to as “man’s natural end.” *Id.*

90. *Id.* at 67.

91. *Id.* at 74.

92. *Id.* at 67.

93. Rasmussen, *supra* note 85, at 73.

thing and not be a particular sort of living thing is impossible," this implicit choice to value one's life is actually a choice to value one's life *as the type of living thing one is*.⁹⁴ Rasmussen summarized his argument as follows:

Insofar as one chooses [values], regardless of the choice . . . one must choose [value] man's life qua man. It makes no sense to value some Y without also valuing that which makes the valuing of Y possible . . . it is a category mistake—a type of contradiction—to hold something as a value . . . and at the same time ask why one should live in accord with his nature. 'Man's life qua man' is the end at which all human action implicitly aims; and insofar as one chooses, one values this ultimate end. The very asking of the question, 'Why should I live in accord with my nature?', is a choice, a valuation, that demands that one already accept this ultimate value [N]ot only does the mere acceptance of end-oriented behavior require the acceptance of an ultimate end; the mere acting for some end requires the acceptance of an ultimate end, which in the case of chosen ends is man's life qua man.⁹⁵

Having established that man's life qua man is the ultimate moral value, Rasmussen develops his complete argument for the right to liberty as follows:

A human being is that kind of living being which can be designated as a rational animal Thus, life as a rational animal is the ultimate value for each person A rational animal is an animal whose mode of consciousness is characterized by the use of concepts, viz., conceptual awareness is the way man is differentiated from the other animals Thus, conceptual awareness must characterize one who lives as a rational animal, and one only lives as a rational animal in so far as one engages in conceptual activity. Conceptual awareness is a peculiarly human form of existence The conceptual mode of cognitive contact with reality is man's only means of determining how to deal with reality so as to sustain his own existence Actions taken in accord with judgments of how to deal with reality are man's only means of dealing with reality so as to sustain his own existence Thus, living as a rational animal means, minimally, acting in accordance with one's own conceptual judgments Conceptual awareness is not automatic. It must be initiated and sustained by a constant act of volition on the part of the person. Conceptual awareness cannot *exist* save through

94. *Id.*

95. *Id.* at 74.

the person's choice to engage in such a mode of awareness.⁹⁶

Since a rational animal must act in accordance with his or her own conceptual judgments, "a precondition for living the life of a rational animal is that within any given context one be free from interference upon acting according to one's judgment."⁹⁷ Since man's life qua man is the ultimate value and one must be free to act on one's own judgment, anything which threatens the precondition for living the life of a rational animal is of ultimate disvalue. In a social context, the initiation of physical force (and by extension the threat thereof) by one man against another serves to destroy the precondition of living the life of a rational animal, since acting upon one's judgment becomes impossible. Thus, the initiation of physical force is an ultimate disvalue.⁹⁸ That is, one ought not to initiate physical force against another human being.

"'Rights' is a moral concept determining the limits or boundaries of human interaction. Thus, one has no right to initiate the use of physical force against another human being." Because the initiation of force is the ultimate disvalue, the right of the individual to be free from such force is "the ultimate social principle. Thus, no other social principle or other rights can include the initiation of physical force as their means of being exercised."⁹⁹

2. *Hans-Hermann Hoppe*.— Hans-Hermann Hoppe has developed an argument for individual rights which does not draw upon natural rights or natural law theory.¹⁰⁰ He thus seeks to avoid using the disputed concept of human nature as a premise in his argument. Instead, he relies upon a form of extreme *a priori* reasoning analogous to that used by the Austrian economists Rothbard and von Mises.¹⁰¹ Instead of formulating hypotheses and then testing them against empirical evidence, he takes seemingly innocuous but unde-

96. Rasmussen, *Essentialism, Values and Rights: The Objectivist Case for the Free Society*, in *THE LIBERTARIAN READER* 49-50 (T. Machen ed. 1982); see also Den Uyl & Rasmussen, *Nozick on the Randian Argument*, in *THE PERSONALIST* 193 (1978) (discussing the arguments as they relate to the writings of Ayn Rand).

97. Rasmussen, *supra* note 96, at 50.

98. *Id.*

99. *Id.*

100. H. HOPPE, *FROM THE ECONOMICS OF LAISSEZ-FAIRE TO LIBERTARIAN ETHICS* 127-34 (1988).

101. See generally L. VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* (1949) (predicting the downfall of socialist economies); M.N. ROTHBARD, *MAN, ECONOMY & STATE: A TREATISE ON ACTION ECONOMIC PRINCIPLES* (2d ed. 1970).

niable concepts and deduces from them some startling conclusions.¹⁰²

Hoppe begins his argument by analyzing the notion of ethical subjectivism—that a rational ethics or rights theory is impossible. Hoppe argues that even this proposition contains an implicit premise. A person who denies that a rational ethics is possible, is at the very least committed to the proposition that “the question of whether or not normative statements are cognitive ones is itself a cognitive problem.”¹⁰³ Reason may not be able to establish a rational ethic, but it is able to determine whether a rational ethic is possible. If it is not able to so determine, then the explicit premise of ethical subjectivism ceases to exist as an “arguable intellectual position.”¹⁰⁴

The above argument illustrates that “any truth claim—the claim connected with any proposition that it is true, objective or valid . . . is and must be raised and decided upon in the course of an argumentation.”¹⁰⁵ Hoppe’s next premise is known as “the a priori of communication and argumentation.”¹⁰⁶ This principle states that “everyone knows what it means to claim something to be true (one cannot deny this statement without claiming its negation to be true).”¹⁰⁷

As argumentation is an axiom in Hoppe’s system, his next task is to make “explicit what is already implied in the concept of argumentation itself.”¹⁰⁸ Hoppe points out four such implications:

(1) “As it is implied in argumentation that everyone who can understand an argument must in principle be able to be convinced of it simply because of its argumentative force, the universalization principle of ethics can now be understood and explained as grounded in the wider ‘a priori of communication and argumentation.’”¹⁰⁹

(2) Argumentation is a practical affair.¹¹⁰

(3) “[A]rgumentation, as a form of action, implies the use of the scarce resources of one’s body.”¹¹¹

102. M.N. ROTHBARD, *INDIVIDUALISM AND THE PHILOSOPHY OF THE SOCIAL SCIENCES*, 19-22 (1979).

103. H. HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS* 130 (1989).

104. *Id.* at 131.

105. *Id.* at 130. Hoppe also notes that one cannot argue that one cannot argue. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 131.

109. *Id.* at 130 (emphasis added).

110. *Id.* at 132.

111. *Id.*

(4) “[A]rgumentation is a conflict-free way of interacting . . . a mutual recognition of each person’s exclusive control over his own body must be presupposed as long as there is argumentation.”¹¹²

Hoppe summarizes the complete argument as follows:

Whenever a person claims that some statement can be justified, he at least implicitly assumes the following norm to be justified: “Nobody has the right to uninvitedly aggress against the body of any other person and thus delimit or restrict anyone’s control over his own body.” This rule is implied in the concept of justification as argumentative justification. Justifying *means* justifying without having to rely on coercion. In fact, if one formulates the opposite of this rule, i.e., “everybody has the right to uninvitedly aggress against other people” . . . then it is easy to see that this rule is not, and never could be, defended in argumentation. To do so would in fact have to presuppose the validity of precisely its opposite, i.e., the aforementioned principle of non-aggression.¹¹³

B. *Rights Theory Applied*

Rasmussen and Hoppe have each argued for a large measure of individual autonomy or liberty. Each holds that individuals have a moral right to control their own minds and bodies. To Rasmussen and Hoppe, such a right is general and applies to all aspects of social and economic life. Each believes that individuals have the right to be free from aggression from others, including state officials, when engaging in non-violent action, even if such action would be considered immoral by each theorist, and even if the purposes behind such aggression would be laudable if achieved by non-violent means.

Since drug prohibition involves the initiation of physical force against persons engaging in peaceful drug transactions to promote their own good and that of the community, drug prohibition is contrary to the moral rights of individuals. Therefore, pursuant to Rasmussen’s and Hoppe’s views, prohibition violates the individual’s right to be free from the initiation of force and aggression.

C. *Is Drug Use an Exception to Rights?*

The argument that drug use should be an exception to individ-

112. *Id.*

113. *Id.* at 133. Having argued for a principle of individual self-ownership, Hoppe continues on to deduce a theory of private property rights. *Id.* at 133-34. However, for the purposes of this article, his theory of self-ownership suffices.

ual rights because it undercuts the very rationality that is the basis for those rights must fail. First, many things, such as alcohol, music, gambling, television, sex, astrology, and trashy magazines, are perfectly legal yet can undercut human rationality. Any strong emotional stimulus can discourage the full use of reason—including anti-drug fanaticism. The full extension of such an argument would pave the way for totalitarian control of all behavior which produces strong emotions.

Second, the argument only works when it assumes that a person is *already* under the influence of a drug. Surely, even prohibitionists would admit that the initial choice to use a drug would not be influenced by the effect of the drug to be used.

Finally, the argument does not hold even for those who have tried illegal drugs. For example, most of the people who have tried cocaine have stopped using it,¹¹⁴ most of the people who use it regularly never become addicted to it,¹¹⁵ and large numbers of people who become addicted to it succeed in returning either to controlled use or to complete abstinence without the need for treatment.¹¹⁶ That even hard-core drug users are amenable to rational persuasion is confirmed by the fact that much of what goes on in drug treatment centers today amounts to attempts at rational persuasion.

D. *Paternalism Rejected*

The individual rights theories outlined above preclude any notion of paternalism, the philosophical bulwark of prohibition. Paternalism is the use of force against persons for their own alleged good. In natural rights terms, it is precisely force which prevents persons from achieving their own good. As Henry Veatch wrote:

[N]o human being ever attains his natural end or perfection save by his own personal effort and exertion. No one other than the human individual—no agency of society, of family, of friends, or of whatever can make or determine or program an individual to be a good man, or program him to live the life that a human being ought to live. Instead, attaining one's natural end as a human person is nothing if not a 'do-it-yourself' job.¹¹⁷

114. See *infra* notes 319-20 and accompanying text (finding that most people who tried cocaine stopped using it).

115. See, e.g., Murphy, Reinerman & Waldorf, *supra* note 65, at 47; *infra* notes 321 and accompanying text.

116. See Murphy, Reinerman & Waldorf *supra* note 65 (presenting evidence of such control with cocaine).

117. H.B. VEATCH, HUMAN RIGHTS: FACT OR FANCY? 84 (1985).

Murray Rothbard continues the argument:

By forcing [people] to [do good], we are taking them out of the realm of action and into mere motion, and we are depriving all these coerced persons of the very possibility of acting morally. By attempting to compel virtue, we eliminate its possibility.¹¹⁸

So paternalism must fail in its mission to make people better. It merely restricts “the opportunity for vice which simultaneously restricts the opportunity for virtue. In the end such efforts promote not moral excellence, but a drab form of moral mediocrity and conformity.”¹¹⁹

Of particular importance in this context is Veatch’s argument that the state cannot compel an individual to be a good man because human rights “are no less the necessary means to his reforming himself than they are the necessary means to his making something of himself in the first place.”¹²⁰

No price is too high to pay for freedom properly understood as the right to dispose of one’s own life as one pleases, which implies the duty not to interfere with the equal right of others to do the same. Since a proper human life must involve choice and the exercise of reason, life is empty and meaningless without freedom. It may be a bad thing for people to smoke tobacco and a good thing for people to choose not to smoke tobacco, but being forced not to smoke tobacco has no moral significance for the individual since moral choice and value require freedom. A person forced not to smoke is simply an object being acted upon by outside forces, not a moral agent.

Finally, another effect of paternalism is to make some people—the morality enforcers—more powerful, and therefore, as Lord Acton argued, more corrupt.¹²¹ In the context of drug enforcement, the resulting corruption is not only financial, but moral as well.¹²²

118. Rothbard, *Frank S. Meyer: The Fusionist as Libertarian Manque*, in *FREEDOM AND VIRTUE, THE CONSERVATIVE/LIBERTARIAN DEBATE* 93 (G. Carey ed. 1984).

119. Den Uyl, *Freedom and Virtue Revisited*, in *MAN, ECONOMY, AND LIBERTY: ESSAYS IN HONOR OF MURRAY N. ROTHBARD* 202 (W. Block and L. Rockwell, Jr., eds. 1988).

120. *Id.* at 206.

121. Letter from Lord Acton, editor of *THE ENGLISH HISTORICAL REVIEW*, to Mandell Creighton (Apr. 3, 1887) *reprinted in* G. HIMMELFARB, *ESSAYS ON FREEDOM AND POWER* 264 (1948).

122. Hoppe offered a fascinating *economic* explanation of how prohibition encourages moral corruption:

[Violation of the right of self-ownership] implies a change in the social structure, a change in the composition of society with respect to personalty or character types.

E. *The Moral Argument From Consequences to Third Parties*

It has been previously argued that each person has a moral right of self-ownership or liberty.¹²³ It follows that it is wrong to use force against a person to advance *that* person's alleged good. However, can we morally use force against a person to prevent that person from harming others? If the concept of "harm" is defined as acts of violence, fraud, property destruction or theft, the answer is yes. It is right to use force to prevent these acts because each act infringes on another's right of self-ownership (this right includes the right to own property produced by one's own labor).¹²⁴

A prohibitionist will not be satisfied with existing tort and criminal law to prevent and punish a drug user for any actual harm caused to other persons or property. The prohibitionist will argue that it is right to use force to prevent drug users from *possibly* harming others. The prohibitionist will want to expand the concept of harm to include not only positive harmful acts to third parties, but also negative acts in which a person fails to fulfill alleged duties to third parties.

This argument faces numerous obstacles. First, it assumes that drug use, as opposed to personality and other factors, is a major cause of harmful conduct. However, it is difficult to prove this causal relationship.¹²⁵ Second, the rights of all drug users not be infringed solely because prohibition *might* prevent *some* drug users from causing harm to third parties, when such harm is already unlawful? Third, why is it so morally imperative to prevent heroin, cocaine, and marijuana users from harming third parties when *no one* is calling

Abandoning the natural theory of property implies a redistribution of income. The psychic income of persons in their capacity as users of their "own" natural body, as persons expressing themselves in this body and deriving satisfaction from doing so, is reduced *at the expense* of an increase in the psychic income of persons in their capacity as invaders of other people's bodies. It has become relatively more difficult and costly to derive satisfaction from using one's own body without invading that of others, and relatively less difficult and costly to gain satisfaction by using other people's bodies for one's own purposes. . . . The redistribution of chances for income acquisition must result in more people using aggression to gain personal satisfaction and/or more people becoming more aggressive, i.e., shifting increasingly from nonaggressive to aggressive roles, and, slowly changing their personalities as a consequence of this, [resulting in a] change in the character structure, in the moral composition of society.

H. HOPPE, *supra* note 100, at 16-17.

123. See *supra* notes 89-122 and accompanying text.

124. M.N. ROTHBARD, *supra* note 85, at 29-34 (discussing "Crusoe Economics").

125. See *supra* note 56 and accompanying text.

for the prohibition of alcohol, the worst of all third-party harmful drugs.¹²⁶ Fourth, to the extent that the argument from third-party consequences involves the alleged lost productivity of drug users, the argument fails. Since each person has a moral right of self-ownership, this implies that he owes society no level of production whatsoever. A person who owes third parties a non-contractual duty to produce is commonly called a slave. The specific contractual and quasi-contractual (e.g., child support) duties a person owes should be enforced in the usual ways regardless of the reason for the failure to fulfill such duties, one possible cause being heavy drug use. Finally, any third party harm caused by illegal drug use today is dwarfed by the third party harm caused by illegal drug laws.¹²⁷ Thus, the moral argument from third-party consequences actually runs in favor of legalization and not against it.

F. *The Consequences of Rights Violations*

Not only does prohibition violate rights in an abstract sense, but this violation has real world consequences. This should surprise no one. No serious theorist of rights, from Aristotle to Thomas Aquinas to Locke to Henry Veatch ever viewed the promulgation of rights doctrines to be a mere academic exercise. Rather, they viewed rights as a necessary condition of human success in everyday life.¹²⁸

1. *Impact on the individual.*— The violation of rights has a serious impact on the lives of those persons whose rights are violated. When rights are violated, when an individual is forced not to engage in actions he would otherwise engage in, he suffers a loss of control over his own life. That is, he is no longer acting according to his own judgment, but he is simply the tool for the achievement of goals formulated by others who have neglected to persuade him of the value of those goals. Since he has, been taken “out of the realm of action and into mere motion,”¹²⁹ we may say that he has been stripped of his very humanity.

Prohibition also harms the individual by depriving him of the opportunity of facing a challenge and overcoming it and learning

126. See sources cited *supra* note 10.

127. See *supra* text accompanying notes 155-292 (providing the cost-benefit analysis of these harms).

128. See *infra* notes 269-92 and accompanying text (analyzing the specific practical consequences drug policies which violate rights). This section of the Article will discuss the consequences of rights violations in more general terms.

129. Rothbard, *supra* note 118, at 93.

more about himself and the world in the process. People who have confronted drugs and dealt with them on their own have reached a higher state of self-knowledge and discipline than those who were protected from them by the state.

Ironically, a major impact of prohibition is to reduce individual responsibility. The common assertion that freedom requires responsibility is misleading. It is responsibility that requires freedom. One cannot be responsible for things beyond one's control. Whenever the state takes over a part of one's life, as it does by punishing drug use, there is a corresponding loss of responsibility, that is, a reduction in the time and energy a person spends on developing the skills and disciplines ("human capital") formerly needed to cope with that aspect of life now controlled by the state.¹³⁰ In short, as the state grows, the individual shrinks.¹³¹

Hoppe puts an economic spin on a seemingly moral phenomenon. "The abolition of private ownership of one's body . . . [causes] a reduction in the amount of human capital."¹³² Since a person "can no longer decide on his own, undisturbed by others, to what uses to put his body, the value attached to it by him is now lower." Since the costs of achieving goals remain the same:

the natural owner is faced with a situation in which the costs of action must be reduced in order to bring them back into line with the reduced expected income There is only one way left to do this: by shortening the waiting time, reducing the disutility of waiting, and choosing a course of action that promises earlier returns. Thus, the introduction of aggressively founded ownership leads to a tendency to reduce investment decisions and favors consumption decisions.¹³³

2. *Cost-Benefit Quagmire*.—Randy Barnett argued that rejection of a rights-based approach to policy necessitates reliance upon "ad hoc arguments about the exigencies of particular policies" and "an endless series of explicit cost-benefit analyses."¹³⁴ As we have seen, the cost-benefit approach has methodological limitations.¹³⁵ To

130. H. HOPPE, *supra* note 100, at 49.

131. *Id.* Hoppe puts an economic spin on a seemingly moral phenomenon. "The abolition of private ownership of one's body . . . [causes] a reduction in the amount of human capital." *Id.* at 15.

132. *Id.* at 15.

133. *Id.*

134. Barnett, *supra* note 41, at 99.

135. See *supra* text accompanying notes 14-75.

these limitations, Barnett adds two further arguments: "policy makers suffer from a pervasive ignorance of consequences"¹³⁶ and are often influenced by considerations of self-interest.¹³⁷ Barnett writes: "To minimize decisions made in ignorance or out of self-interest, legal policy makers must somehow be constrained. And the most practical way to constrain them is to craft general principles and rules—*laws*—reflecting a conception of individual rights that rests on fundamental principles of justice."¹³⁸

Both elements of Barnett's thesis are exemplified by the drug-related AIDS crisis. In spite of the existence of substantial evidence that prohibition caused the drug-related AIDS crisis,¹³⁹ there is no official recognition of this fact. Thus, tragically, nothing has been done to repeal the laws which caused the problem in the first place.

The first problem was ignorance. Although by 1987, evidence of the cause of drug-related AIDS existed, it was unknown to almost everyone. The staff of the National Institute on Drug Abuse (NIDA) in Spring 1987 conducted a telephone survey of state drug officials concerning the rate of infection among intravenous drug users in each state.¹⁴⁰ The data collected by NIDA indicated that in those states which make it a crime to sell clean needles, 31 percent of drug users had the AIDS virus,¹⁴¹ while in states where the sale of needles is allowed, only 5 percent were infected.¹⁴² In states such as

136. Barnett, *supra* note 41, at 99.

137. *Id.*

138. *Id.* (emphasis in original).

139. See *On Drug Related AIDS and the Legal Ban on Over the Counter Hypodermic Needles*, A REPORT OF THE NEW YORK COUNTY LAWYERS ASSOCIATION 2-4 (Jan. 12, 1988) [hereinafter *Drug Related AIDS*]. Substantial evidence exists linking the ban on over-the-counter sales of hyperdermic needles with the contraction of AIDS through intravenous drug use. See *id.*; see also Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 HOFSTRA L. REV. 37, 46 n. 43 (1989) (discussing the impact of intravenous drug use on the spread of AIDS) (authored by Richard C. Shoenstein).

140. Portions of the results of this survey are published in *Drug Related AIDS*, *supra* note 139, at 9-10. For reasons unknown to the author, this study was not published by NIDA and NIDA at that time had no plans to publish it. While the entire nation was struggling to find ways to deal with the drug-related AIDS crisis, the most important cost-benefit evidence demonstrating the failure of current policy was lying on the desk of a NIDA staff member.

141. *Drug Relate AIDS*, *supra* note 139, at 9. The states which ban the non-prescription sale of hypodermic needles which were included in the survey were: California, Connecticut, Delaware, District of Columbia, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania. *Id.*

142. *Id.* at 10. The states which allow the non-prescription sale of hyperdermic needles which were included in the survey were: Colorado, Florida, Georgia, Indiana, Maryland, Michigan, Ohio, Texas, and Wisconsin. *Id.*

New York, where drug-related AIDS proliferates, over-the-counter sales of clean hypodermic needles are illegal as is their mere possession. This is why drug users obtain their needles at "shooting galleries" where dirty needles are passed around to save a few dollars.

Additionally, the study noted that "the rate of intravenous drug use in states which allow over-the-counter needle sales is *lower* than in states which ban such sales. In states which ban needle sales, eight out of one thousand people use intravenous drugs, while in states which allow needle sales, only four out of one thousand people use these drugs."¹⁴³

The NIDA study demonstrates that just one piece of prohibitionist legislation—the ban on over-the-counter needle sales—seems to be responsible for most drug-related AIDS cases. The problem was that no one knew of the study except the few NIDA employees who worked on it.

It is at this point that the second prong of Barnett's critique of ad hoc policy making—*self-interest*¹⁴⁴—becomes operative. Historian Ronald Hamowy elaborates upon the impact of self-interest on the drug policy debate:

[T]here are large numbers of people, principally employees of law enforcement agencies, who have a vested interest in seeing to it that ever increasing amounts are expended to stamp out the distribution and sale of illicit drugs. These groups are economically dependent on the existence of restrictive drug legislation; and even though the evidence might point to relaxing or repealing our current laws, their own economic benefit will best be served by supporting comprehensive legislation and a massive campaign of drug enforcement.¹⁴⁵

In addition to the self-interest of bureaucrats, there is also the self-interest of politicians, eager to utilize the public's concern over the drug problem for the purpose of getting publicity and votes, and gaining approval for greater public spending.¹⁴⁶ Thomas Szasz described this phenomenon as follows:

The assertion that the War on Drugs is failing, or is not working, is—in a fundamental sense—false. It is terribly misleading. The

143. See *Drug Related AIDS*, *supra* note 139, at 4 (emphasis in original).

144. See *supra* notes 134-38 and accompanying text.

145. Hamowy, *supra* note 36, at 7.

146. Accordingly, in 1988, Representative Lawrence J. Smith (D., Fla.), described the drug problem as "a great issue, a great opening for the Democrats." Roberts, *Democrats Seek to Seize Initiative on Drug Issue*, N.Y. Times, March 14, 1988, at A17, col. 1.

War on Drugs *is* working just fine, thank you. Its primary purpose is to elect politicians. Hasn't it done wonders for Governor Nelson Rockefeller and many others? When confronted with social policy, we must always ask: "*Cui bono?*" The War on drugs is not supposed to help the addicts, or the people who get mugged by criminals on the street, or the patients who get AIDS from contaminated blood because selling clean syringes is illegal in America. It is supposed to help [politicians].¹⁴⁷

In spite of clear evidence that drug laws stimulate the spread of AIDS,¹⁴⁸ legislatures in New York and Massachusetts have refused to allow the sale of clean needles. Two hundred fifty thousand drug users are already infected and millions more are at risk, and yet very little is being done. Perhaps legislatures have refused to do anything because legalizing clean needles would be admitting that the law enforcement approach has not only failed to stop IV drug use, but has also contributed to a deadly plague among drug users. Perhaps asking drug enforcers to step aside on the issue of legalizing needles would lead to a slippery slope threatening the entire edifice of drug prohibition. It is difficult to imagine a motive for the failure to legalize needles other than mere bureaucratic and political self-interest.

3. *Impact on rights-violating policy.*— Finally, regardless of the rights of the individual, policies based on rights-violating coercion face all of the practical obstacles involving the inefficacy of coercion. The problem here is not that rights are violated, but that those who use coercion to achieve their goals will only achieve these goals to the extent that coercion is able to achieve them.

Coercion so often fails to achieve positive social goals because a human being is not an inert object waiting to be pushed around by outside forces. A human being has a mind, free will, emotions, and values. A human being is inner-directed by his values and choices, not outer-directed by coercion. A human being acts, and must act, in accordance with his own values and his own judgment. A human being can be temporarily controlled by another human being with a gun, but this coercive control breeds resistance. As soon as the gun disappears, the person will go back to his preferred chosen behavior. He will do so with a vengeance because there are now two values at stake—doing what one values and asserting one's right to do what one values. A person with self-destructive values may be restrained

147. *Symposium Proceedings: Roundtable Discussion*, 11 NOVA L. REV. 957-58 (1987) (comments of Thomas Szasz) (emphasis in original).

148. See *supra* notes 139-43 and accompanying text.

by a gun for a while, but when the gun disappears, he will return to his business of self-destruction.

G. *The Relation Between Rights and Cost-Benefit Analysis*

In the natural law tradition, individual rights are a statement of the fundamental preconditions for human happiness.¹⁴⁹ A human being is by nature a unity of mind and body.¹⁵⁰ As a natural fact, the human mind controls the actions of the human body.¹⁵¹ This is the meaning of the concept of self-ownership.

The natural fact of self-ownership is so fundamental to human life that it is often overlooked. Efforts to prove the ultimate moral status of self-ownership—such as Rasmussen's and Hoppe's—can proceed only by various forms of axiomatic demonstration.¹⁵² They demonstrate that the moral norm of self-ownership is *implicitly* accepted even by those who *explicitly* reject it.

Not only is self-ownership a natural fact and an ultimate moral principle, but it is a practical one as well. According to Rasmussen, “[a]ctions taken in accord with judgments of how to deal with reality are man's only means of dealing with reality so as to sustain his own existence.”¹⁵³ In Rasmussen's formulation, “judgment” refers to the mind determining the “actions” of the body. Thus, self-ownership is also a fundamental principle of practical success in life. According to Rasmussen:

[I]t is not possible to separate consequential considerations from formal considerations when arguing for man's life qua man [self-ownership] as the standard of value. It is because life requires certain things for its maintenance that a human being, with no automatic form of knowledge, must use the only tool available to him—his conceptual ability. The principle of rationality is dictated by the nature of a human being and the life of the human being necessitates the adoption of such a principle. Both the consequences and formal considerations are part of one principle . . . and cannot be considered separately.¹⁵⁴

149. See Rasmussen, *supra* note 85, at 49 (stating that “[h]uman excellence cannot be accomplished if a person's actions are not his own.”).

150. See Salmon & Berliner, *Health Policy Implications of the Holistic Health Movement*, 5 J. HEALTH POL'Y & L. 535-36 (1980); see also *supra* text accompanying note 98 (discussing the Randian argument).

151. M.N. ROTHBARD, *supra* note 85, at 46.

152. See *supra* notes 85-116 and accompanying text.

153. Uyl & Rasmussen, *supra* note 96, at 198 (emphasis added).

154. *Id.* at 193.

Since successful human life requires that the right of individual self-ownership be respected, it can be predicted that when this right is not respected, human life—in those areas in which rights have been violated—will be unsuccessful. The following cost-benefit analysis of the specific consequences of rights violations regarding drug use, confirms this thesis.

III. THE COST-BENEFIT ANALYSIS

A. Introduction

On Thursday, March 17, 1988, at 10:45 p.m. in the Bronx, Vernia Brown was killed by stray bullets fired in a dispute over illegal drugs.¹⁵⁵ The 19-year-old mother of one was not involved in the dispute, yet her death was a direct consequence of the “war on drugs.”

There can be little doubt that most, if not all, “drug-related murders” are the result of drug prohibition. The same type of violence came with the eighteenth amendment’s ban of alcohol in 1920.¹⁵⁶ The murder rate rose with the start of Prohibition, remained high during Prohibition, then declined for eleven consecutive years when Prohibition ended.¹⁵⁷ The rate of assaults with a firearm rose with Prohibition and declined for ten consecutive years after Prohibition.¹⁵⁸ In 1933, the last year of Prohibition, there were 12,124 homicides; 7,863 resulted from assaults with firearms and explosives.¹⁵⁹ By 1941 these figures had declined to 8,048 and 4,525

155. James, *Stray Bullet Kills Woman in the Bronx*, N.Y. Times, Mar. 19, 1988, at 29, col. 5.

156. U.S. CONST. AMEND. XVIII (repealed). Pursuant to this amendment, “the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.” *Id.* § 1.

157. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, BICENTENNIAL EDITION, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART 1, at 414 (1975) [hereinafter HISTORICAL STATISTICS]. The murder and assault rates had been rising even before Prohibition. Nevertheless, during Prohibition “[v]iolence was commonplace in establishing exclusive sales territories, in obtaining liquor, or in defending a supply.” D.E. KYVIG, REPEALING NATIONAL PROHIBITION 27 (1979). While there is no comprehensive study of Prohibition-era violence, it is reported that there were more than 1,000 gangland murders in New York City alone during prohibition. *Id.* Another writer estimates that between two and three thousand people died during law enforcement raids, auto chases, and arrests, casualties which would not show up in murder statistics. See H. LEE, HOW DRY WE WERE: PROHIBITION REVISITED 8 (1963).

158. See HISTORICAL STATISTICS, *supra* note 157, at 414.

159. *Id.*

respectively.¹⁶⁰

Vernia Brown died because of the policy of drug prohibition.¹⁶¹ If her death is a "cost" of that policy, what did the "expenditure" of her life "buy"? What benefits has society derived from the policy of prohibition that led to her death? To find the answer, it was necessary to turn to the experts and to the supporters of drug prohibition.

In 1988, I wrote to then-Vice President George Bush, the head of the South Florida Drug Task Force, then-Education Secretary William Bennett, Assistant Secretary of State for Drug Policy Ann Wroblewski, White House drug policy adviser Dr. Donald I. McDonald, and the public information directors of the Federal Bureau of Investigation, Drug Enforcement Administration, General Accounting Office, National Institute of Justice, and National Institute on Drug Abuse. None of these officials were able to cite any study that demonstrated the beneficial effects of drug prohibition when weighed against its costs.¹⁶² The leaders of the war on drugs are apparently

160. *Id.*

161. It is necessary to distinguish between individual and policy notions of causation. Individuals act, cause certain results to occur, and are responsible for those results. However, individuals also act *within a context*. When social policy changes the context within which individuals act, resulting in the commission of more murders, it may be said that this policy caused these murders to occur, without denying that the proximate cause of the murders was the murderers themselves.

162. On April 1, 1988, each official was requested in writing to supply or cite any study, regardless of the source, which demonstrated the net benefits of drug prohibition. Additionally, in lieu of provision of a pro-prohibition study, all officials were provided with a copy of this author's prior cost-benefit analysis in support of drug legalization. See ADVISORY REPORTS OF THE COMMITTEE ON LAW REFORM OF THE NEW YORK COUNTY LAWYERS ASSOCIATION (August 1987). Comments were also solicited.

The responses were as follows: *Vice-President Bush*: A spokesman said he did not know of any study in support of prohibition. Telephone interview with Kevin Cummings, spokesman for Vice President Bush, (Apr. 29, 1988). *Assistant Secretary of State for Drug Policy, Ann B. Wroblewski*: "I am not aware of any cost-benefit studies of the type to which you refer." Letter from Ann Wroblewski, Assistant Secretary of State for Drug Policy, to James Ostrowski (May 2, 1988) (copy on file at Hofstra Law Review). *FBI Public Affairs Office*: "The FBI has not conducted research comparing the costs with the benefits of drug prohibition" and the FBI does not comment on policy studies. Letter from Milt Ahlerich to James Ostrowski (Apr. 18, 1988) (copy on file at Hofstra Law Review). *William J. Bennett*: Insufficient data exists for an adequate cost-benefit study of prohibition. Letter from John P. Walters to James Ostrowski (Apr. 21, 1988) (copy on file at Hofstra Law Review). *National Institute of Justice*: I was informed by Mr. Glenn Holly that he was not aware of any cost-benefit studies of the overall effects of prohibition. Telephone conversation with Glenn Holly, National Clearinghouse on Drug and Crime Information, (Apr. 29, 1988). *White House Drug Policy Advisor, Dr. Donald I. McDonald*: No written reply was received and a detailed phone message was not returned. *Drug Enforcement Administration*: No response was received to a letter and detailed phone message. *National Institute on Drug Abuse*: No response to letter or phone call was received. *General Accounting Office*: The GAO supplied an excellent study, see *infra* note 225,

unable to defend on rational cost-benefit grounds their 70-year-old policy, which costs nearly \$10 billion per year,¹⁶³ imprisons nearly 75,000 persons,¹⁶⁴ and fills our cities with violent crime.¹⁶⁵ It would seem that Vernia Brown and many others like her have died for nothing.

Some supporters of drug prohibition claim that its benefits are undeniable and self-evident.¹⁶⁶ Their main assumption is that without prohibition, drug use would skyrocket with disastrous results.¹⁶⁷ There is precious little evidence for this commonly held belief. The few cases of empirical evidence lend little support to the prediction of soaring drug use.¹⁶⁸ For example, in the Netherlands¹⁶⁹ and

on the results of the Reagan drug enforcement effort, but did not supply or cite any cost-benefit studies.

163. See *infra* note 232.

164. In 1986, there were 54,674 prisoners in both federal and state prisons for drug related offenses. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1986 37 (1989) (reporting 38,394 imprisoned for drug offenses in state prisons); Kerr, *War on Drugs Puts Strain on Prisons, U.S. Officials Say*, N.Y. Times, Sept. 25, 1987, at A1, col. 2 (noting that 37 percent of the 44,000 federal prison inmates, or 16,280, were arrested on drug charges).

165. See *infra* notes 194-209 and accompanying text (discussing the effect of drug prohibition on crime).

166. See, e.g., Interview with William Bennett, Director of National Drug Control Policy (Cable News Network television broadcast, Dec. 16, 1989); Interview with Carl Rowan, columnist, *Inside Washington* (Public Broadcasting System television broadcast, Dec. 16, 1989); cf. *Legalization of Illicit Drugs: Impact and Feasibility, Part I, Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess. 2 (1988) [hereinafter *Legalization Hearings, Part I*] (statement of Charles B. Rangel, stating that the United States should pursue further the war on drugs which has just begun); *id.* at 59 (testimony of Edward I. Koch, Mayor, New York City, arguing that it was a mistake to legalize even liquor); *id.* at 68 (testimony of Dennis Callahan, Mayor, Annapolis, Maryland, stating that drug related crime is a crime against youth, future and moral fabric); *id.* at 70 (testimony of John Lawn, Administrator, Drug Enforcement Administration, stating that no legalization should ever be permitted because drugs cause the most damage to society); *id.* at 73 (testimony of Arthur C. "Cappy" Eads, Chairman of the Board, National District Attorneys Association, saying "drugs are illegal because they are bad."); *id.* at 74 (testimony of Sterling Johnson, Special Narcotics Prosecutor, City of New York, stating that legalization is impossible because "[i]t is morally, ethically and wrong religiously."); *id.* at 109 (testimony of Mitchell Rosenthal, M.D., President, Phoenix House, New York, New York, asserting that drug treatment and not legalization is the only solution to the drug problem); OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY, 1 (1989) [hereinafter BENNETT PLAN I] (presenting the statement by William J. Bennett, Director, Office of National Drug Control Policy, that "[m]ost Americans remain firmly convinced that drugs represent the gravest present threat to our national well-being.").

167. See, e.g., *Legalization Hearings, Part I, supra* note 166, at 71 (testimony of John C. Lawn); *id.* at 108 (testimony of Mitchell Rosenthal).

168. See A. TREBACH, *supra* note 17, at 103 (citing a study by Dr. Bernard Segal, director of the Center for Alcohol and Addiction Studies at the University of Alaska, which concluded that "there is no conclusive proof that legalization affected use, since there was no good

Alaska,¹⁷⁰ two places in the Western world where use of small amounts of marijuana is legal, the rate of marijuana consumption is arguably *lower* than in the continental United States where marijuana is banned.¹⁷¹ In 1982, 6.3 percent of American high school seniors smoked marijuana daily, but only 4 percent did so in Alaska.¹⁷² In 1983, 5.5 percent of American high school seniors used marijuana daily, but in the Netherlands in 1985 only 0.5 percent of high school seniors used marijuana daily.¹⁷³ These are not controlled comparisons; no such comparisons exist. However, the numbers that are available do not bear out the drastic scenario portrayed by supporters of continued prohibition.

Finally, there is at least some evidence that the "forbidden fruit" aspects of prohibition may lead to *increased* use of, or experimentation with, drugs, particularly among the young. This phenomenon apparently occurred with marijuana, LSD, and glue-sniffing.¹⁷⁴ The case for legalization does not rely on such an argument, but those who believe prohibition needs no defense should consider this possibility.

Legalizers and prohibitionists agree that the status quo is intolerable. Change is demanded by all concerned. Yet, we have only two options: escalate the war on drugs or legalize them. Once we grasp the consequences of still further escalation, the legalization option may win by default.

Escalating the war on drugs is doomed to fail. First, past escalations by Richard M. Nixon,¹⁷⁵ Nelson Rockefeller,¹⁷⁶ and Ronald

evidence about the extent of use [in Alaska] before 1975."); *infra* note 171 and accompanying text (setting forth the results of the study).

169. See Van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717 (1990).

170. ALASKA STAT., § 11.71.070 (1989) (imposing a fine not to exceed \$100 for possession of less than an ounce of marijuana in public).

171. A. TREBACH, *supra* note 17, at 103. Dr. Segal's study found that in 1982, 4 percent of Alaskan students used marijuana daily, which was lower than the national average of 6.3 percent for that year. *Id.*

172. *Id.*

173. *Id.* at 105. Further, although 4 percent of Dutch youth admitted to ever having used marijuana, 55 percent have reported that they stopped using it before their nineteenth birthday. See Ruter, *The Pragmatic Dutch Approach to Drug Control: Does It Work* (presented at Drug Policy Forum, sponsored by The Drug Policy Foundation, May 25, 1988) reprinted in *Legalization Hearings, Part I*, *supra* note 166, at 521.

174. See generally, E. BRECHER, *supra* note 28, at 368-69 (discussing how the publicity of anti-LSD warnings was partially responsible for the increase in the demand for LSD); *id.* at 321-33 (discussing how the anti-glue-sniffing campaign popularized glue sniffing).

175. See C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 232-45 (1978) (dis-

Reagan,¹⁷⁷ have failed.¹⁷⁸ Second, there are the seemingly intractable problems of lack of funds, lack of prison space, lack of political will to put middle class drug users in jail, and the simple impossibility of preventing consenting adults in a free society from engaging in extremely profitable transactions involving tiny amounts of illegal drugs.

However, none of these factors ultimately explain why escalating the war on drugs will fail. Failure is guaranteed because the black market thrives on the war on drugs and benefits from its intensification. At best, intensified law enforcement simply boosts the black market price of drugs, encouraging more drug suppliers to supply more drugs. The publicized conviction of a drug dealer, which instantly creates a vacancy in the lucrative drug business, has the same effect as hanging up a help-wanted sign which says, "Drug dealer needed—\$5,000 a week—exciting work."

While escalating the war on drugs cannot succeed, there is a real danger that an intensified war on drugs will squander much of our nation's wealth and freedom and cause enormous social disruption. As of yet, there is no limit in sight to the amount of money and new enforcement powers that committed advocates of prohibition will demand before giving up.¹⁷⁹

It is instructive to note the parallel between the current debate over the drug problem and the debate over the alcohol problem in the twenties and thirties. In the alcohol debate, one side called for intensified enforcement efforts, while the other called for outright repeal. The prohibitionists won all the battles: enforcement efforts escalated throughout the duration of Prohibition. Convictions under the National Prohibition Act¹⁸⁰ rose from approximately 18,000 in

cussing Richard M. Nixon's efforts after escalating the war on drugs failed).

176. NATIONAL INST. OF LAW ENFORCEMENT & CRIM. JUST., *THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE, THE FINAL REPORT OF THE JOINT COMMITTEE ON NEW YORK DRUG EVALUATION 7* (1978) [hereinafter *EVALUATING THE NEW YORK EXPERIENCE*].

177. See A. TREBACH, *supra* note 17, at 177. According to Trebach, Reagan's South Florida Task Force resulted in "little objective evidence of bottom-line success produced by the vast efforts of the many competent enforcement leaders and officers . . ."; see also Brinkley, *4-Year Fight in Florida 'Just Can't Stop Drugs*, N.Y. Times, Sep. 4, 1986, at A1, col. 2. (discussing the failure of the South Florida Task Force which was labelled the "the most ambitious and expensive drug enforcement operation in the nation's history . . .").

178. See also *EVALUATING THE NEW YORK EXPERIENCE*, *supra* note 176, at 7.

179. See, e.g., OFFICE OF NATIONAL DRUG CONTROL POLICY, *NAT'L DRUG CONTROL STRATEGY 7* (1990) [hereinafter *BENNETT PLAN II*] (proposing that the federal government spend \$10.6 billion in 1991 to fight the war on drugs).

180. National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935).

1921¹⁸¹ to approximately 61,000 in 1932.¹⁸² Prison terms grew longer and were meted out with greater frequency in the latter years of Prohibition.¹⁸³ The enforcement budget rose from \$7 million in 1921 to \$15 million in 1930.¹⁸⁴ The number of stills seized rose from 32,000 in 1920 to nearly 282,000 in 1930.¹⁸⁵ In 1926, the Senate Judiciary Committee produced a 1,650-page report evaluating enforcement efforts and proposing reforms.¹⁸⁶ In 1927, the Bureau of Prohibition was created to streamline enforcement efforts, and agents were brought under civil service protection to eliminate corruption and improve professionalism.¹⁸⁷ In 1929, the penalties for violating the National Prohibition Act were increased.¹⁸⁸

Also in 1929, President Hoover appointed a blue-ribbon commission to evaluate enforcement efforts and recommend reforms. The 1931 Wickersham Commission report, while concluding that "there is as yet no adequate observance or enforcement," nevertheless urged that:

[A]ppropriations for the enforcement of the Eighteenth Amendment should be substantially increased and that the vigorous and better organized efforts which have gone on since the Bureau of Prohibition Act, 1927, should be furthered by certain improvements in the statutes and in the organization, personnel, and equipment of enforcement, so as to give enforcement the greatest practical efficiency.¹⁸⁹

Proponents of legalization won the war. In 1933, two years later, Prohibition was dead.¹⁹⁰ In light of this history, it should not be at all surprising that increasing support for drug legalization is coming at the same time as the war on drugs is intensifying. There is nothing incongruous about a highly respected big-city mayor, Kurt Schmoke of Baltimore, Maryland, endorsing legalization¹⁹¹ at the

181. 1921 ATT'Y GEN. ANN. REP. 101.

182. 1932 ATT'Y GEN. ANN. REP. 65.

183. See NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, ENFORCEMENT OF THE PROHIBITION LAWS, S. DOC. NO. 307, 71st Cong., 3d Sess. 144-45 (1931) [hereinafter REPORT ON ENFORCEMENT].

184. *Id.* at 18.

185. *Id.* at 123; see also 1930 COMM'R OF PROHIBITION ANN. REP. 110-11 (1930) (setting forth statistics for 1930).

186. REPORT ON ENFORCEMENT, *supra* 183, at 14.

187. See Act of 1927, ch. 348, 44 Stat. 1381 (repealed 1933).

188. See National Prohibition Act, ch. 473, 45 Stat. 1446 (1929) (repealed 1935).

189. REPORT ON ENFORCEMENT, *supra* note 183, at 83.

190. U.S. CONST. amend XXI.

191. See Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV.

same time that the first "drug czar" is appointed.¹⁹² Rather, it means that the nation may be ready for a major change in its policy toward drugs.

This Article does not suggest that legalization would solve the drug problem in its entirety. Legalization is offered as a solution only to the "drug problem problem,"¹⁹³ that is, the problems such as the crime, corruption, and AIDS caused not by the pharmacological effects of illegal drugs but by the attempt to fight drug use with the criminal justice system. The repeal of alcohol prohibition provides the appropriate analogy. Repeal did not end alcoholism—as indeed Prohibition did not—but it did solve many of the problems created by Prohibition, such as corruption, murder, and poisoned alcohol. We can expect no more and no less from drug legalization today.

B. *The Costs of Prohibition*

"Policies are judged by their consequences but crusades are judged by how good they make the crusaders feel."¹⁹⁴ So the inquiry must be, do drug laws cause more harm than good?

1. *Street Crime by Drug Users*

Drug laws greatly increase the price of illegal drugs, often forcing users to steal to get the money to obtain them. Although difficult to estimate, the black market prices of heroin and cocaine appear to be about 50 to 100 times greater than their anticipated market price under legalization. It is frequently estimated that at least forty percent of all property crime in the United States is committed by drug users so that they can maintain their expensive habits.¹⁹⁵ That

501 (1990).

192. See Anti Drug-Abuse Act of 1988, 21 U.S.C. § 1501 (1989); see also Shenon, *Nominee for 'Drug Czar' Has Tough-Talking Past*, N.Y. Times, Jan. 13, 1989, at B17, col. 1 (describing Bennett's appointment).

193. E. BRECHER, *supra* note 28, at 521 (referring to the term coined by Dr. Helen Nowlis).

194. T. SOWELL, *COMPASSION VERSUS GUILT AND OTHER ESSAYS* 74 (1987).

195. Estimates of drug-related crime vary widely. Arnold Trebach, summarizing various surveys, estimated that 50 percent of all burglaries and robberies were drug related in urban areas. Trebach, *The Potential Impact of "Legal" Heroin in America*, in *DRUGS, CRIME AND POLITICS* 169 (A. Trebach ed. 1978). A Wharton Econometrics survey found that local police officials believe that drug users commit about 25 percent of auto thefts, 40 percent of robberies and assaults, and 50 percent of burglaries and larcenies. See G. Godshaw, R. Koppel & R. Pancoast, *Anti-Drug Law Enforcement Efforts and Their Impact* 95 (Aug. 1987) (unpublished study prepared for the U.S. Customs Service on file at the Hofstra Law Review). In 1986, Assistant Police Chief Isaac Fulwood of Washington, D.C., estimated that 50 to 60 percent of crime in his city is drug-related. Lewis, *U.S. Judge Hails 'Clean Sweep'*, Wash. Post, Nov. 7,

amounts to about eight million crimes per year and \$6 billion in stolen property.¹⁹⁶ In addition, many victims of property crime are beaten and severely injured; an estimated 1200 are murdered each year.¹⁹⁷

1986, at B1, col. 4, B7, col 1; see also Terry, *Drug Riches of the Capital Luring Poor Youth Down a Bloody Path*, N.Y. Times, Apr. 2, 1989, at 1, col. 1, col. 2 (stating that 36.8 percent of all homicides committed in New York City in 1988 were drug related); *id.* at 25, col. 1 (reporting that more than 80 percent of the 126 people slain in Washington, D.C. in the early months of 1989 were drug related).

196. In the chart below, the value of property stolen is based on the FBI UNIFORM CRIME REP.: CRIME IN THE U.S. (1988). Figures on total crimes are based on victimization surveys done by the Bureau of Justice Statistics for the year 1985.

Crime	No.(1000s)	x 40%	x \$\$ stolen	= Total (millions)
robbery	985	394	\$631	\$248
larceny	13,474	5,389.6	\$426	\$2,290
burglary	5,594	2,237.6	\$1,014	\$2,270
car theft	1,270	508	\$5,117	\$2,600
	21,323	8,529.2	n/a	\$7,400

Thus, the total number of drug-related property crimes is 8,529,200 and the total value of property stolen is \$7.4 billion. One possible objection to the \$7.4 billion figure is that using the value of property stolen in *reported crimes* to calculate the value of property stolen in *unreported crimes* may make the totals questionable since the value of property taken in unreported crimes may be less. To deal with this objection, we can assume that the value of property taken in unreported crimes is only fifty percent of the value of property taken in reported crimes.

Based on comparing the victimization figures to the FBI reported crime figures, the percentage of crimes unreported are as follows: robbery—54%; larceny—49%; and auto theft—20%. If we reduce the dollar value of the property stolen in the chart above by fifty percent for each unreported crime, the new total would still be approximately \$6 billion.

197. There were on average 20,640 murders each year from 1979-1988. To determine the estimated number of murders which result from drug-related property crime, we must determine how many murders result from property crime and then multiply by the number of property crimes estimated to be drug-related—40 percent.

9.1 percent of murders resulted from robbery. FBI CRIME REP.: CRIME IN THE U.S. 14 (1988) [hereinafter FBI REP.] (taking average from 1984-1988). 3.6 percent of murders resulted from "other felonies" not specified. Since burglaries are a commonly committed felony (over five million each year) with a high potential for violence, assume that one-third of "other felonies" are burglaries. Telephone interview with Vicki Major, FBI Statistical Office (Jun. 1, 1990). This would yield a percentage of 1.2 percent. Thus, 10.3 percent of murders resulted from robbery or burglary (9.1 + 1.2).

1.8 percent of murders resulted from "suspected felonies." See FBI REP. *supra*. The percentage of murders resulting from known felonies is 18.8 percent, 10.3 percent of which resulted from property crime. *Id.* This means that 55 percent of these felonies involved property crime. If we assume that the same percentage holds true of "suspected felonies," we can conclude that 1 percent of these involved property crimes. Accordingly, the total percentage of murders resulting from property felonies and suspected property felonies is 11.3.

23.8 percent of murders resulted from unknown circumstances. *Id.* Drug-related property crime murders could easily be seen as occurring in this category since they would frequently involve violence against a stranger—exactly the type of crime which would remain a mystery to the police. 14.8 percent of murders whose circumstances were known involved property crime. If we assume that this percentage would hold for murders whose circumstances were

Supporters of prohibition have traditionally used drug-related crime as a simplistic argument for enforcement: stop drug use to stop drug-related crime. They have even exaggerated the amount of such crime in the hopes of demonstrating a need for larger budgets and greater powers. In recent years, the more astute prohibitionists have noticed that drug-related crime is drug-law-related. Thus, in many cases they have begun to argue that even if drugs were legal and thus relatively inexpensive, drug users would still commit crime simply because they are criminals at heart.¹⁹⁸

While some researchers have questioned the causal connection between illegal drugs and street crime, many studies over a long period have confirmed what every inner-city dweller already knows: drug users steal to get the money to buy expensive illegal drugs.¹⁹⁹

Moreover, in addition to causing street crime and drug related violence, prohibition also stimulates crime by:

- criminalizing users of illegal drugs, creating disrespect for the law;
- forcing users into daily contact with professional criminals, which often leads to arrest and prison records that make legitimate employment difficult to obtain;
- discouraging legitimate employment because of the need to “hustle” for drug money;
- encouraging young people to become criminals by creating an extremely lucrative black market in drugs;
- destroying, through drug crime, the economic viability of low-income neighborhoods, leaving young people fewer alternatives to

unknown, we can conclude that 3.5 of those murders were property crime related.

Thus, 14.8 percent of all murders involve property crime. 40 percent of these were drug-related in the sense that their motive was to secure funds to pay for expensive black market drugs. That is 5.9 percent. 5.9 percent of 20640 is 1,217.

For a study on drug related homicides see generally P.J. GOLDSTEIN & H.H. BROWNSTEIN, *DRUG RELATED CRIME ANALYSIS—HOMICIDE: A REPORT TO THE NAT'L INST. OF JUSTICE DRUGS, ALCOHOL AND CRIME PROGRAM* (1987).

Further, according to one study, in 1980 there were 460,000 drug-related assaults and in 140,000 of these cases, the victims required hospitalization totaling 50,000 hospital days. Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 15 *J. DRUG ISSUES* 493, 494 (1985).

198. See, e.g., Inciardi & McBride, *Legalization: A High Risk Alternative in the War on Drugs*, 32 *AM. BEHAVIORAL SCI.* 259-60 (1989).

199. These studies were reviewed in 1985. The authors concluded:

[H]eroin addiction can be shown to dramatically increase property crime levels. . . . A high proportion of addicts' preaddiction criminality consists of minor and drug offenses, while post-addiction criminality is characterized much more by property crime.

Speckart & Anglin, *Narcotics and Crime: An Analysis of Existing Evidence for a Causal Relationship* 3 *BEHAVIORAL SCI. & THE LAW* 259, 273 (1985).

working in the black market; and
 •removing the settling of drug-related disputes from the legal process, creating a context of violence for the buying and selling of drugs.²⁰⁰

2. *Black Market Violence*

Prohibition also causes what the media and police misname "drug-related violence." This *prohibition-related* violence includes all the random shootings and murders associated with black market drug transactions: ripoffs, eliminating the competition, killing informers and suspected informers.

Those who doubt that prohibition is responsible for this violence need only note the absence of violence in the legal drug market. For example, there is no violence associated with the production, distribution, and sale of alcohol. Such violence was ended by the repeal of Prohibition.

The President's Commission on Organized Crime estimates a total of about 70 drug-market murders yearly in Miami alone.²⁰¹ Based on that figure and FBI data, a reasonable nationwide estimate would be that at least 825 murders each year are drug-market murders.²⁰² Recent estimates from New York City and Washington D.C. suggest an even higher figure.²⁰³ In addition, many law enforcement officers are killed enforcing drug laws each year.²⁰⁴

200. See *infra* text accompanying notes 201-04 (discussing black market violence).

201. PRESIDENT'S COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND COCAINE TRAFFICKING, RECORD OF HEARING IV, NOVEMBER 27-29, 1984, at 536 (1984) (prepared statement of Charles V. Wetli, M.D., Deputy Chief Medical Examiner, Medical Examiner Department, Miami, Florida) [hereinafter PRESIDENT'S COMM'N, ORGANIZED CRIME AND COCAINE TRAFFICKING].

202. There were, on average, 20,640 murders and non-negligent homicides per year from 1979-88. FBI UNIFORM CRIME REP.: CRIME IN THE U.S. 13 (1988). The F.B.I. estimates that four percent of the murders (from 1984-88) involved narcotics. *Id.* at 14. That would mean, on average, 825 narcotic related murders per year. However, this figure is certainly an underestimate since the motive of twenty-three percent of all murders was "unknown" and drug-related murders can be expected to frequently fall into this category. *Id.* Thirty to forty percent of all murders in Miami, about 70 per year, are drug-related. See PRESIDENT'S COMM'N, ORGANIZED CRIME AND COCAINE TRAFFICKING, *supra* note 201, at 536. In addition, one study found that 42 percent of murders committed in a nine month period in 1981 in one precinct in New York City were drug-related. Heffernan, Martin & Romano, *Homicides Related to Drug Trafficking*, 3 FED. PROHIBITION 3, 6 (1982). These figures indicate that the four percent FBI estimate is very low.

203. See Heffernan, Martin & Romano, *supra* note 202 (setting forth statistics for New York City and Washington, D.C.).

204. See FBI, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1988, at 17. From 1979 to 1988, 65 law enforcement officers lost their lives in arrest

3. *Do Drugs Cause Crime?*

It is often thought that illegal drugs cause crime through their pharmacological effects on the mind. Marijuana laws were originally justified on that basis.²⁰⁵ Today, the notion that marijuana causes crime "is no longer taken seriously by even the most ardent anti-marijuana propagandists."²⁰⁶ Even heroin use "is a neutral act in terms of its potential criminogenic effect upon an individual's behavior. . . . [T]here is nothing in the pharmacology, or physical or psychological impact, of the drug that would propel a user to crime."²⁰⁷ Cocaine, like other stimulants such as nicotine and caffeine, can stimulate aggressive behavior. However, Grinspoon and Bakalar argue:

[P]ersonality and setting as usual make all the difference. . . . Jared Tinkelberg, commenting on [a DEA] study and in general on the relation between cocaine and violence, expresses some surprise that it seems to produce "amphetamine-like paranoid assaultiveness" so seldom and concludes that at present it is not a serious crime problem.

. . . [M]ost violence in the illicit cocaine trade, like the violence in the illicit heroin traffic today and in the alcohol business during Prohibition, is of course not necessarily related to the psychopharmacological properties of the drug. Al Capone did not order murders because he was drunk, and the cocaine dealer "Jimmy" does not threaten his debtors or fear the police because of cocaine-induced paranoia.²⁰⁸

When the New York City Police Department announced that 38 percent of murders in the city in 1987 were "drug-related," Deputy Chief Raymond W. Kelly explained that "[w]hen we say drug-related, we're essentially talking about territorial disputes or disputes over possession[. . .]. We're not talking about where somebody is deranged because they're on a drug."²⁰⁹

situations involving drug-related matters. *Id.*

205. See E. BRECHER, *supra* note 28, at 414-15.

206. E. GOODE, *DRUGS IN AMERICAN SOCIETY* 124 (2d ed. 1984).

207. A. TREBACH, *supra* note 34, at 246.

208. L. GRINSPOON & J. BAKALAR, *COCAINE—A DRUG AND ITS SOCIAL EVOLUTION* 227 (rev. ed. 1985) (footnotes omitted).

209. James, *Serious Crime Up 3.4% in New York City*, N.Y. Times, Mar. 23, 1988, at B1, col 2, col. 3-col. 4.

4. *Loss of Illegal Drugs for Medical Purposes*

The issue of whether the *medical* use of drugs such as marijuana and heroin should be permitted appears to be logically separable from the issue of whether the use of such drugs is allowed for non-medical purposes. However, as a practical matter, the valuable medical uses of these drugs²¹⁰ have been denied to the American people largely because making them even medically available is perceived dangerous to the drug war effort.²¹¹ Thus, the general unavailability of marijuana for the treatment of glaucoma and cancer and heroin for the relief of pain in cancer patients can be considered a cost of drug prohibition.

A description of the use of marijuana to alleviate the nausea of chemotherapy and to fight weight loss in cancer patients, contained in a 1988 decision by a DEA administrative law judge, leaves little doubt that some people have died because of the unavailability of the medical use of marijuana during the past several decades.²¹² However, there is no reliable "body count" to date.

5. *Drugs Made More Dangerous*

Because there is no quality control in the black market, prohibition also kills by making drug use more dangerous. Illegal drugs contain poisons, are of uncertain potency, and are injected with dirty needles. Many deaths are caused by infections, accidental overdoses, and poisoning.²¹³

At least 3,500 people will die from AIDS each year as a result of the use of unsterile needles, a greater number than the combined

210. See Grinspoon & Bakalar, *Medical Uses of Illicit Drugs* in DEALING WITH DRUGS, *supra* note 17, at 183 (discussing the significant medical uses of psychoactive drugs, including opium, coca, cannabis, mescaline and even alcohol, although they are severely restricted or banned by law today).

211. See, e.g., Marijuana Scheduling Petition; Denial of Petition, 54 Fed. Reg. 53,767, 53,784 (1989) (announcing the view of John C. Law, then-Drug Enforcement Administrator, that even the declaration of marijuana as a medically accepted drug has potential risks).

212. In the Matter of Marijuana Rescheduling Petition, Docket No. 86-22 (Dep't of Justice, Drug Enforcement Admin., Sept. 6, 1988), *reprinted in* THE DRUG POLICY FOUNDATION, DRUG POLICY 1989-1990, A REFORMER'S CATALOGUE 325 (A.S. Trebach & K.B. Zeese eds. 1989) (recommending that marijuana should be transferred from a Schedule I substance to a Schedule II substance to allow legitimate use for medical treatment through pharmacies). *But see* Marijuana Scheduling Petition, Denial of Petition, 54 Fed. Reg. 53767 (1989) (rejecting the recommendation of the administrative law judge since all evidence accepted by the judge was merely preliminary studies and insufficient to demonstrate that marijuana has an accepted medical use in the treatment of any medical conditions).

213. See *supra* notes 222-36 and accompanying text.

death toll from cocaine and heroin.²¹⁴ These casualties include the sexual partners and children of intravenous drug users.²¹⁵ Drug-related AIDS is almost exclusively the result of drug prohibition.²¹⁶ Users inject drugs rather than taking them in tablet form²¹⁷ because tablets are expensive. They go to “shooting galleries” to avoid arrests for possessing drugs and needles. They share needles because possession of needles is illegal and they are difficult to obtain.²¹⁸ In Hong Kong, where needles are legal, there are *no* cases of drug-related AIDS.²¹⁹ Legalization would fight AIDS in three ways:

- by making clean needles cheaply available;
- by making drugs in tablet form less expensive;
- by helping to break up the drug subculture, with its “shooting galleries” and needle-sharing.²²⁰

214. See CENTERS FOR DISEASE CONTROL, HIV/AIDS WEEKLY SURVEILLANCE REPORT, Nov. 1989. In the one year period from November 1988 through October 1989, there were about 10,000 new cases of drug-related AIDS. *Id.* The overall fatality rate from AIDS is about 60 percent, including the most recently diagnosed cases. *Id.* Thus, barring a cure for AIDS, about 6,000 people who were diagnosed with drug-related AIDS in that period will eventually die from AIDS. From 1986 to 1988, deaths from drug-related AIDS averaged about 4,000 per year. *Id.* However, deaths from AIDS declined in 1989, perhaps as a result of improved medical treatment. *Id.* It cannot be assumed that all cases of drug-related AIDS are reflected in the official statistics. The Centers for Disease Control estimates that 10 to 30 percent of the cases go unreported, while the figure may be as high as 40 percent in some states. *Many AIDS Cases Go Unreported*, N.Y. Times, Nov. 28, 1989, at C15, col. 1.

215. According to the National Institute on Drug Abuse Survey, there are about 1,285,000 intravenous drug users in the United States. According to one expert, the average drug user has 0.5 female non-drug using sexual partners and two children. This means that about 4,500,000 people are in the *direct* line of fire of drug-related AIDS. *Drug Related AIDS*, *supra* note 139, at 5 (footnotes omitted) (emphasis in original) (referring to an unpublished survey by the National Institute on Drug Abuse dated Spring, 1987).

216. See *supra* text accompanying notes 139-43 (referring to cost benefit analysis section).

217. See *Appendix*, *infra* notes 380-459 and accompanying text.

218. See *Drug Related AIDS*, *supra* note 139, at 7 (discussing the problems drug users have in obtaining clean needles).

219. Kristof, *Hong Kong Program: Addicts Without Aids*, N.Y. Times, June 17, 1987, at A1, col. 3.

220. These factors would also reduce the spread of hepatitis, tuberculosis and other diseases spread by the use of dirty needles.

The number of deaths caused by illnesses other than AIDS spread through the use of unsterile needles is unknown.²²¹

As many as 2,400 of the 3,000 deaths attributed to heroin and cocaine use each year—80 percent—are actually caused by black market factors.²²² For example, many heroin deaths are caused by an allergic reaction to the street mixture of the drug,²²³ while 30 percent are caused by infections.²²⁴

In summary, the attempt to protect users from themselves has backfired, as it did during Prohibition. The drug laws have succeeded only in making drug use much more dangerous by driving it underground and out of the reach of moderating social and medical influences. As indicated in Table 1, drug prohibition causes at least 7,925 deaths each year.²²⁵

221. See Haller, *Infections in Intravenous Drug Abusers: What Makes Them Different*, 83 POSTGRADUATE MED. 95 (1988). Infections which are more prevalent in intravenous drug abusers include: pulmonary infection, endocarditis, bacteremia, osteomyelitis and arthritis, hepatitis, tetanus and AIDS. *Id.* at 96-111; see also Kolata, *Gain Reported in Hepatitis Treatment*, N.Y. Times, July 15, 1988, at B5, col. 4 (stating that according to the Center For Disease Control, 4,000 deaths annually are related to hepatitis B); *Changing Patterns of Groups at High Risk for Hepatitis B in the United States*, 37 MORBIDITY & MORTALITY WEEKLY REPORT 429, 430 (1988) (estimating that 27% of hepatitis B cases are incurred through intravenous drug abuse).

222. See *Appendix, infra* notes 380-459 and accompanying text.

223. E. BRECHER, *supra* note 28, at 101-14.

224. N. ZINBERG & J. ROBERTSON, *DRUGS AND THE PUBLIC* 204 (1972).

225. Not included in this estimate are deaths caused by "designer" drugs.

Designer drugs "is a term that has been used . . . to describe synthetic drugs of abuse. . . . More correctly, this term should be applied to only those drugs that are (1) synthesized from common chemicals, (2) exempt from control by the Drug Enforcement Administration because of their unique chemical structure, and (3) skillfully marketed under attractive, often exotic names.

Henderson, *Designer Drugs: Past History and Future Prospects*, 33 J. FORENSIC SCI. 569, 569 (1988) For example, the DEA found that the material called "China White" was alpha-methylfentanyl, which caused fifteen deaths in Orange County, California in 1979-1980. *Id.* at 570. Estimates of deaths due to designer drugs range from 100 to 1,000. See *id.* at 573 (estimating about 100 deaths between 1981-1987; U.S. GENERAL ACCOUNTING OFFICE, *CONTROLLING DRUG ABUSE: A STATUS REPORT* 17 (1988) [hereinafter GAO REPORT] (reporting deaths caused by dangerous drugs including designer drugs

The net effect, tragic and ironic, of drug prohibition has been the creation of synthetic drugs that are more potent, dangerous, and unpredictable than the drugs originally banned. . . . Unless we turn away from drug prohibition, and learn to live with the drugs we have, we will be awash in a flood of cheap and deadly synthetic drug substitutes.

Shafer, *The War on Drugs is Over—The Government Has Lost*, INQUIRY, Feb., 1984 at 14.

Table 1.

ANNUAL DEATHS CAUSED BY DRUG PROHIBITION

Murders incident to street crime	1,200
Black market murders	825
Drug-related AIDS	3,500
Other diseases spread through dirty needles	?
Poisoned drugs/no quality control	2,400
Loss of medical use of illegal drugs	?
<hr/>	
<i>Total</i>	7,925

An implicit point throughout this Article is made explicit here; drug users do not benefit from drug prohibition. Users die of overdoses caused by the uncertain quality of illegal drugs, and of AIDS contracted through dirty needles. They are murdered in remarkable numbers while buying or selling drugs. They are led into a criminal lifestyle by the need to raise large sums of money quickly, and must constantly associate with professional criminals to secure a drug supply. Many users have long records of convictions for drug offenses, making it difficult for them to secure legitimate employment.²²⁶ "It is difficult to overestimate the harm caused by forcing drug users into a life of crime. Once this threshold is crossed, there is often no return."²²⁷

Yet, isn't the point of drug prohibition the salvaging of the welfare of those who, for whatever reasons, are unable to resist the lure of drugs? The 250,000 drug users infected with the AIDS virus are a grim reminder of the failure of prohibition to do so.²²⁸

C. *Economic Impact of Prohibition*

What about the economic impact of prohibition? First, take a common estimate of annual black market drug sales which in 1980

226. See generally Barnett, *supra* note 41, at 85-86 (discussing how "drug laws criminalize users").

227. *Id.* at 85.

228. See *Drug Related AIDS*, *supra* note 139, at 5 (citing the results of an unpublished survey by the National Institute of Drug Abuse).

was \$79 billion.²²⁹ Because the black market price of drugs is inflated at least ten-fold over the probable legal price,²³⁰ 90 percent of this figure, or about \$70 billion, constitutes an economic loss caused by prohibition. The drug user (and his dependents) is deprived of the purchasing power of 90 percent of the money he spends on illegal drugs without any *net* benefit accruing to the economy as a whole.²³¹

The added expenditure to the drug user under prohibition pays for the dramatically increased costs of producing and selling illegal drugs. Large amounts of land, labor and capital, not required in the legal drug market, are utilized in the illegal drug market. The high prices drug users pay for illegal drugs compensate drug dealers for their expenditures in acquiring the drugs, as well as for the risks of violence and imprisonment.

The economic loss to drug users is evident in such phenomena as wealthy users squandering hundreds of thousands of dollars on drugs, middle-class users losing their houses and cars to drug expenditures, and poor users going without food or shelter because the bulk of their funds is spent on purchasing expensive illegal drugs. Ironically, this economic loss to drug users under prohibition is frequently cited as a justification for prohibition. However, this harm is a major cost of prohibition and should be held against it in the legalization debate.

The total cost of drug-related law enforcement—courts, police, prisons, on all levels of government—is about \$10 billion each

229. NATIONAL NARCOTICS INTELLIGENCE CONSUMER'S COMMITTEE, NARCOTICS INTELLIGENCE ESTIMATE, THE SUPPLY OF DRUGS TO THE U.S. ILLICIT MARKET FROM FOREIGN AND DOMESTIC SOURCES IN 1980, at 77 (1980). In 1986, it was estimated that revenues from black market drug sales were estimated at about \$100 billion per year. See S. WISOTSKY, *supra* note 17, at 80.

230. See, e.g., BENNETT PLAN I, *supra* note 166, at 6 (estimating the free market price of a gram of cocaine would be three or four dollars, roughly five percent of the current black market price of sixty to eighty dollars).

231. In a value-free economic analysis, we are compelled to treat a black market business the same as a legitimate one. Thus, it might be argued that the high price drug users pay for drugs is offset by the high profits made by drug dealers, and thus drug transactions are a zero-sum game with no net economic loss to the economy. While this logic applies to transfers of property by theft—which are therefore not included in the cost analysis of this report—it does not apply to black market drug sales. While it is true that the money paid for illegal drugs goes to black market “businesses”, there is no net economic benefit because, if drugs were made legal, this money would flow to legal business. Thus, drug prohibition operates to transfer gross sales from legal to illegal business entities in zero-sum fashion, while the drug consumer, and his dependents if any, are net losers in the process. Cf. H. HAZLITT, *ECONOMICS IN ONE LESSON* 23-24 (2d ed. 1979) (discussing analogous economic consequences of a broken window).

year.²³² Each dollar spent on drug enforcement yields seven dollars in economic *loss*.²³³ Prohibition takes \$10 billion from taxpayers and uses it to raise \$80 billion for organized crime and drug dealers, impoverishing many drug users in the process. To pay for expensive black-market drugs, poor drug users then victimize the taxpayers by stealing \$7.5 billion from them.²³⁴ Thus, the total economic cost of prohibition is about \$80 billion each year (excluding the \$7.5 billion in thefts).

Even this \$80 billion figure does not include a number of other negative economic consequences of prohibition that are difficult to estimate. These include:

- the lost productivity of those who die as a result of prohibition;
- the lost productivity of those in prison on drug convictions or drug users who must “hustle” all day to pay for their drugs;²³⁵
- the costs imposed by organized crime activities funded by drug profits;
- government and private funds spent on prohibition-created illnesses such as AIDS, hepatitis, and accidental overdose;²³⁶ and
- the funds spent on private security to fight drug-related crime.

Another difficult-to-measure economic cost of prohibition merits special mention: the negative impact of prohibition on the economic viability of inner cities and their inhabitants. Prohibition-related violence and property crime raise costs, make loans and insurance

232. See G. GODSHAW, R. KOPPEL & R. PANCOAST, *supra* note 196, at 17, 134 (estimating the cost of drug use on the criminal justice system to be \$4.5 billion and estimating that \$6.2 billion is spent on drug-related police activities alone, excluding the cost of courts and prisons). Total criminal and civil justice spending was \$39.7 billion in 1983, three-quarters of which went for police and prisons. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN, JUSTICE EXPENDITURE AND EMPLOYMENT 1983, at 1 (1986). Further, the federal government has proposed an increase for drug reduction activities to \$10.6 billion in 1994. BENNETT PLAN II, *supra* note 179, at 7.

233. See *supra* text accompanying notes 234-35.

234. See *supra* text accompanying note 197 (estimating drug-related property crime losses).

235. Not all drug addicts are easy to discern.

The addict who is able to obtain an adequate supply of drugs through legitimate channels and has adequate funds usually dresses properly, maintains his nutrition, and is able to discharge his social and occupational obligations with reasonable efficiency. He usually remains in good health, suffers little inconvenience, and is, in general, difficult to distinguish from other persons.

E. BRECHER, *supra* note 28, at 38 (quoting J. Jaffe, in GOODMAN AND GILMAN 286 (4th ed. 1970)).

236. For example, it is estimated that the yearly cost of care for an AIDS patient can range from \$50,000 to \$100,000. See NEW YORK STATE DEP'T OF HEALTH, ACQUIRED IMMUNE DEFICIENCY SYNDROME: 100 QUESTIONS AND ANSWERS 17 (1989).

difficult or impossible to secure, and make it difficult to attract skilled workers. Prohibition lures some workers away from legitimate businesses and into the black market, where salaries are astronomically higher. As long as a black market in illegal drugs thrives in the inner cities, it is difficult to see how inner cities can ever become economically viable.

D. *Economic Costs of Drug Use*

If prohibition causes at least \$80 billion in economic loss each year,²³⁷ what are the economic costs of illegal drug use per se? What costs of drug use would remain the same despite legalization? The author is unaware of any studies that attempt to directly measure these costs. However, an examination of the various components of economic cost indicates that the costs of legal drug use would be less than the costs of legal alcohol and tobacco use.

1. *Crime*

As noted above, the pharmacological effects of cocaine, heroin, and marijuana on violent crime are slight.²³⁸ The drug most frequently associated with crime and violence is alcohol.²³⁹

2. *Accidents*

The primary drug associated with accidents is, again, alcohol. Large numbers of drunk drivers have killed themselves and others on the nation's roads.²⁴⁰ In a study of 440 fatally injured drivers, "[a]lcohol was by far the drug found most frequently, and the crash responsibility analysis provided evidence of its causal role in crashes," but the role of marijuana and other illegal drugs could not

237. See *supra* notes 232-34 and accompanying text.

238. See *supra* notes 205-09 and accompanying text.

239. For example, in 1980, 50% of the homicides committed were attributable to alcohol. SECRETARY OF HEALTH AND HUM. SERVS., SIXTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 12 (1987) [hereinafter SIXTH SPECIAL REPORT ON ALCOHOL]; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1988, at 481 [hereinafter 1988 SOURCEBOOK] (setting forth the statistics for all arrests in 1987). According to the Federal Bureau of Investigation through the Uniform Crime Reporting System, almost 25% of all arrests (12,711,600) in 1987 were alcohol related crimes including "driving while under the influence" (1,727,200), violation of liquor laws (616,700) and "drunkenness" (828,300). See *id.* By comparison, only 7% of all arrests were for "drug abuse violations." *Id.*

240. In 1986, 23,897 highway deaths were alcohol related. NATIONAL COUNCIL ON ALCOHOLISM, FACTS ON ALCOHOLISM AND ALCOHOL RELATED PROBLEMS 2 (1987).

be determined.²⁴¹ Heroin was present in very few of the victims.²⁴² Cocaine, a stimulant, is unlikely to constitute a major accident problem. The Research Triangle Institute study was unable to find evidence to show that illegal drugs play a major role in causing auto accidents.²⁴³ The point is not that legalization would not have an impact on accidents, but that the impact will be far less than the impact of alcohol consumption on the number of fatal accidents.

3. *Health Care Costs*

Tobacco and alcohol are more lethal on a per capita basis than illegal drugs.²⁴⁴ In addition, since the pernicious effects of tobacco and alcohol are primarily chronic and long-term, there can be little doubt that users of these drugs do and will consume greater health care resources than the users of the illegal drugs.²⁴⁵

4. *Productivity*

Some legal drugs, such as caffeine, seem to make people more productive.²⁴⁶ Others, such as alcohol, seem to make them less productive.²⁴⁷ Many illegal drugs could impair productivity if used on the job. As with alcohol, however, on-the-job use of a drug is no reason to make a drug illegal.

241. Williams, Peat, Crouch, Wells & Finkle, *Drugs in Fatally Injured Young Male Drivers*, 100 PUBLIC HEALTH REP. 19, 24 (1985). However, marijuana and cocaine were found frequently enough to constitute a potentially significant problem on the highway. *Id.*

242. *Id.* at 22.

243. HARWOOD, NAPOLITANO, KRISTIENSEN, & COLLINS, *supra* note 43, at 4.

244. See *Appendix, infra* notes 380-459 and accompanying text.

245. In the United States, tobacco smoking is the cause of more than 300,000 deaths per year. Smoking "causes lung cancer, other cancers, chronic obstructive lung disease, heart disease, complications of pregnancy, and several other health effects." U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION* iii (1988); see also U.S. DEP'T OF HEALTH AND HUMAN SERVS., *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS* 35-101 (1989) (discussing specific diseases caused by cigarette smoking).

Health hazards of alcohol include:

liver disease, particularly cirrhosis; diseases of the nervous, gastrointestinal, and respiratory systems; heart and vascular diseases; cancers; metabolic and immune system disorders; endocrine disorders; nutritional deficiencies; [and] poisoning

The health effects of maternal drinking on the developing fetus include neurological, behavioral, skeletal, morphological, and development disorders, including mental retardation.

SIXTH SPECIAL REPORT ON ALCOHOL, *supra* note 239, at 8.

246. Loke, *Effects of Caffeine on Mood and Memory*, 44 PHYSIOLOGY & BEHAV. 367, 371 (1988).

247. See SIXTH SPECIAL REPORT ON ALCOHOL, *supra* note 239 at 8-12 (discussing the adverse effects of alcohol consumption).

As a general rule, a worker's productivity is visible and measurable. Thus, when productivity falls, the employer can take action, including firing the worker if appropriate. However, the fact that many companies are adopting drug testing suggests that the impact of illegal drug use on the job is not readily apparent. If it is difficult to discern, it is not significantly affecting productivity.

Possibly, the key motivation behind drug testing is the prevention of employee theft. Under legalization, the price of drugs would be greatly reduced and employee theft may decline as well. The reasons given for drug testing based on the desire to reduce health care costs and increase productivity seem disingenuous. Few companies test for (or ban) off-the-job nicotine use (which is often associated with high health care costs and absenteeism) or alcohol use (associated with lower productivity), even though the Constitution would probably prohibit such testing by private employers.²⁴⁸

It is remarkable that the Research Triangle Institute study, so often relied upon to demonstrate the negative impact of illegal drugs on productivity, contains so little solid evidence of such an impact. First, the report concedes that "the statistical analysis of the impact of consumption of drugs other than marijuana yielded no significant results relating abuse of the drugs to household income."²⁴⁹ The report states that the relatively small number of other users of other illegal drugs makes statistical analysis difficult.²⁵⁰

Second, the study's conclusion that marijuana use causes a \$34 billion economic loss each year²⁵¹ is highly dubious. According to the study:

The cause and effect relationships among . . . drug abuse, the work environment, and other social factors are not clear . . . [T]he *attitudes, values, and personality traits* which underlie substance abuse behaviors as well as others should be incorporated in future analysis; however, it was not possible with the data sets presently available. . . . The drug abuse study, unlike the study on alcohol abuse, obtained no information about untoward events [that] might have been due to abuse of drugs. Questions were not asked about areas in which abuse of alcohol is known to have an impact such as symptomatic drug consumption, interpersonal problems, difficulties in the household, legal entanglements, or problems on the job. By

248. See, e.g., sources cited *supra* note 245.

249. HARWOOD, NAPOLITANO, KRISTIANSEN, & COLLINS, *supra* note 43, at A-20.

250. *Id.* at A-22.

251. *Id.* at A-22.

analogy, it would be *predicted* that drug abuse has impacts in the same areas as alcohol abuse, *but this has not been examined by any of the national surveys on drug abuse*. . . . It would be too simplistic to suggest that the [cost attributed to marijuana use] could only be due to . . . drug abuse. Plausible alternative explanations can be offered. One alternative may be that . . . drug abuse may be symptomatic of other personal problems. . . . Drug abusers may be self-destructive or have other personality disorders, *low orientation toward achievement or low motivation*.²⁵²

The major remaining cost component is crime costs. The study divides these costs into the following categories: crime careers, drug trafficking, property crime, and various consensual offenses, victims of crime, incarceration, and enforcement expenses.²⁵³ The overwhelming majority of these costs involve drug law enforcement, black market violence, and street crime committed by drug users to pay for expensive illegal drugs. These costs are a direct or indirect cost of prohibition.²⁵⁴ One can therefore estimate that 90 percent of crime costs are prohibition-related. In addition, federal drug interdiction costs can be completely attributed to prohibition.²⁵⁵

The study's estimate of mortality costs²⁵⁶ can be discounted by 80 percent because, as discussed in the appendix, about 80 percent of illegal-drug-related deaths can be traced to prohibition factors. As for the remaining cost components, there is little doubt that some are prohibition-related. However, for the sake of a conservative estimate, it will be assumed that they would all be incurred under legalization.

252. *Id.* at A3, A20, A24 (emphasis added). As noted earlier, *supra* note 43, the Research Triangle Institute study does not separate the costs attributable to prohibition from those attributable to drug use per se. Per se costs could be estimated by discounting the Research Triangle Institute figures by the extent to which they represent costs attributable to prohibition, except that the figures given for lost productivity are unwarranted estimates. The study's estimate of \$26.4 billion in economic loss from drug abuse sets the upper limit of possible economic loss from drug use per se. This figure must be discounted by the percentage of costs attributable to prohibition.

253. HARWOOD, NAPOLITANO, KRISTIANSSE, & COLLINS, *supra* note 43, at 5.

254. It can be inferred from the study that the purely chemical effects of drugs may play a role in crime. *Id.* at C-6, C-7. The study does not contain any data from which the *quantity* of chemically-induced crime can be measured. To prove that the chemical effects of drugs cause crime is very difficult because such proof would have to separate the effects of personality and environment from the effects of the drugs themselves.

255. *See, e.g.*, P. REUTER, G. CRAWFORD, J. CAVE, SEALING THE BORDERS, THE EFFECTS OF INCREASED MILITARY PARTICIPATION IN DRUG INTERDICTION 64-65 (1988) (estimating the drug interdiction costs in 1987 to be \$775 million total and \$647 million without port-of-entry customs expenses).

256. HARWOOD, NAPOLITANO, KRISTIANSSEN, & COLLINS, *supra* note 43, at 4.

Table 2 presents the revised Research Triangle Institute figures for the economic cost of drug abuse.

Table 2.

THE DISCOUNTED COSTS OF DRUG ABUSE

Type of Cost	Total Cost (\$ millions)	Cost Caused by Prohibition %	Costs Caused by Prohibition (\$ millions)
Treatment	2,049	0	0
Mortality	2,486	80	1,988
Lost Employment	405	0	0
Crime	20,781	90	18,702
Welfare	3	0	0
Interdiction	677	100	677
Total	26,401	80%	21,367 ²⁵⁷

In summary, the gross costs of drug abuse are \$26.4 billion. Of that, \$21.4 billion is the result of prohibition, while \$5 billion is the result of drug use per se.

E. *Clogged Courts and Prisons*

Each dollar spent enforcing drug laws and fighting the violent crimes stimulated by those laws is a dollar that cannot be spent fighting other violent crimes. Incarceration is one law enforcement technique that works in deterring violent crime. Put a violent career criminal in prison for five years and that person simply will not commit his usual quota of over 100 serious crimes per year during the period of his incarceration.

Currently, there are not enough judges and prosecutors to try cases or enough prison cells to house convicts.²⁵⁸ In 1987, the federal

257. These calculations are based upon HARWOOD, NAPOLITANO, KRISTIANSEN, & COLLINS, *supra* note 43, at 34 and *passim*. Cost of drug use per se: \$5,034 (\$26,401 - \$21,367). This calculation omits the \$33.3 billion loss attributed to marijuana use because of the study's dubious methodology. *See supra* note 43 and accompanying text.

258. *See, e.g.*, BENNETT PLAN I, *supra* note 166, at 27 (graphically representing the overcrowding in federal and selected state prisons for 1988); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES:

prison system had 44,000 inmates;²⁵⁹ 16,000 were drug offenders.²⁶⁰ Official capacity in federal prisons was only 28,000.²⁶¹ In addition, many prisons are operating under court orders due to overcrowding or poor conditions.²⁶² Because of the lack of prison space, violent criminals frequently are given deals, probation, or shorter terms than they deserve. Then they are back on the streets, and often back to serious crime.²⁶³

F. Corruption

Drug money corrupts law enforcement officials. Corruption is a major problem in drug enforcement because drug agents are given tremendous power over desperate persons in possession of large amounts of cash. Drug corruption charges have been leveled against FBI agents, policemen, prison guards, U.S. Customs inspectors, even prosecutors.²⁶⁴ In 1986, in New York City's 77th Precinct, 12 police

1986, at 8 (1989) [hereinafter CORRECTIONAL POPULATIONS] (stating that jails in jurisdictions with large jail populations were operating at 108 percent capacity in 1986); Schuler & McBride, *Notes from the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, 18 HOFSTRA L. REV. 893 (1990) (reporting the overcapacity problems of the criminal justice system resulting from prohibition).

259. See 1988 SOURCEBOOK, *supra* 239, at 615 (reporting federal prison population as of December 31, 1986 as 44,408).

260. *Id.* at 620.

261. Kerr, *War on Drugs Puts Strain on Prisons, U.S. Officials Say*, Sept. 25, 1987, A1, at col. 1, col. 2.

262. See CORRECTIONAL POPULATIONS, *supra* note 258, at 9 (reporting that 166 jails in jurisdictions with large jail populations are under a court order to reduce population or improve confinement conditions in 1986).

263. For example, in 1987 in New York City, a man who had been released after serving 5 years of a 15-year term for robbery was arrested again for auto theft, released on bail, and finally arrested once more and indicted for rape and robbery at knife-point. Williams, *Queens Parolee Is Held in Rape in Parking Lot*, N.Y. Times, Oct. 23, 1987, at B5, col. 6.

264. See, e.g., Berke, *Corruption in Drug Agency Called Crippler of Inquiries and Morale*, N.Y. Times, Dec. 17, 1989, § 1, at 1, col. 1 (stating that [a] recent spurt in corruption cases at the Drug Enforcement Administration has undermined morale and crippled many investigations"); Lubasch, *9 Jail Guards Are Arrested in Drug Case*, N.Y. Times, Feb. 17, 1989, at B1, col. 5 (reporting that nine New York City correction officers were accused of receiving cash payments and cocaine from agents posing as inmates); *F.B.I. Agent is Held on Charge of Selling Cocaine in Chicago*, N.Y. Times, Oct. 22, 1988, at 9, col. 1 (reporting that an eight year veteran of the Federal Narcotics Bureau was arrested for selling a gram of cocaine); Pitt, *Officer Arrested in Robbery of Bronx Drug Dealers*, N.Y. Times, June 30, 1988, at B3, col. 1 (reporting that a senior police officer was arrested in what "appeared to be a small ring of officers who robbed drug dealers in the South Bronx"); Woestendiek, *Of Guards and Drugs in Philadelphia's Prisons*, Philadelphia Inquirer, Aug. 2, 1987, at 1, col. 1. (reporting that in the Philadelphia prison system, officials have predicted that as many as 200 prison employees are involved in supplying drugs to inmates); *Ex-U.S. Prosecutor Indicted*, N.Y. Times, Oct. 29, 1985, at D26, col. 5 (reporting that a former U.S. prosecutor was in-

officers were arrested for stealing and selling drugs.²⁶⁵ Miami's problem is worse. In June 1986, seven officers there were indicted for using their jobs to run a drug operation that used murders, threats, and bribery.²⁶⁶ Add to that two dozen other cases of corruption in Miami in the last few years.²⁶⁷

We must question a policy that so frequently turns policemen into organized criminals. There are two solutions to drug corruption: hire morally perfect policemen or eliminate the black market in drugs.

G. *Assault on Civil Liberties*

Drug war hysteria has created an atmosphere in which long-cherished rights are discarded wherever drugs are concerned. Suspected drug users are subject to urine testing,²⁶⁸ roadblocks,²⁶⁹ routine strip searches,²⁷⁰ school locker searches without probable cause,²⁷¹ abuses of the good faith exception to the exclusionary rule,²⁷² preventive detention,²⁷³ and nonjudicial forfeiture.²⁷⁴

dicted for selling over \$200,000 worth of information to drug dealers); *see also* Schuler & McBride, *supra* note 258, at 915, n.81.

265. *See* Daly, *The Crack in the Shield: The Fall of the Seven-Seven*, N.Y. MAG., Dec. 8, 1986, at 50.

266. Volsky, *7 Former Officers on Trial in Miami*, N.Y. Times, Oct. 12, 1986, § 1, at 35, col. 1.

267. *See, e.g.*, Volsky, *Wide Miami Inquiry into Police Is Seen: Law Enforcement Officers Say 100 to 200 on City Force May Be Investigated*, N.Y. Times, Dec. 13, 1987, at 29, col. 1 (describing several cases which have occurred in Miami since 1985).

268. In many contexts, the courts have ruled that drug testing can proceed if a "reasonable suspicion" of drug use has been established. *See, e.g.*, *New Jersey v. T.L.O.* 469 U.S. 325, 340-41 (1985); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1547 (6th Cir. 1988) (drug testing of fire fighters); *Thomson v. Weinberger*, 682 F. Supp. 829 (D. Md. 1988) (U.S. Army testing of civilian employees); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1443 (N.D. Ill. 1987) (testing of correctional officials); *Amalgamated Transit Union, Local 1277 v. Sunshine Transit Agency*, 663 F. Supp. 1560, 1569 (C.D. Cal. 1987) (testing of municipal bus drivers); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 592 (N.D. Ohio 1987) (testing of police academy cadets); *see also* Note, *The National Collegiate Athletic Association, Random Drug-Testing, and the Applicability of the Administrative Search Exception* 17 HOFSTRA L. REV. 641 (1989) (authored by Craig H. Thaler) (discussing the body of law surrounding drug testing, and applying the analysis to the NCAA's drug testing policies).

269. *See generally* Grossman, *Society Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123 (1984) (discussing the legal implications of the use of roadblocks).

270. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 558 (1979) (upholding strip searches of prisoners following visits from outsiders); *United States v. Guadalup-Garza*, 421 F.2d 876, 879 (9th Cir. 1970) (upholding strip searches at borders if based on "real suspicion").

271. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (holding that searches of students must be based on reasonable suspicion).

272. *See generally* Uchida, Bynum, Rogan & Murasky, *Acting in Good Faith: The Ef-*

These governmental intrusions into our most personal activities are the natural and necessary consequence of drug prohibition. It is no accident that a law review article entitled "Crackdown: The Emerging 'Drug Exception' to the Bill of Rights" was published in 1987.²⁷⁵ In explaining why drug prohibition, by its very nature, threatens civil liberties, law professor Randy Barnett notes that drug offenses differ from violent crimes in that there is rarely a complaining witness to a drug transaction.²⁷⁶ Drug transactions are hidden from police view because the transactions are illegal, but the participants in the crime are willing. Thus, to be effective, drug agents must intrude into the innermost private lives of *suspected* drug criminals.

The term innermost is no exaggeration. In one case, the Supreme Court "approved a prolonged and humiliating detention of an incomer who was held by customs agents to determine, through her natural bodily processes, whether or not she was carrying narcotics internally," even though probable cause was lacking.²⁷⁷ That is, a woman was subjected to a rectal exam even though there was no probable cause to believe she was carrying drugs.²⁷⁸ Since evidence of guilt, if it exists, is not obtained until *after* such intrusions, the privacy of large numbers of innocent people must be violated in the

facts of United States v. Lean on the Police and Courts, 30 ARIZ. L. REV. 467 (1988) (discussing policies and practices regarding search warrants).

273. See, e.g., *Baker v. McCollan*, 443 U.S. 137, 143 (1979) (finding that the probable cause requirement for both pretrial arrest and detention is identical).

274. See UNIF. CONTROLLED SUBSTANCES ACT § 505, 9 U.L.A. 833 (1970).

275. Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987). Wisotsky states that the "War on Drugs is producing a political-legal context in which drug enforcement constitutes an exception to the principle that laws must comport 'with the deepest notions of what is fair and just.' In drug enforcement, most anything goes." *Id.* at 925-26.

276. Barnett, *supra* note 41, at 88-92. In addition, Barnett notes the following:

If the rights of individuals to choose how to use their person and possessions are fully respected, there is no guarantee that they will exercise their rights wisely. Some may mistakenly choose the path of finding happiness in a bottle or a vial But we must not give in to the powerful temptation to grant some the power to impose their consumptive preferences on others by force.

Id. at 102.

277. *People v. Luna*, 73 N.Y.2d 173, 176, 535 N.E.2d 1305, 1307, 538 N.Y.S.2d 765, 767 (1989) (discussing the Supreme Court's decision in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985)).

278. See *Montoya de Hernandez*, 473 U.S. at 532-36 (outlining the events and the search). The Court noted that situations arising at the international border receive less scrutiny as a general matter. *Id.* at 537-41. Therefore, it was held that such a search was justified if customs agents "reasonably suspect that the traveler is smuggling contraband in her alimentary canal." *Id.* at 541.

process of enforcing drug laws.

The same principle operates in enforcement efforts seemingly far removed from the invasive practice of body searches. Roadblocks, used with greater frequency in the war on drugs, impose an inconvenience on all citizens for the sake of allowing the police to ferret out a few drug suspects.²⁷⁹ One of the main purposes of currency reporting laws is to allow government agents to trace cash from drug transactions that is being "laundered."²⁸⁰ Currently, most cash transactions involving more than \$10,000 must be reported to the government.²⁸¹ Thus, the financial privacy of *all* must be sacrificed to allow government agents to search for a relatively small number of drug criminals. This intrusion is simply another cost of criminalizing an activity in which all the participants are willing.

The dangerous precedents used in the war on drugs represent a permanent increase in government power for all purposes. The tragedy is how cheaply our rights have been sold. Our society was once one in which the very thought of men and women being strip-searched and forced to urinate in the presence of witnesses was revolting. Furthermore, this degradation of our individual rights is in furtherance of a policy that does not work. It does not work because prohibition is the cause of the problems that make these extreme measures appear necessary.

H. *Destruction of Community*

Drug prohibition has had devastating effects on inner-city minority communities. A poorly educated young person in the inner city now has three choices: welfare, a low-wage job, or the glamorous, high-profit drug business. It is no wonder that large numbers of ghetto youth have gone into drug dealing, some of them as young as 10 years old. When the most successful people in a community are those engaged in illegal activities, the natural order of the community is destroyed. How can a mother maintain authority over a 16-year-old son who pays the rent out of his petty cash? How can a teacher persuade students to study hard when dropouts drive

279. See Grossman, *supra* note 269.

280. See Anti-Drug Abuse Act of 1986, Subtitle H—Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified in scattered sections of 18 & 21 U.S.C.).

281. See 12 U.S.C. §§ 1730(d) & 1829b(b) (1988) (authorizing the Secretary of the Treasury to prescribe regulations for retention of records by insured banks); 31 C.F.R. § 103.22 (1989) (setting forth the reporting requirement for transactions of currency in excess of \$10,000).

BMW's? The profits from prohibition make a mockery of the work ethic and of family authority.

A related problem with prohibition is that it forces drug users to come into contact with people of real criminal intent. For all the harm that alcohol and tobacco cause, one does not have to deal with criminals to use those drugs. Prohibition drags the drug user into a criminal culture.

Once familiar with breaking the law by using drugs and dealing with criminals, it is difficult for the drug user, and especially the drug dealer, to maintain respect for other laws. Honesty, respect for private property, and other aspects of a law-abiding community are further casualties of the drug laws. When the huge illegal profits and violence of the illegal-drug business permeate a neighborhood, it ceases to be a functioning community. The natural tendency of people to help each other and to maintain standards of decency and order is undermined. In the communities where drug dealing is most prevalent, this has many consequences. For example, legitimate businesses are discouraged from opening or remaining in business, education is disdained, and the resulting violence makes mail carriers and ambulance drivers afraid to enter housing complexes. The destruction of inner-city communities is one of the major evils of prohibition.²⁸²

I. *International Costs*

There are three kinds of international costs:²⁸³

- (a) costs to primarily drug-consuming countries;²⁸⁴
- (b) costs to primarily drug-producing countries;²⁸⁵
- (c) restrictions on the ability of persons, goods and capital to cross national borders.²⁸⁶

1. *Costs to Other Drug-Consuming Countries*

We can assume that other wealthy nations with substantial markets for illegal drugs are experiencing costs similar to those in-

282. I am indebted to David Boaz of the Cato Institute for many of these insights.

283. See generally Marshall, *Drugs and United States Foreign Policy*, in *DEALING WITH DRUGS*, *supra* note 17, at 137 (discussing the success or failure of United States foreign policy controlling the supply of drugs); Nadelmann, *U.S. Drug Policy: A Bad Export*, 70 *FOREIGN POL'Y* 83 (1988) (discussing the failure of past United States foreign policy and suggesting drug policies that should be adopted).

284. See *infra* notes 287-89 and accompanying text.

285. See *infra* notes 290-91 and accompanying text.

286. See *infra* note 292 and accompanying text.

curred in the United States.²⁸⁷ The level of particular costs in other countries will depend upon the demand for illegal drugs and the intensity of enforcement in those countries.²⁸⁸ The greater the demand and intensity of enforcement, the greater the costs. Thus, for example, as Great Britain intensified drug enforcement in recent years, prohibition-related crime and smuggling increased.²⁸⁹

2. *Costs to Producing Countries*

The main problem with producing countries, such as Colombia, is that drug money derived mainly from sales in the United States and Europe creates a huge illegal slush fund that is used to corrupt democratic governments and courts and fund terrorist and revolutionary movements.²⁹⁰ The power of those who control illegal drug profits is magnified in producing countries since they are, in general, quite poor relative to consuming countries. Thus, a few billion dollars translates into tremendous economic and social power in those countries.²⁹¹

287. See, e.g., BRITISH INFORMATION SERVICES, *THE PREVENTION AND TREATMENT OF DRUG MISUSE IN BRITAIN*, 14-16 (1985) (describing the efforts by the British Government in enforcing anti-drug laws, especially by HM Customs, Excise and the police).

288. For example, the United Kingdom incurred the following cost: an annual contribution of £100,000 to the United Nations Fund for Drug Abuse and Control, *id.* at 12; £2 million for anti-drug health education and information campaign, *id.* at 17; and a £17 million fund was established and raised to support projects for treatment and rehabilitation. *Id.* at 24; see also BUREAU OF INT'L NARCOTICS MATTERS, U.S. DEP'T OF STATE, *INT'L NARCOTICS CONTROL STRATEGY REPORT 47-48* (1989) (describing the international effort by the United States to train personnel of other countries whereby more than 2000 persons from over 75 countries participated in the United States Government's International Narcotics training program in 1988).

289. BRITISH INFORMATION SYSTEMS, *supra* note 287, at 14-16.

290. See SUBCOMMITTEE ON TERRORISM, NARCOTICS AND INT'L OPERATIONS OF THE COMM. ON FOREIGN RELATIONS, 100TH CONG., 2d SESS., *REPORT ON DRUGS, LAW ENFORCEMENT AND FOREIGN POLICY 25-26* (Comm. Print 1988).

291. See Marshall, *supra* note 283, at 175. Jonathan Marshall summarizes the costs of prohibition in producing countries.

These [costs] range from the disruption of traditional economies in Peru and Bolivia, where peasant leaders have warned that "pressures from the United States are about to provoke a bloodbath" to the corruption of entire societies in Latin America and Asia, where drug profits, artificially boosted by legal constraints, have lured members of the political, judicial, police, and even church establishments. . . . In Columbia, as in Peru, Bolivia, Mexico, Thailand, and Burma, the effect on drug enforcement, police aid, and related programs has been to militarize the society, put enormous pressure on fledgling liberal institutions, and divert resources from more productive endeavors.

Id.

3. *Restrictions on International Travel and Commerce*

Drug enforcement necessitates that the movement of persons, goods, and capital across international borders be restricted.²⁹² Common sense suggests that freedom of travel, free trade, and the free flow of capital to where it is most urgently needed, are positive values. Yet, sadly, drug enforcers suspect that travelers are potential drug couriers, that goods are potential hiding places for drugs, and that capital is possibly laundered drug money. The resulting restrictions increase the costs of moving persons, goods, and capital across international borders.

J. *The Consequences of Legalization*

As a general rule, legal drug use is less dangerous than illegal drug use and is influenced by the social mores of the society. Legal drug use would involve non-lethal doses, nonpoisoned drugs, clean needles and warning labels. Basketball star Len Bias died from a cocaine overdose.²⁹³ His friends, probably fearing the police, waited until after his third seizure before calling an ambulance.²⁹⁴ Illegal drug users have been arrested at hospitals after seeking medical attention. Legalization would put an end to this deadly situation. Users would be free to seek needed medical attention and counseling without fear of legal repercussions.

A given amount of legal drug use would cause much less death and illness than the same quantity of illegal drug use. A realistic estimate is that illegal drug use is five times more dangerous than legal use.²⁹⁵ This means that even a highly unlikely five-fold increase in drug use under legalization would *not* increase the current number of drug overdose deaths. That is: the yearly number of heroin and cocaine deaths combined is about 3,000 per year.²⁹⁶ Of the 3,000 deaths, 80 percent or 2,400 deaths are caused by black market factors,²⁹⁷ while 20 percent or 600 deaths are caused by the intrinsic effects of the drugs. Thus, if under legalization legal drug use remained at the same level as current illegal use, there would be only

292. See, e.g., 21 U.S.C.A. § 959 (West Supp. 1990) (making it unlawful to knowingly or intentionally import controlled substances into the United States).

293. *Examiner Confirms, Cocaine Killed Bias*, N.Y. Times, June 25, 1986, at D25, col. 3.

294. See *Bias Said to Suffer Seizures*, N.Y. Times, Oct. 18, 1986, at A50, col. 3.

295. See *Appendix, infra* notes 380-459 and accompanying text.

296. See *Appendix, infra* notes 428-33 and accompanying text.

297. See *id.*

600 deaths each year. Only a five-fold or 500 percent increase in use would match the current black market death toll.²⁹⁸

Furthermore, it would take a 1,200 percent increase in legal drug use to produce as many deaths as prohibition causes through murder, AIDS, and poisoned drugs. Prohibition now causes 7,925 deaths, while 600 are the result of the drugs themselves.²⁹⁹ Thus, in order for legalized drug use to match the overall death toll of prohibition, use would have to increase more than thirteen-fold.

There are now about three million regular cocaine users³⁰⁰ and approximately 500,000 regular heroin users.³⁰¹ Thus, to prove that prohibition saves more lives than it destroys, it would have to be shown that legalization would result in more than 6.0 million *additional* heroin users and more than 35 million *additional* cocaine users. Such enormous increases in drug use are inconceivable at a time when the overall trend is toward *less* legal and illegal drug use.

The economic impact of drug use is subject to the same analysis. Since the economic cost of prohibition is \$80 billion,³⁰² and the economic cost of drug use per se is about \$5 billion,³⁰³ legalization of drugs would have a positive economic impact—unless it causes a 1,500 percent increase in drug use.

Even if prohibition advocates could prove that astronomical increases in users would occur, the policy of prohibition would still not be vindicated on the basis of the phenomenon of drug-switching.³⁰⁴

Any increase in the use of newly legalized drugs is likely to involve some drug-switching by smokers and drinkers. Since the death

298. Note in this regard that estimates of the increase in alcohol use in the decades after repeal of Prohibition range from 0 percent to a maximum of 250 percent. See D.E. KYVIG, *supra* note 157, at 24, 112-13, 131, 186 (citing various reports which show that after the repeal of Prohibition, alcohol use did not return to its pre-Prohibition levels); R. O'BRIEN & M. CHAFETZ, *ENCYCLOPEDIA OF ALCOHOLISM* 72-73 (1982) (showing an increase in alcohol consumption since the repeal of Prohibition); Kondracke, *Don't Legalize Drugs*, *THE NEW REPUBLIC*, June 27, 1988, at 17 (stating that in the decade prior to Prohibition, "alcohol consumption . . . averaged 2.6 gallons per person per year. It fell to 0.73 gallons during Prohibition . . . then doubled to 1.5 gallons . . . after repeal, and is now back to 2.6 gallons.").

299. See *supra* note 225 & Table 1.

300. NATIONAL INST. ON DRUG ABUSE, *HIGHLIGHTS OF THE 1988 NAT'L HOUSEHOLD SURVEY ON DRUG ABUSE 2* (revised ed. Aug. 1989) [hereinafter *NIDA HIGHLIGHTS*]. In 1988, there were 2.9 million current users of cocaine reported, a decrease from 5.8 million in 1985. *Id.*

301. NATIONAL INST. ON DRUG ABUSE, *OVERVIEW OF THE 1988 NAT'L HOUSEHOLD SURVEY ON DRUG ABUSE 2* (revised ed. Aug. 1989) [hereinafter *NIDA OVERVIEW*].

302. See *supra* notes 229-36 and accompanying text.

303. See *supra* notes 237-57 and accompanying text.

304. See *infra* notes 312-30 and accompanying text (referring to drug switching).

rate for these activities is greater than the death rate from heroin, cocaine and marijuana use,³⁰⁵ for the purposes of cost-benefit analysis, any deaths avoided by switching would have to be subtracted from the deaths caused by the legal use of heroin and cocaine. (The marijuana death rate is apparently zero.) Depending on the rate of switching, it is possible that the increased use of these drugs could actually reduce the total number of drug deaths and drug related economic costs.³⁰⁶

The consequences of drug-switching is not a technical or minor issue. It is a critical one that any regime of drug control must face. What is the point of attempting to limit access to certain drugs, when the user will merely turn toward other, more dangerous drugs? In China, the opium problem may or may not have been wiped out, but so-called “[w]eak tranquilizers [sic] and sedative pills have been widely used in China, and they are easily available on the market.”³⁰⁷ Furthermore, it has been reported that two-thirds of all Chinese men now smoke cigarettes.³⁰⁸

Examples of drug-switching abound. When narcotics were first outlawed, many of the middle class users switched to “barbiturates . . . and later, to sedatives and tranquilizers The laws did nothing to terminate this group of addicts. . . . They simply changed the drug to which the users were addicted.”³⁰⁹ Marijuana smoking first became popular as a replacement for alcohol during Prohibition.³¹⁰ Recently, it has been reported that some intravenous heroin

305. See *Appendix, infra* notes 380-459 and accompanying text.

306. For example, assume that legalization leads to ten million new cocaine users. This could cause an additional 400 deaths per year. However, assume also that a mere five percent of these users switched to cocaine from tobacco (tobacco and cocaine both being central nervous system stimulants). This would reduce tobacco-related deaths by about 3,250 per year and result in a net gain in lives saved of 2,850.

Using the more sophisticated method of “years of potential life lost” (“YPLL”) would be unlikely to change the analysis significantly. Although people who die from alcohol and tobacco use are generally older than those who die from illegal drug use, alcohol and tobacco also cause a significant number of sudden deaths which take the lives of people of all ages (e.g., car accidents, fires).

307. See Chenru, *Keeping Narcotics Under Strict Control: Some Effects in China*, 34 *IMPACT OF SCI. ON SOC'Y* 131, 136 (1984). Shen Chenru, a Chinese journalist, claims that the Communist Chinese government completely eliminated the opium problem three years after coming into power and that “[d]rug-taking became extinct.” *Id.* at 134. However, he admits that heroin is being smuggled into China and that 18 persons in one city were charged with drug trafficking in one month. *Id.*

308. *CBS News*, (CBS television broadcast, Apr. 24, 1988).

309. E. GOODE, *supra* note 206, at 221.

310. See E. BRECHER, *supra* note 28, at 410.

users have switched to smoking "crack" to avoid the risk of AIDS.³¹¹

The ramifications of drug-switching for defenders of drug prohibition are that, assuming they can prove that the use of drugs would greatly increase under legalization, *and* that this increased use would not be offset by quality control gains, they would then have to prove that these new users would not be switching from more dangerous drugs (e.g., alcohol) to less dangerous drugs (e.g., opium—one-tenth the strength of heroin). Finally, prohibition advocates would need to prove that the damage caused by any increase in *legal* use would exceed the tremendous damage, both social and medical, caused by the current level of illegal use. None of these critical methodological steps have been performed. Until this is done, prohibition will simply be a policy in search of a justification.

K. *Would Drug Use Increase?*

Would there be any substantial increase in drug use under decriminalization? Long-term trends in legal drug use suggest not. As a society, we are gradually moving away from the harmful use of alcohol and tobacco.

In 1956, 42 percent of adults smoked; in 1980 only 33 percent. In 1977, 29 percent of high school seniors smoked; in 1981, 20 percent. . . . We did not declare a war on tobacco. We did not make it illegal. . . . We did seek to convince our citizens not to smoke through persuasion, objective information, and education.³¹²

The consumption of alcohol, and deaths caused by alcohol, have also been gradually declining as people switch from hard liquors to less potent formulations.³¹³ Finally, users of marijuana—now a *de facto* legal drug in some states—declined from 18 million in 1985 to 12 million in 1988 according to the National Institute on Drug Abuse (NIDA).³¹⁴

311. See D. MUSTO, *THE AMERICAN DISEASE* 274-77 (2d ed. 1987).

312. Trebach, *Peace Without Surrender in the Perpetual Drug War*, 1 JUST. Q. 136 (1984). In 1987, only 29 percent of adults continue to smoke. "Nearly half of all living adults whoever smoked have quit." Mason & Windon, *Foreward* to U.S. DEP'T OF HEALTH AND HUMAN SERVS., *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS* i (1989). The number of high school seniors who smoke has leveled off from 1980 through 1987. *Id.*

313. Per capita alcohol consumption declined 0.7 percent from 1974 to 1984, while distilled spirit consumption declined 15.4 percent. Berkelman, Ralston, Herndon, Gwinn, Bertolucci & Dufour, *Patterns of Alcohol Consumption and Alcohol-Related Morbidity and Mortality*, 35 MORBIDITY & MORTALITY WEEKLY REP 1SS, 2SS (Aug. 1986) (No. 2SS).

314. NIDA HIGHLIGHTS, *supra* note 300, at 3.

As our society grows increasingly health and fitness conscious, heavy drug use will lose its appeal. Many are trading in the tavern for the health club and choosing vitamins over martinis. This process of bringing legal drug use under the influence of positive social values such as health and moderation has less influence on the illegal drug scene. There, hard-core drug users form subcultures that reinforce the values of heavy, reckless drug use.

It is a mistake to assume that the mere availability of a drug causes or leads to drug use or abuse:

[F]or most of human history, even under conditions of ready access to the most potent of drugs, people and societies have regulated their drug use without requiring massive education, legal, and interdiction campaigns.³¹⁵

Before prohibition, in both America and England, narcotics use peaked and then declined long before national prohibition was adopted.³¹⁶ Today, despite the availability of alcohol, only about 10 percent of the population are considered problem drinkers.³¹⁷ Although marijuana can be purchased on virtually any street corner in some cities, only about six percent of the population had done so during a recent one month period, according to NIDA.³¹⁸ Significantly, the figures for cocaine are similarly low, in spite of the drug's reputation for addictiveness.³¹⁹ In addition, about twenty million have tried the drug, but only 25 percent of them have used it in the last month and only about 10 percent are considered addicts.³²⁰ It should be noted that for cocaine, the sample population is drawn from that segment of the population already interested enough in drugs to break the law to obtain them. Thus, an even lower percentage of repeat users could be expected from the overall population under legalization. These numbers explain or justify Stanton Peele's belief that "[c]ocaine use is now described [incorrectly] as presenting the same kind of lurid monomania that pharmacologists once

315. Peele, *supra* note 55, at 209 (citation omitted).

316. D. MUSTO, *THE AMERICAN DISEASE, ORIGINS OF NARCOTIC CONTROL* 41-42 (1987).

317. *SIXTH SPECIAL REPORT ON ALCOHOL*, *supra* note 239 at 3.

318. See NATIONAL INST. ON DRUG ABUSE, *NAT'L HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1988* 23 (1989) [hereinafter *NIDA 1988 HOUSEHOLD SURVEY*].

319. *Id.* at 29.

320. PRESIDENT'S COMM'N, *ORGANIZED CRIME AND COCAINE TRAFFICKING*, *supra* note 201, at 487 (testimony of Dr. Arnold Washton).

claimed only heroin could produce"³²¹

The fatal flaw in the policy of prohibition is that those who need to be protected most from drug use—hard-core users—are those who will not be deterred by laws against drugs. These individuals consider drug use to be one of their highest values in life. They will take great risks, pay high prices, and violate the law to achieve this value. The remainder of the population consists of moderate drug users and non-drug users. These are people who have developed the individual or social resources which allow them to avoid harmful legal drug use.

Even when it comes to *illegal* drugs, it is naive to think that prohibition relieves moderate drug users of having to make responsible choices regarding these substances. Regardless of the expense of long-term use, obtaining the first batch of "crack" or heroin is not expensive and opportunities abound—on the street, in broad daylight, illegal drugs are there. Thus, the level of illegal drug use is strongly influenced by individual choices and values. For example, individual preference—not law enforcement—is the likely explanation for the existence of 20,000,000 marijuana smokers, but a mere 500,000 heroin users.³²² If 20,000,000 people demanded heroin, the black market would meet that demand, just as it met the enormous demand for alcohol in the 1920s. Thus, prohibition is at best a comforting illusion.

The ideal test of the effectiveness of our drug laws is whether they have reduced overall drug use since their enactment. In fact, they have not. On a per capita basis, the use of narcotics was no greater before prohibition than it is today and the use of cocaine is far greater today than it was when cocaine was legally available. In 1915, the year the first national control laws became effective, there were about 200,000 regular narcotics users and only 20,000 regular cocaine users.³²³ Today, there are about 500,000 regular heroin users and nearly three million regular cocaine users.³²⁴ Since the population is more than twice what it was in 1915,³²⁵ it is apparent that the percentage of the population using narcotics has remained about the

321. Peele, *supra* note 55, at 200.

322. See *supra* note 300 and accompanying text.

323. Kolb & Du Mez, *The Prevalence and Trend of Drug Addiction in the United States and the Factors Influencing It*, 39 U.S. PUB. HEALTH REP. 1181 (1924).

324. See NIDA HIGHLIGHTS, *supra* note 300, at 2.

325. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION, NUMBER OF INHABITANTS, UNITED STATES SUMMARY 1-14 (stating that the population of the United States was 106 million in 1920 and 226.5 million in 1980).

same, while cocaine use has increased astronomically percent. Seventy years of intensive law enforcement efforts have failed to measurably reduce drug use.

This should not be surprising. During Prohibition, alcohol consumers merely switched from beer and wine to hard liquors often of dubious quality, resulting in a drastic increase in deaths from alcohol poisoning.³²⁶ Whether alcohol prohibition actually reduced total consumption is disputed,³²⁷ but it is known that the repeal of Prohibition *did not* lead to an explosion in drinking.³²⁸ More recently, in those states which have decriminalized marijuana, no substantial increase in use has occurred.³²⁹ When the Netherlands decriminalized marijuana in 1978, use actually declined.³³⁰

Regardless of time, place or drug, the policy of prohibition tends to work in reverse.

L. *The Failure of Enforcement*

Common sense tells us that illegal drugs will always be readily available. Prison wardens cannot keep drugs out of their own institutions—an important lesson for those who would turn this country into a prison to stop drug use. Even the Soviet Union has admitted to having a serious illegal drug problem.³³¹ In this country, police officers are regularly caught using drugs, selling drugs and even *stealing* drugs.³³² How are these people going to lead a drug war?

Regarding Reagan administration enforcement efforts, the *New*

326. See S. CASHMAN, PROHIBITION—THE LIE OF THE LAND 251-56 (1981).

327. See, e.g., D.E. KYVIG, *supra* note 157, at 24, 12-113.

328. See *id.* at 186. Some commentators have cited the sizable alcohol consumption rates in post-war America as evidence that the repeal of prohibition may have been unwise. Surely some of this increase in consumption was due to the increased purchasing power of Americans in that era, and not solely to the legal availability of alcohol. It is safe to assume that even if prohibition had not been repealed, an increase in disposable income would have led to an increase in alcohol consumption.

329. FINANCIAL TIMES, Nov. 25-26, 1989, §2 (Weekend), at 1, col. 1.

330. Zeese, *No More Drug War*, Nat'l L.J., at 25, 32 (July 7, 1986) (citing NETHERLANDS MINISTRY OF WELFARE, HEALTH AND CULTURAL AFFAIRS, SCIENTIFIC STUDY OF ALCOHOL AND DRUG USE, THE USE OF DRUGS, ALCOHOL AND TOBACCO (1985)).

331. Schmemmann, *Drug Issue Publicized by Soviet*, N.Y. Times, June 11, 1986, at A9, col. 1 (stating that the Soviet press acknowledged a rising drug problem at home).

332. See, e.g., *Police Officer Held on Drug Charges*, N.Y. Times, Jan. 9, 1990, at B2, col. 5; Hays, *Massachusetts Police Chief Quits, Accused of Stealing Cocaine from Evidence Room*, N.Y. Times, Nov. 4, 1989, at 7, col. 1; Blumenthal, *Convicted Officer Issues Warning on Corruption*, N.Y. Times, Sept. 17, 1989, at A54, col. 1; McKinley, *Police Face Drug Testing in New York*, N.Y. Times, Sept. 6, 1989, at B1, col. 5, B3, col. 1; Purdum, *Drugs Seen as an Increasing Threat to Police Integrity*, N.Y. Times, Nov. 12, 1988, at A29, col. 2; Nordheimer, *Police Corruption Plaguing Florida*, N.Y. Times, Aug. 3, 1986, at A19, col. 1.

York Times reported that “[f]our and a half years after Vice President Bush established the South Florida Task Force, the most ambitious and expensive drug enforcement operation in the nation’s history, the Federal officials who run it say they have barely dented the drug trade here.”³³³ On August 10, 1986 a *New York Times* analysis concluded that “20 years of intensive enforcement has done little to reduce drug abuse.”³³⁴ The same article quoted Judge Irving R. Kaufman as stating, “[l]aw enforcement has been tested to the utmost, but let’s face it, it just hasn’t worked.”³³⁵ Law enforcement diehards should take note of the failure of the death penalty—liberally applied—to stop drugs in Malaysia.³³⁶ Despite 18 death sentences and four executions, “authorities reported in late 1981 widespread use of illicit drugs.”³³⁷

A General Accounting Office (GAO) report released at the White House Conference for a Drug Free America in 1988 contains overwhelming evidence of the failure of President Reagan’s war on drugs.³³⁸ Contrary to the claims of some critics, the Reagan war on drugs did not fail for lack of trying. The federal drug control budget increased from \$1.2 billion in 1981 to nearly \$4 billion in 1987.³³⁹ The FBI and the military were brought into drug enforcement.³⁴⁰ Two major pieces of legislation were passed to toughen penalties and give enforcers more powers—the Comprehensive Crime Control Act of 1984³⁴¹ and the Anti-Drug Abuse Act of 1986.³⁴² Arrests rose 58 percent and federal prisons became filled with convicted drug dealers.³⁴³ Drug seizures greatly increased—362 percent in the case of

333. Brinkley, *4-Year Fight in Florida ‘Just Can’t Stop Drugs’*, N.Y. Times, Sept. 4, 1986, at A1, col. 2.

334. Brinkley, *Fighting Narcotics is Everyone’s Issue Now*, N.Y. Times, Aug. 10, 1986, § 4, at 1, col. 2.

335. *Id.*

336. See BUREAU OF INT’L NARCOTICS MATTERS, U.S. DEP’T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 205 (Mar. 1989) (describing Malaysia’s drug laws as among the world’s most severe and noting that Malaysia’s Dangerous Drug Act stipulates the mandatory death sentence for narcotics trafficking).

337. Trebach, *The Lesson of Ayatollah Khomeini*, 13 J. DRUG ISSUES 379, 383-84 (1983).

338. See generally GAO REPORT, *supra* note 225.

339. *Id.* at 28 (noting further that in 1988 the budget was reduced to \$3 million).

340. See *id.* at 29.

341. Pub. L. 98-473, 98 Stat. 1976 (codified in scattered sections of 21 U.S.C.)

342. Pub. L. No. 99-570, 100 Stat. 3207 (codified in scattered sections of 18 and 31 U.S.C.).

343. See GAO REPORT, *supra* note 225, at 30 (noting that “[c]ombined arrests of drug violators by DEA, FBI, and the United States Customs Service (Customs) and the U.S. Coast

cocaine from 1982 to 1986.³⁴⁴

The GAO reported the results:

- Drug abuse in the United States has persisted at a very high level throughout the 1980s.³⁴⁵
- Cocaine*: The amount of cocaine consumed more than doubled. The price declined about 30 percent. The average purity doubled. Cocaine-related deaths rose substantially.³⁴⁶
- Heroin*: The price of heroin declined 20 percent. The average purity rose 33 percent. Heroin-related deaths rose substantially.³⁴⁷
- Marijuana*: While use declined, “[m]arijuana continues to be readily available in most areas of the country, with a trend toward increased potency levels.” Marijuana is now grown in all fifty states and “[t]o avoid detection, marijuana growers are moving their operations indoors and are growing smaller and more scattered plots outdoors.”³⁴⁸

M. *Why Prohibition Fails*

Why did the Reagan war on drugs fail? The reasons for this are best seen by examining the motivations of drug users, sellers and enforcers.

Human beings experience life through their consciousness and emotions. Drugs have a direct, powerful, and predictable effect on these. Drug laws on the other hand have an occasional impact on the drug user and many drug users persist in their use even after being penalized by law. Obviously, for them, the subjective benefits of drugs outweigh the costs of criminal penalties.

Even without criminal penalties, many drug users continue to use drugs in the face of the severe physical penalties drugs impose on their bodies. Again, they simply consider the psychic benefit of drug use to be more important than the harm the drugs do to their bodies. The fact is that drugs motivate some people—those who most need protection from them—more than any set of penalties a civilized society can impose, even more than some less-than-civilized societies have imposed. This is why the undeniable seductiveness of drugs, usually thought of as a justification for prohibition, actually argues

Guard increased from 30,446 in 1982 to 48,061 in 1986 . . .”).

344. *Id.*

345. *See id.* at 3.

346. *Id.* at 7-8.

347. *Id.* at 11-12.

348. *Id.* at 16.

for legalization. If drugs are so seductive, the laws will fail to deter millions of drug users and will greatly increase the social costs of their drug use.

As far as drug sellers are concerned, a similar motivational gap exists. Drug sellers are simply more highly motivated than those who are paid to stop them. This is not a criticism of drug enforcement personnel—it is just a fact. Drug sellers make enormous profits selling drugs—more money than they could make at other illegal activities (otherwise they would already be engaging in those other activities), and much more money than they could make at legal jobs. They are willing to risk death and long prison terms to make this profit. They are professionals, on the job 24 hours a day, and able to pour huge amounts of capital into their enterprises as needed. They are willing to murder competitors, informers and police as needed.

On the other hand, law enforcement officers get paid whether they catch drug dealers or not. They have virtually no economic stake in the success of their efforts, aside from incremental salary increases. While it is true that they also risk their lives in their jobs, drug dealers face a much greater risk of violent death than policemen—perhaps a hundred times greater. Drug dealers have ten times as much money to work with as do drug enforcers. Drug enforcement is a bureaucracy and suffers from all the inefficiencies of bureaucracies,³⁴⁹ while drug dealers are akin to free-market entrepreneurs, unrestrained by arbitrary bureaucratic rules and procedures. They do what needs to be done based on their own judgment. They are not restrained by law as are drug enforcers.

The public has been given the false impression that drug enforcers are highly innovative and continually devising new schemes to catch drug dealers, always one step ahead of the dealers. Actually, the reverse is true. The dealers, like any other successful businessmen, are usually one step ahead of the “competition”:

Private firms [read: drug dealers] are constantly seeking new products and practices to give them a competitive edge. They adapt swiftly to changing market conditions, knowing that the failure to do so might lead to bankruptcy.

The rate of innovation in public operations [DEA] is much slower, and public services [drug enforcement] appear to change very slowly over time. During the time when a private sector good or service may change beyond recognition, the public sector seems

349. See generally M. PIRIE, *DISMANTLING THE STATE: THE THEORY AND PRACTICE OF PRIVATIZATION* 12-13 (1985) (describing in detail these inefficiencies).

to turn out the same products year after year. The low rate of innovation in the state's postal services, for example, contrasts sharply with innovations of private postal services.³⁵⁰

Finally, drug dealers can use their enormous profits to bribe the police. A predictable minority of enforcement agents will always decide that the monetary benefit of a bribe is more important than the moral cost and legal risk of corruption, particularly when it is so clear that their legitimate efforts have been futile. Drugs are available in prisons, not so much because friends and relatives smuggle them in, but more often because the drugs are supplied by corrupt prison guards eager to supplement their income.

It is easy to get lost in piles of numbers, names, dates, and places when evaluating the effect of drug enforcement. It is more important to keep in mind the ultimately decisive facts of human motivation. These facts guarantee that wars on drugs will always fail.

N. *The Policy Alternatives*

If drug prohibition has failed, the next question is what policy alternatives are available. It is best to see reform alternatives as gradations leading from outright criminal prohibition to outright free availability. The options are presented in the following chart:

350. *Id.* at 12-13.

ALTERNATIVES TO PROHIBITION

<u>Status Quo</u> Prohibition	Criminal ban on production, sale and use.
<u>Option A</u> Decriminalization (new British system)	Government-controlled distribution through clinics only for short-term treatment purposes—criminal penalties for unauthorized sale and use.
<u>Option B</u> Decriminalization	Government controlled distribution through clinics for long-term maintenance—criminal penalties for unauthorized sale and use.
<u>Option C</u> Decriminalization (old British system)	Government-controlled distribution; availability by prescription from any physician for treatment or maintenance—criminal penalties for non-prescription sale and use.
<u>Option D</u> Legalization (British and American systems prior to 1914)	Distribution, sale and use regulated on a par with the alcoholic beverage industry; non-prescription use by adults permitted.

Keep in mind that the variations are endless. Nevertheless, these are our basic choices. Options A, B, and C are various types of “decriminalization,” while “legalization” is represented by Option D. Option C represents, more or less, the old British system, while Option A represents the new British system.

In 1989, New York State Senator Joseph Galiber of the Bronx introduced a bill to establish a regulatory authority which would legalize the sale and use of illegal drugs on a par with the sale and use of alcohol.³⁵¹

The arguments previously presented indicate Option D or legalization is the best choice. Legalization (non-prescription availability)

351. S. 1918, 1989-90 N.Y. Reg. Sess. (intro. Sen. Galiber Feb. 6, 1989); see also Galiber, *A Bill to Repeal Criminal Drug Laws: Replacing Prohibition With Regulation*, 18 HOFSTRA L. REV. 854 (1990).

was our policy and England's until 1914, and continues to be our policy on alcohol and tobacco use. The medical danger from these drugs is comparable, to say the least, to that of heroin or cocaine.³⁵² There is no logical basis for distinguishing between these drugs. Supporters of prohibition illustrate this when they attempt to find a distinguishing criterion. Faced with clear evidence of the greater deadliness of tobacco and alcohol, they lamely assert that the difference between the legal and illegal drugs is that the various legislatures have chosen to treat them differently. This is question-begging in its purest form—the very issue in dispute is the rationality of this choice.

In its simplest terms, the choice between decriminalization and legalization is a choice between solving the entire problem (or close to it) or solving part of the problem. Since the drug black market is the cause of most illegal drug-related problems, *the goal of reform is to eliminate the black market*. Legalization does this; decriminalization does not. For example, dispensing drugs in federal clinics staffed by psychiatrists would probably draw some business away from the black market. Those who did not want to be treated by psychiatrists or take their drug in a clinical setting would continue to fuel a violent and destructive black market. How many drinkers would go to a hospital and drink liquor while being harangued by psychiatrists?

Since the goal of reform is elimination of the black market, we should be wary of legalization schemes which propose heavy taxation and regulation of the legalized drug industry. Economist Richard Stevenson, Department of Economics, Liverpool University, warns:

Markets may not be perfect. Mistakes would be made and some firms would break the law, but it does not follow that governments ought to intervene, or could do so usefully. If markets had weaknesses, citizens would respond in a variety of ways to protect their interests. . . . One danger with regulation is that politicians and bureaucrats will so fetter the market as to make it unprofitable for law-abiding firms. Unless regulatory restraint was exercised, the aims of legalization could be frustrated. At best, responsible firms would lack incentive to innovate, at worst, the criminal market could re-emerge. The other risk is that the heavy hand of government intervention may stifle private initiative and prevent citizens from solving their own problems.³⁵³

352. See *Appendix, infra* notes 380-459 and accompanying text.

353. Remarks by Richard Stevenson, Liverpool University Department of Economics, at International Conference on Drug Policy Reform, Washington, D.C. (Nov. 1989) (on file at

O. *The British Systems—Old and New*

Since the goal of reform is to eliminate the black market and its attendant problems, the central test for judging the success or failure of reform is whether this goal has been accomplished. However, those who oppose any form of decriminalization or legalization sometimes proffer different criteria for evaluating the results of reform. The prime example is their ubiquitous claim that "the British system failed." Many who claim that the British system failed are not very clear on exactly how and why it failed. Presumably, what they mean is that during the 1960s, while doctors were allowed to prescribe heroin on a long-term basis, overall heroin use rose substantially.³⁵⁴ However, this argument cannot withstand scrutiny.

In the 1920's, the British elected to follow "the medical model" of drug control (while the United States adopted the "criminal model").³⁵⁵ Private physicians were allowed to prescribe heroin and other controlled drugs to their patients in their discretion. By most accounts, the system worked fairly well for the next forty years: the number of users remained low; they were receiving quality-controlled drugs under medical supervision; and no substantial criminal black market developed.³⁵⁶

However, in the 1960s, the number of heroin users increased substantially, especially among the young.³⁵⁷ These new users received their supply from illegal imports and from "grey market" sellers: users who received large amounts of prescribed heroin from a few cooperative physicians.³⁵⁸

In response to this situation, the system was altered in the late 1960's. The right of individual physicians to prescribe heroin was taken away.³⁵⁹ Drug Treatment Centers (DTCs) were established to

Hofstra Law Review).

354. See Stimson, *The War on Heroin: British Policy and the International Trade in Illicit Drugs* in *A LAND FIT FOR HEROIN?* 35, 39 (N. Dorn & N. South eds. 1987). "In 1968, after what had been seen as a major increase in the extent of heroin addiction, the total number of addicts known . . . was only 2782." *Id.*

355. See Stimson, *supra* note 354, at 36-39 (discussing "the medico-centrism of British Policy").

356. See Fazey, *The British System Has Not Failed* in *DRUG POLICY 1989-1990: A REFORMER'S CATALOGUE* 195, 196 (1989); see also E. BRECHER, *supra* note 28, at 122-23 (discussing the lack of a black market for heroin in Great Britain).

357. See E. BRECHER, *supra* note 28, at 123-24.

358. Fazey, *supra* note 356, at 196. It was called the grey market because the supply came from a legal, rather than illegal, source. *Id.*

359. *Id.* In the new system, only "more senior, hospital based, doctors could prescribe for addicts." *Id.*

treat users. While heroin could still be prescribed at DTC's, the emphasis was on "curing" users, not maintaining them on a long-term basis.³⁶⁰ As a result, the prescription of heroin, while still allowed, slowed to a trickle.³⁶¹

The claim that the British system failed appears to be based on the fact that drug use apparently increased under heroin maintenance in the 1960's.³⁶² However, to argue that the system *caused* this use is to confuse correlation with causation. If the British system "caused" increased drug use in the 1960's, why did it fail to cause increased use in the previous four decades? If the British system caused increased drug use in Britain, what caused the same increase in the United States at the same time? Finally, drug use continued to rise even under the new British system.³⁶³

Neither the American nor British systems—nor any other system known to man—has been able to stop intermittent increases in drug use.

As Arnold Trebach wrote:

The clinics . . . were instructed to stop the spread of heroin addiction in the general population. But no one—not the second Brain committee, not the other experienced drug-abuse doctors, not the criminologists, not the police, and certainly not the visiting American experts—knew then, and no one knows now, how to perform that task.³⁶⁴

Erich Goode concurs:

[T]here is at present no possible solution to the drug problem. There is no program in effect or under discussion that offers any hope whatsoever of a "solution." Asking for the solution to the drug problem is a little like asking for the solution to the accident problem, the problem of crime and violence, the problems created by the economy.³⁶⁵

360. See generally W. CUSKEY, A. KLEIN & W. KRASNER, *DRUG TRIP ABROAD* 141-53 (1972) (describing the treatment-clinics); see also, Fazey, *supra* note 356, at 196 (discussing doctors' and nurses' desire to cure addicts rather than maintain their addiction).

361. However, in response to the drug-related AIDS crisis, there are indications that policy may be shifting back to long-term maintenance. See Fazey, *supra* note 356, at 198.

362. Brecher suggests that the "increase" was a statistical artifact. E. BRECHER *supra* note 28, at 127.

363. The number of heroin addicts estimated in Britain rose from 2,782 in 1968 to 12,489 in 1984. Stimson, *supra* note 355, at 39.

364. A. TREBACH, *supra* note 34, at 220.

365. E. GOODE, *supra* note 206, at 253.

While neither system stopped drug use, the old British system minimized the social harmfulness of drug use. Under the old British system, there was virtually no black market nor organized crime and little drug-related crime or violence.³⁶⁶ The users themselves were better off since they were receiving quality-controlled drugs and medical treatment and were not branded as criminals and social outcasts.

Predictably, when the British moved toward the criminal model of drug control, the effective termination of heroin maintenance forced users to turn to the ever-waiting black market, leading to an "explosion of heroin importation" in the 1980's:³⁶⁷

The evidence . . . suggest[s] that the illicit market in heroin, and the involvement of criminal syndicates, increased in direct relationship to the policy of the clinics of rapidly cutting heroin prescribing.³⁶⁸

Arnold Trebach agrees:

Inspector [H.B.] Spear is convinced that the new crop of younger addicts, having been repelled in various ways by the clinics, is resorting to the street, to the black market, and to crime in order to obtain money to buy drugs. . . . Detective Chief Inspector Colin Coxall estimated in July 1979 that 3,700 heroin addicts were on the streets of London using illegal drugs and that these addicts were spending between 60 and 80 [pounds] per day to satisfy their habit. Most were forced to resort to crime in order to find that much money. He calculated that 147 million [pounds] (approximately \$382 million) worth of illegal heroin was being traded on the streets of London annually.³⁶⁹

Even the British government now acknowledges a "growing incidence of serious crime associated with the illegal supply of controlled drugs" and describes the drug problem as "the most serious

366.

There is practically no illicit traffic in opiates [in Britain], because the legal provision of low-cost drugs . . . has largely eliminated the profit incentives supporting such a traffic. Similarly, . . . serious addict-crime is almost non-existent. The addict in Britain need not become a thief or a prostitute in order to support his habit . . .

Stimson, *supra* note 355, at 37 (quoting E. SCHUR, *CRIMES WITHOUT VICTIMS* 154-55 (1965)).

367. Mersey Regional Alcohol and Drug Dependence Unit, Countess of Chester Hospital, *The Decline of Long-term Prescribing to Opioid Users in the United Kingdom*, 82 *BRIT. J. OF ADDICTION* 457 (1987).

368. Leech, *Leaving it to the Market*, *NEW STATESMAN*, Jan. 4, 1985, at 8-9.

369. A. TREBACH, *supra* note 34, at 212.

peacetime threat to our national well-being."³⁷⁰

Since the drug black market is the source of most illegal drug-related problems, we must eliminate that market to the greatest extent possible. Legalization is the most efficient means of doing this. Decriminalization, such as the old British system, is less efficient in combatting the black market. However, as a first step toward reform, it would represent a vast improvement over current policies.

The new British system, by forcing drug users into the black market, created an American-style drug problem in that country in a few short years. The new British system failed because it adopted the failed American "criminal model" of drug control.

IV. HOPE FOR THE FUTURE

Most of the serious problems the public associates with illegal drug use are in reality caused directly or indirectly by drug prohibition.

Let's assume that we did end the war on drugs. What would that mean? The day after legalization goes into effect, the streets of America will be safer. The drug dealers will be gone. The shootouts between drug dealers will end. Innocent bystanders will not be murdered anymore. Hundreds of thousands of drug "addicts" will no longer be roaming the streets, shoplifting, mugging, breaking into homes in the middle of the night to steal, dealing violently with those who happen to wake up. One year after prohibition is repealed, 825 innocent people who would otherwise have been dead at the hands of drug criminals will be alive and well.³⁷¹

Within days of prohibition repeal, thousands of judges, prosecutors and police will be freed up to catch, try, and imprison violent career criminals, men who commit 50 to 100 serious crimes per year when on the loose, including robbery, rape and murder.³⁷² For the first time in years, our overcrowded prisons will have room for these men. Ultimately, repeal of prohibition will open up 75,000 jail cells.³⁷³ Imagine the impact of locking up 75,000 violent criminals, each of whom would have committed 50 crimes per year.

The day after repeal, organized crime gets a big pay cut—\$80

370. BRITISH INFORMATION SERVICES, *THE PREVENTION AND TREATMENT OF DRUG MISUSE IN BRITAIN 1* (1985) (quoting HOME AFFAIRS COMMITTEE, HOUSE OF COMMONS, REPORT (May 1985)).

371. See *supra* note 197 and accompanying text.

372. See 1988 SOURCEBOOK *supra* note 239, at 620.

373. *Id.*

billion a year.³⁷⁴

How about those slick young drug dealers who are the new role models for the youth of our cities, with their designer clothes and Mercedes convertibles, always wearing a broad smug smile that says, crime pays? They snicker at the honest kids going to school or working for minimum wage. The day after repeal, the honest kids will have the last laugh. The dealers will be out of a job, unemployed.

The day after repeal, honest drug education can begin. For the first time in history, it can be honest. There will be no need to prop up the failed war on drugs.

The year before repeal, 500,000 Americans died from illnesses related to overeating and lack of exercise;³⁷⁵ 390,000 died from smoking;³⁷⁶ and 150,000 died from drinking alcohol.³⁷⁷ About 3,000 died from cocaine, heroin, and marijuana combined, and many of these deaths resulted from the lack of quality control in the black market.³⁷⁸ The day after repeal, cocaine, heroin and marijuana will, by and large, do no harm to those who choose not to consume them.

In contrast, the day before prohibition repeal, all Americans, whether or not they chose to use illegal drugs, were forced to endure the violence, street crime, erosion of civil liberties, corruption and social and economic decay caused by the war on drugs.

This is why, at this point in the cost-benefit argument, utilitarian analysis breaks down and drug legalization unavoidably becomes a moral issue. The war on drugs is immoral as well as impractical. It imposes enormous costs, including the ultimate cost of death, on large numbers of innocent non-drug abusing citizens such as Vernia Brown,³⁷⁹ in the failed attempt to save a relatively small group of hard core drug abusers from themselves. It is immoral and absurd to *force* some people to bear costs so that others might be prevented from *choosing* to do harm to themselves. This crude utilitarian sacrifice—so at odds with traditional American values—has never been justified and can never be justified. That is why we must end the war on drugs and why the war on drugs *will* be ended once the public comes to understand the truth about this destructive

374. See *supra* notes 229-37 and accompanying text.

375. See AMERICAN HEART ASS'N, 1990 HEART AND STROKE FACTS 20 (1989) (citing statistics relating obesity and physical inactivity to coronary heart disease).

376. See *infra* note 429 and accompanying text.

377. See *infra* note 430 and accompanying text.

378. See *supra* note 213-28 and accompanying text.

379. See *supra* notes 155-65 and accompanying text.

policy.

V. CONCLUSION

Drug prohibition is immoral because it violates the individual right of self-ownership. Drug prohibition is also a practical failure. The moral and practical arguments come together since prohibition fails precisely because it violates the right of self-ownership. Prohibition relies on force as opposed to persuasion to achieve its goal. Tens of millions of Americans who have not been rationally persuaded to avoid drug use are using illegal drugs in spite of the law *whenever the force of law is absent*. In a free society, it is in the nature of law enforcement to be absent most of the time.

While prohibition fails to deter millions of individual drug users whose main risk of arrest occurs only when purchases are made, prohibition does absolutely deter legitimate businesses from entering the drug market. Since businesses would have to establish fixed locations for production, distribution and sale, drug enforcement would put them out of business within hours. Thus, prohibition, by violating the rights of legitimate businessmen and women to produce and sell drugs to willing buyers, destroys any possibility of a drug market which would produce drugs designed to reduce the chances of death by overdose and other maladies, and to sell drugs at a low enough price so that consumers would not have to impoverish themselves to buy them.

Prohibition, by mandating that the conditions of drug production, distribution, and sale will be secrecy, violence, and risk, puts the drug industry in the hands of professionals in the art of engaging in clandestine action and systematic violence; avoiding arrest, conviction, and imprisonment and tolerating the same if necessary. Since the risks of engaging in clandestine activities and systematic violence, and facing long prison terms are very high, illegal drug users pay very high prices to compensate drug dealers for the cost of these risks.

Violence between dealers is common because it is their primary mode of resolving disputes since they are denied access to the courts. Further, to be a dealer means that one is more willing to use violence and incur the risk of violence than the average person. Thus, dealers use this "skill" to enhance the profitability of their businesses by murdering their competitors.

In sum, each of the problems caused by prohibition is ultimately traceable to the fact that individuals are prevented from acting on

their own judgment by the initiation of force by the state. It is not that prohibition violates individual rights to liberty and also happens not to work. Rather, prohibition does not work *because* it violates the individual right to liberty.

APPENDIX

THE RELATIVE HARMFULNESS OF TOBACCO, ALCOHOL, HEROIN AND COCAINE

One of the many myths underlying the policy of prohibition is the belief that the drugs we have decided to prohibit are much more dangerous than those which remain legal. Actually, the reverse is true. The two main legal drugs—tobacco and alcohol—are more deadly than heroin or cocaine would be if made legally available, and marijuana has apparently caused no deaths at all.

I. CHRONIC EFFECTS

The main danger from heroin and cocaine is death from acute intoxication (overdose). This issue is discussed in the following section. However, the chronic or long-term effects of these drugs are not as severe as those of their legal counterparts.

There is thus general agreement throughout the medical and psychiatric literature that the overall effects of opium, morphine, and heroin on the addict's mind and body under conditions of low price and ready availability are on the whole amazingly bland.³⁸⁰

James Q. Wilson, an opponent of legalization, concurs; "While it is true that heroin, by itself, does not cause, so far as we know, any organic illness and could, in principle, be taken safely . . . its use, *and especially in the setting in which it is used*, is far from benign."³⁸¹

After an exhaustive survey of the medical and social aspects of cocaine use, Drs. Lester Grinspoon and James Bakalar conclude:

The dangers of cocaine are not of the nature or degree that the law now implies and the public now assumes. There is little evidence that it is likely to become as serious a social problem as alcohol (or firearms) or as serious a health problem as tobacco. . . . The most humane and sensible way to deal with [drugs]. . . is to create a social situation in which they can be used in a controlled fashion

380. E. BRECHER, *supra* note 28, at 27.

381. Wilson, *The Fix* (Book Review), *NEW REPUBLIC*, Oct. 25, 1982, at 25 (emphasis added).

and with moderation.³⁸²

In contrast, the chronic effects of tobacco and alcohol are devastating. Tobacco causes cancer, heart disease and emphysema.³⁸³ Alcohol consumption causes anemia, fatty liver, hepatitis, cirrhosis, pancreatitis, gastritis, ulcer, hypoglycemia, congestive heart failure, ataxia, brain damage, blurred vision, dementia, cranial nerve palsy, circulatory collapse, and hemorrhages.³⁸⁴

II. ACUTE EFFECTS

For the purposes of cost-benefit analysis, the purely medical effects of illegal drug use must be distinguished from the physical harm caused by black market factors. The problem (for supporters of prohibition) is that illegal drug use is shrouded in mystery and ignorance and is cut off from the usual protections of legal drug use. The entire social, chemical and informational context is different.

Under legalization, drug use would gradually return to lower dosages and safer forms of administration, as did alcohol use after repeal of prohibition. The universal tendency of prohibition, in addition to eliminating quality control, is to encourage the use of the most potent drug formulations administered in the most radical ways. From the producer's perspective, the need to smuggle encourages the sale of potent, less bulky drugs. From the consumer's perspective, the radical means of administration, such as injection, give him "more bang for the buck" he pays for an expensive drug. This trend was apparent in the early days of prohibition:

The various laws designed to restrict the use of narcotics by addicts have almost completely done away with opium smoking, and have tended to drive laudanum (alcohol mixed with morphine) and gum opium users, who have failed to be cured, to the use of the alkaloids, because in this form the drug is much less bulky and consequently can be more easily obtained and concealed.³⁸⁵

The main intrinsic danger of both cocaine and heroin is acute intoxication.³⁸⁶ Due to black market factors, however, users do not

382. L. GRINSPOON & J.B. BAKALAR, *supra* note 208, at 232-33.

383. See, e.g., UNITED STATES DEPT. OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION 11-12 (1988).

384. See A.M. HARVEY, R. JOHNS, V. MCKUSICK, A. OWENS & R. ROSS, THE PRINCIPLES AND PRACTICE OF MEDICINE 452 (12th ed. 1980).

385. Kolb & Du Mez, *supra* note 323, at 1190.

386. See generally E. BRECHER, *supra* note 28, at 21-32, 101-14 (discussing heroin and other opiates); Buchanan, *Cocaine Intoxication: A Review of the Presentation and Treatment*

know the exact strength of the drug. Nor do they know the lethal dose. Any deaths resulting from such ignorance must be presumed to be caused by black market factors. To prove otherwise, it would have to be shown that the user would have knowingly taken a lethal dose in spite of warnings on the label to the contrary.

In addition to the general presumption that illegal drug deaths are caused by the black market, there is a great deal of specific evidence that this is the case.

A. Heroin

Brecher reports that many heroin deaths are caused by an allergic reaction to the unpredictable street mixture of the drug.³⁸⁷ Another 30 percent of the deaths are caused by "tetanus, hepatitis, or bacterial endocarditis, all contracted from bad heroin or dirty syringes."³⁸⁸

Many deaths originally attributed to heroin use, have been later found to have been caused by AIDS.³⁸⁹ As noted in the text, drug-related AIDS is almost purely a creation of the drug black market. This is one possible explanation for the sharp rise in so-called heroin deaths in recent years at a time when the level of heroin use was relatively stable.

The medical literature indicates that the main causes of acute heroin death are the use of heroin with alcohol, the presence of quinine and other impurities in the heroin street mixture, and the unpredictable and unknown potency of black market heroin.³⁹⁰ Each of these factors is largely the consequence of the black market context of drug use.

Prohibition contributes to alcohol/heroin deaths in several ways. First, since heroin is illegal, the usual warning labels of over-the-counter drugs are lacking. Second, given a social philosophy of "zero tolerance" for drug use, absolutely no attempt is made to publicly warn heroin users not to mix these two drugs. Brecher rightly de-

of Medical Complication (1988), reprinted in *Born Hooked: Confronting the Impact of Perinatal Substance Abuse, Hearings Before the Select Comm. on Children, Youth and Families, House of Representatives* 101st Cong., 1st Sess. 37-41 (1989).

387. E. BRECHER, *supra* note 28, at 101-14.

388. N. ZINBERG & J. ROBERTSON, *supra* note 224, at 204.

389. A recent study concluded that thousands of deaths previously thought to have been drug-related, were actually caused by AIDS. A LARGER SPECTRUM OF SEVERE HIV-1 RELATED DISEASE IN INTRAVENOUS DRUG USERS IN NEW YORK CITY, 242 *SCI.* 916-17 (1989).

390. See E. BRECHER, *supra* note 28, at 101-14 (discussing the effects of the black market for heroin).

cried this failure in 1972, but 18 years later, there are still no public warnings against mixing heroin and alcohol. One pamphlet put out by New York State, which warns against mixing alcohol with a long list of drugs, fails to mention heroin.³⁹¹ Apparently, heroin users are expected to peruse medical journals to learn a crucial life-saving fact. Finally, Brecher points out that drug users often alternate alcohol with heroin as a result of high heroin prices.³⁹² In contrast, when inexpensive opiates are available, the tendency to use both drugs is reduced, even among former alcoholics.³⁹³

There is no doubt that even after receiving warnings and reliable information, some reckless individuals will continue to mix heroin and alcohol. This is no argument against legalization. Individuals who would destroy themselves even when full information is available are certainly already destroying themselves. Legalization, leading to the free flow of reliable drug information, will save the lives of many other users who simply do not know that mixing alcohol and heroin can be deadly.

The presence of quinine in the blood of heroin "overdose" victims has often been noted.³⁹⁴ Quinine, which has long been used as an adulterant in heroin street bags,³⁹⁵ is known to cause rapid death due to pulmonary edema (fluid in the lungs).³⁹⁶ Brecher urged in 1972 that researchers study whether quinine could be the cause of many heroin-related deaths.³⁹⁷ In 1983, eleven years and thousands of deaths later, a Centers for Disease Control report stated, "The association between quinine and [heroin-related deaths] . . . conflicts with past reports and merits further consideration."³⁹⁸ A 1984 article "suggest[ed] the potential lethality of the quinine injected by decedents in this epidemic . . ."³⁹⁹ In 1985, another report stated, "[T]he relatively high occurrence of. . . quinine in narcotism cases is

391. DIVISION OF SUBSTANCE ABUSE SERVS., STATE OF N.Y., CAUTION: DRUGS & ALCOHOL DON'T MIX! (1984).

392. See E. BRECHER, *supra* note 28, at 8-12.

393. *Id.*

394. See *id.* at 110 (noting that quinine is the standard adulterant of heroin sold in New York City).

395. *Id.*

396. *Id.*

397. *Id.* at 114.

398. CENTERS FOR DISEASE CONTROL, *Heroin-Related Deaths—District of Columbia, 1980-1982*, 32 MORBIDITY AND MORTALITY WEEKLY REP. 321, 323 (1983).

399. Ruttenger & Luke, *Heroin-Related Deaths: New Epidemiologic Insights*, 226 SCI. 14, 19 (1984).

also noteworthy."⁴⁰⁰

From these facts, three important lessons can be drawn. First, it is difficult and time-consuming to gain accurate knowledge about *illegal* drug deaths. Second, there is virtually no political or social pressure to determine the causes of illegal drug deaths or to do anything about them. Finally, even if we had perfect knowledge of the causes of illegal drug deaths *and* the will to do something about them, so long as the drugs in question remain illegal, no legal or social structure will exist within which to act. Quality control over an illegal drug is an oxymoron.

The other major cause of heroin-related deaths is the variable potency of the heroin street mixture. "Heroin-related deaths are associated with the amount of heroin and quinine in street packages."⁴⁰¹ In the black market, the buyer can never be certain what that amount is.

An examination of the patterns of heroin deaths over the years confirms that the bulk of these deaths are the result of unpredictable changes in the heroin street mixture. For example, heroin deaths in New York City were steady and low until the 1950's, when they started to rise much faster than heroin use increased.⁴⁰² This sharp rise in deaths must be attributable to a factor other than heroin consumption. Similarly, the pattern of heroin deaths in the District of Columbia from 1971 through 1982 is so unusual that it could not possibly correlate with the level of heroin use. In the third quarter of 1972, no deaths occurred, but in the second quarter of 1981, 42 deaths were reported.⁴⁰³ Varying and unknown potency of drugs is the most likely explanation for such widely varying mortality rates. There is no evidence that the low price of heroin (or cocaine) under legalization would lead users to keep consuming the drug until death ensues.

Finally, there is a well known antidote to narcotics overdose—naloxone.⁴⁰⁴ Whether there is some way to reduce the risk of overdose by putting naloxone or another narcotic antagonist into the

400. Caplan, Ottinger, Park & Smith, *Drug and Chemical Related Deaths: Incidence in the State of Maryland—1975 to 1980*, 30 J. FORENSIC SCI. 1012, 1018 (1985).

401. Rutenber & Luke, *supra* note 399, at 17.

402. See E. BRECHER, *supra* note 28, at 103 (showing graphically the number of deaths caused by the use of narcotics (mostly heroin) in New York City from 1918-1971).

403. See Centers for Disease Control, *supra* note 398, at 322 (charting the number of heroin deaths in the District of Columbia between 1971-1982 inclusive).

404. See E. BRECHER, *supra* note 28, at 159. Another drug that is an effective antidote is nalorphine. *Id.* at 102.

heroin mixture is a possibility which is likely to be explored by pharmaceutical companies under legalization. While such companies should be immune from suit for any side effects which are fully disclosed on labels, they would, nevertheless, attempt to make their products as safe as possible to avoid the high costs of even spurious lawsuits (and to avoid losing customers). Naturally, such a strategy would work only if the antidote did not block the euphoric effect of the drug, thus forcing the drug user back to the black market.

Many will be outraged at the notion of making drugs safer. They will argue that we should not make drugs safer because more people will use them. Such an argument is nonsensical: we should not eliminate the danger of drug use because people should not use dangerous drugs. A sizable number of human beings are going to use drugs whether we want them to or not. It is inhumane to support a policy which greatly increases the hazards of drug use. Ultimately, the argument for making drugs safer is simple: drugs should be made safer because, as New York Governor Mario Cuomo stated in his landmark speech: "life is better than death."⁴⁰⁵

B. Cocaine

There is abundant evidence in the medical literature that a large number of cocaine-related deaths are traceable to the side effects of drug prohibition:

•"On the street, [cocaine's] purity is highly variable (up to 95 percent) and reflects 'cutting' with various sugars, local anesthetics, caffeine, amphetamines, heroin, phencyclidine, and quinidine. . . . Most of these [77 cocaine] fatalities were due to nonspecific pulmonary edema believed secondary to either an anaphylactic reaction to impurities or rapid absorption of the drug. . . . [e]ither cocaine or one of its contaminants could contribute to [coronary thrombosis]."⁴⁰⁶

•"No cases were encountered where sudden death occurred following the medical administration of cocaine. Hence, cocaine, in this presentation, actually refers to the illicit street drug of variable purity and usually diluted ("cut") with mannitol. The preparation may also contain other additives such as procaine, lidocaine, or amphetamine."⁴⁰⁷

405. Keynote address by Mario Cuomo, Governor of New York State, 1984 Democratic Convention at San Francisco, California (July 16, 1984).

406. Mathias, *Cocaine-Associated Myocardial Ischemia*, 81 AM. J. MED. 675-77 (1986).

407. Mittleman & Welti, *Cocaine and Sudden 'Natural Death'*, 32 J. FORENSIC SCI. 11,

•“The purity of cocaine purchased on the street may vary from 25% to 90%, with unpredictable effects.”⁴⁰⁸

•“[T]he relative purity of street cocaine has increased from about 10% to nearly 35% over the time when these cases [cocaine deaths] were identified.”⁴⁰⁹

Thus, as with heroin, it appears that adulterants and uncertain potencies play a major role in cocaine-related deaths. Also, the occurrence of cocaine epidemics limited in time and place, such as a 1985 epidemic in Utah,⁴¹⁰ tends to confirm the quality control thesis.

Certain beliefs about cocaine militate against the notion that cocaine can ever be made safe even under legal quality controls. These include the interrelated beliefs that some people have a particular sensitivity to cocaine and that even a small amount of cocaine can be deadly. While it is true that cocaine cannot be made safe under legalization, it can be made safer, probably much safer.

It is difficult to gather accurate information about cocaine deaths because cocaine is illegal; evidence is destroyed, witnesses lie and no labeled containers remain. There is a general tendency to understate the amount of cocaine which caused a death because cocaine is broken down quickly by the body and is metabolized even after death.⁴¹¹ Once cocaine use is legalized, this information gap can be substantially closed.

There is speculation that a relatively small number of persons are particularly sensitive to cocaine because they lack the enzymes needed to metabolize the drug.⁴¹² Persons with liver disease may be unknowingly at risk for cocaine overdose.⁴¹³ Under prohibition, no

12 (1987).

408. Cregler & Mark, *Cardiovascular Dangers of Cocaine Abuse*, 57 AM. J. CARDIOLOGY 1185, 1185 (1986).

409. Welti & Fishbain, *Cocaine-Induced Psychosis and Sudden Death in Recreational Cocaine Users*, 30 J. FORENSIC SCI. 873, 879 (1985).

410. Sanders, Ryser, Lamoreaux, & Raleigh *An Epidemic of Cocaine Associated Deaths in Utah*, 30 J. FORENSIC SCI. 478 (1985) (characterizing this particular cocaine epidemic as the establishment and dismantling of a single large cocaine operation)

411. Tazelaar & Karch, Stephens & Billingham, *Cocaine and the Heart*, 18 HUM. PATHOLOGY 195, 196 (1987).

412. Loveys, *Physiologic Effects of Cocaine with Particular Reference to the Cardiovascular System*, 16 HEART & LUNG 175, 176 (Mar. 1987) (stating that individuals with a deficiency of pseudocholinesterase, one of the enzymes that breaks down cocaine, may experience more prolonged or toxic effects from cocaine use); Devenyi, *Cocaine Complications and Pseudocholinesterase*, 110 (No. 2) ANNALS OF INTERNAL MED. 167 (1989) (advocating the study of cocaine patients to determine the effect of enzyme deficiency).

413. See Loveys, *supra* note 412, at 176 (placing the metabolism of cocaine largely within the liver).

structure or incentives exist to determine, in advance of tragic death, just who these people are. Under legalization, common sense and humane values would again prevail. Tests for sensitivity to cocaine would probably be developed and available to those who choose to use the drug.

Finally, as with heroin, antidotes to the lethal effects of cocaine now exist. The most effective of these antitoxins appears to be nitrendipine.⁴¹⁴ When administered to rats concurrently with cocaine, this drug increased the animals' survival time four-fold and also increased the lethal dose of cocaine four-fold (meaning it took four times as much cocaine to kill the rats).⁴¹⁵ The authors of the experiment conclude: "[t]his study illustrates the protective effects of nitrendipine on the cardiotoxicity of cocaine and also indicates that nitrendipine is an anti-dote to the lethal toxicity of cocaine. . . . Nitrendipine also appears to antagonize some of the effects of cocaine on the central nervous system."⁴¹⁶

Approximately three million Americans are using cocaine in spite of our best efforts to stop them.⁴¹⁷ At the same time, a drug exists that could substantially reduce the danger of using cocaine. Just as black market drug sellers "cut" cocaine with adulterants, perhaps legal drug manufacturers could "cut" cocaine with protective agents such as nitrendipine.⁴¹⁸

C. *Alcohol*

As previously discussed, the *chronic* effects of heavy alcohol consumption are devastating.⁴¹⁹ These effects are not cured by legalization and quality controls. However, the *acute* effects of alcohol were directly affected by Prohibition. During alcohol prohibition, about 40 Americans per million died from acute alcohol poisoning.⁴²⁰

414. Trouve & Nahas, *Nitrendipine: An Antidote to Cardiac and Lethal Toxicity of Cocaine*, 183 PROC. SOC'Y EXPERIMENTAL BIOLOGY AND MED. 392, 395 (1986).

415. *Id.* at 392.

416. *Id.* at 395.

417. *See supra* note 324.

418. As with heroin, any antidote which completely blocks the "high" from the drug is pointless as no one would leave the black market to buy such a drug. "There is no clear answer" to whether nitrendipine would block the cocaine high. Interview with Dr. Renaud Trouve, (Apr. 27, 1988), one of the authors of the nitrendipine study, see Trouve & Nahas, *supra* note 414.

419. *See supra* note 384 and accompanying text.

420. T. SZASZ, *supra* note 62, at 200, (citing A. SINCLAIR, *ERA OF EXCESS: A SOCIAL HISTORY OF THE PROHIBITION MOVEMENT* 201 (1964)); *see also* J. MENDELSON & N. MELLO, *ALCOHOL: USE AND ABUSE IN AMERICA* 87 (1985) (stating that in 1927, there were almost

In contrast, the acute alcohol death rate is about 4 per million,⁴²¹ a reduction in deaths at a ratio of 10 to 1. In the Soviet Union, in 1979, there were about 56,000 cases of acute alcohol poisoning, about 200 per million, over 50 times the U.S. rate.⁴²² Although heavy alcohol consumption has traditionally been a problem in the Soviet Union, by and large these deaths are the result of widespread moonshining stimulated by high alcohol prices and low wages in that country.⁴²³

D. Designer Drugs

Deaths from designer drugs are almost exclusively the result of prohibition. Designer drugs are powerful synthetic drugs originally designed to take advantage of chemical loopholes in federal and state criminal drug laws.⁴²⁴ Their other function was to compete with natural opiates and cocaine made expensive by prohibition.⁴²⁵ Designer drugs can be as much as 6,000 times more potent than natural drugs and are usually indistinguishable from them.⁴²⁶ The lethal amount of these drugs is so small that medical examiners often cannot find it.⁴²⁷ Additionally, designer drugs may cause physiological harm with unforeseeable effects. Laws prohibiting the use of particular drugs foster the development of other drugs not yet prohibited, which drugs may be potentially more dangerous than the known and prohibited drugs.

Conclusion: It can be reasonably estimated that at least 80 per-

12,000 deaths from acute alcohol poisoning)

421. Acute alcohol poisonings averaged 380 per year from 1980 to 1983. See 35 MORBIDITY AND MORTALITY WEEKLY REP. 3ss (Aug. 1986).

422. Kirn, *In Time of Change, USSR Seeks to End Tradition of Extensive Alcohol Use by Majority of Citizens*, 258 J. A.M.A. 883, 883 (1987).

423. *Id.* at 884-85.

424. See *supra* note 225.

425. By definition, the dealers of designer drugs do not have to compete with natural opiates and cocaine. They are made from ordinary chemical compounds. See, e.g., Baum, *New Variety of Street Drugs Poses Growing Problem*, 63 CHEM. & ENG'G. NEWS 7, 8 (Sept. 9, 1985). Baum stated the following:

The biggest motivation [of bucket chemists who produce designer drugs] is pure profit. According to . . . a chemist . . . in Washington, D.C., in rough numbers a \$2,000 investment will yield about a kilogram of heroin worth about \$1 million on the street. A similar \$2,000 investment in glassware and chemicals can be turned into a kilogram of 3-methyl fentanyl, currently the most common fentanyl analog being sold, worth about \$1 billion (yes, billion!) on the street.

Id.

426. See Henderson, *supra* note 225, at 572-73.

427. See Baum, *supra* note 425, at 9 (describing the process to develop the radioimmunoassay which can detect low concentrations of designer drugs in blood and urine).

cent of current illegal drug deaths are attributable to the effects of drug prohibition.

III. THE NUMBERS

The following chart presents the estimated per capita death rates for each drug. Although a number of persons have died as a result of marijuana *enforcement*, there are no confirmed deaths traceable to marijuana *use*.⁴²⁸ The figures for cocaine and heroin have been adjusted downward in accordance with the previous analysis to reflect only those deaths due to drug use per se and not to prohibition. The unadjusted death rate for these drugs is in parentheses.

<u>DRUG</u>	<u>USERS</u>	<u>DEATHS PER YEAR</u>	<u>DEATHS PER 100,000</u>
Tobacco	60M	390,000 ⁴²⁹	650
Alcohol	100M	150,000 ⁴³⁰	150
Heroin	500,000	400 ⁴³¹	80 (400)
Cocaine	5M	200 ⁴³²	4 (20)

Thus, for every death caused by the intrinsic effects of cocaine, heroin kills 20, alcohol kills 37 and tobacco kills 132.

These numbers raise the interesting prospect that if tobacco and

428. See Nadelman, *Drug Prohibition in the United States: Costs, Consequences and Alternatives*, 245 *Sci.* 939, 943 (1989).

429. U.S. SURGEON GENERAL, DEP'T OF HEALTH, EDUC. & WELFARE, *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS* (1989).

430. See SECRETARY OF HEALTH AND HUMAN SERVS., *SIXTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCHOL AND HEALTH 11-12*. Estimates vary greatly, depending upon whether all health consequences are considered (for example, cancer, heart problems), or only those traditionally associated with alcoholism (for example, cirrhosis of the liver, psychosis due to brain damage). *Id.* at 9-10.

431. The number of deaths were determined as follows: Drug Abuse Warning Network (DAWN) heroin and cocaine fatalities for 1984, 1985, and 1986 were averaged. See NATIONAL INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUM. SERVS., *ANNUAL DATA 1986, SERIES 1, NO. 6* 63-67. Suicides were subtracted since these represent a problem entirely different from accidental death from recreational drug use. *Id.* Figures were discounted to account for deaths in which both heroin and cocaine played a role. Since the DAWN system covers about one-third of the nation's population, but almost all major urban areas where drug use flourishes, the DAWN totals were doubled to arrive at the following yearly estimates: heroin deaths—2,000; cocaine deaths—1,000. Finally, these figures were discounted by 80 percent in accordance with the analysis of the previous discussion. *Id.*

432. *Id.*

alcohol users switched to narcotics or cocaine under legalization, a substantial reduction in deaths would occur.⁴³³ Furthermore, if the manner of using opium and coca derivatives returned to pre-prohibition practice—drinking low-dose cocaine and drinking or smoking opium or morphine (each weaker than heroin)—the death rate would decline even further below that of alcohol and tobacco.

IV. POPULARITY AND ADDICTIVENESS

To complete the analysis, two additional factors must be considered. First, not only are the two legal drugs more dangerous than the illegal drugs on a *pro rata* basis, but because they are also more popular, their danger is magnified. The greater popularity of alcohol and tobacco, at least in the Western world, as has been demonstrated over the centuries, was manifest in pre-prohibition days and continues today. (The fact that alcohol and tobacco use, unlike the use of some of the more potent illegal drugs, can be easily integrated into a person's daily routine is often offered as a justification for their legality. This very characteristic is what encourages heavy use and causes the problems that result from such use.) If we assume that alcohol and tobacco are only five times more popular than their illegal counterparts, we can conclude that, in practice, the ratio of deaths caused will be tobacco—1,620; alcohol—370; heroin—20 and cocaine—1.

As for addictiveness, a recent study of 160 cocaine users in the Netherlands concluded that only 20 percent of the random sample reached high levels of use (2.5 grams/week), and that 90 percent of high level users were able to return to moderate use or abstinence without seeking treatment.⁴³⁴ Dr. Peter Cohen, who conducted the study, notes that when users use too much, "the mind and body protest," and in most cases, this reaction leads to successful efforts to reduce consumption.⁴³⁵ A recent study of American cocaine users reached similar results.⁴³⁶

"[T]he most detailed longitudinal report [on the natural history of drug involvement that charts changes in the use of a variety of

433. See *supra* notes 293-330 and accompanying text (discussing "The Consequences of Legalization").

434. Speech given by Dr. Peter Cohen, University of Amsterdam, The Netherlands, at the 1989 International Conference on Drug Policy Reform, Washington, D.C. (awaiting publication in the United States and on file at the Hofstra Law Review).

435. *Id.*

436. Murphy, Reinerman, Waldorf, *supra* note 65, at 427.

[legal and illegal] drugs [including cocaine and heroin] by a general population sample in their late twenties,"⁴³⁷ concluded that "[a]lcohol shows by far the most persistence, followed by cigarette smoking."⁴³⁸ Any doubts that nicotine is an addictive drug were put to rest in 1988 by the Surgeon General's report on nicotine addiction.⁴³⁹ "The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine."⁴⁴⁰ The following chart, based on a 1988 survey of young adults by the National Institute on Drug Abuse, reaches a similar conclusion.⁴⁴¹

<u>DRUG</u>	<u>% WHO EVER USED</u>	<u>% WHO USED IN LAST MONTH</u>
Alcohol	90.0	65.0
Tobacco	75.0	35.0
Cocaine	19.7	4.5

Thus, the percentage of repeat users for alcohol is 72 percent, for tobacco—47 percent and for cocaine—23 percent. Data on heroin was not available, but on the basis of one survey which stated that about two and one-half million people have tried heroin,⁴⁴² we can estimate that heroin's recidivism rate is 20 percent. These results confirm Stanton Peele's claim that "*no data of any sort* support the idea that addiction is a characteristic of some mood-altering substances and not of others."⁴⁴³

These studies cannot be explained away by pointing to the illegal status of heroin and cocaine—the surveys consider only those who were willing to violate prohibition to try illegal drugs initially. The better explanation is that tobacco and alcohol are simply very attractive and physically addicting drugs. Referring to tobacco, Brecher writes, "No other substance known to man is used with such remarkable frequency."⁴⁴⁴

437. Raveis & Kandel, *Changes in Drug Behavior from the Middle to the Late Twenties: Initiation, Persistence, and Cessation of Use*, 77 AM. J. PUB. HEALTH 607, 607 (1987).

438. *Id.* at 609.

439. See generally U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING, NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL (1988).

440. See U.S. SURGEON GENERAL, *supra* note 429, at 9.

441. NIDA OVERVIEW, *supra* note 301, at 2-4.

442. See *id.* at 102.

443. Peele, *supra* note 55, at 200 (emphasis in original).

444. E. BRECHER, *supra* note 28, at 223.

V. "CRACK"

In recent years, the cocaine derivative "crack" has become the drug of the moment. In spite of the fact that crack is a more pure and potent form of cocaine, there is little evidence that its use has increased cocaine fatalities. The author was unable to obtain statistical information about crack fatalities in phone calls to the National Institute on Drug Abuse, the 1-800-Cocaine Hotline or the New York State Division of Substance Abuse Services. NIDA does not separately record crack deaths—they are included in overall cocaine figures.

There is no doubt that crack is a potentially dangerous drug which can disturb the chemistry in the human brain. The important point to remember is that the drug laws have completely failed to stop the use of crack. They have only allowed a profitable and violent black market to develop around this drug. It is arguable that crack exists *because* of our drug laws; "[t]he iron law of drug prohibition is that the more intense the law enforcement, the more potent the drugs will become. The latest stage of this cycle has brought us the crack epidemic."⁴⁴⁵

Many fallacies about crack were exploded in a front page article in the New York Times in August 1989 which summarized what is known about crack:⁴⁴⁶

(1) Difficulties in treating crack users "stem far more from the setting and circumstances of the users than the biochemical reaction the drug produces."⁴⁴⁷

(2) Crack addiction can be successfully treated.⁴⁴⁸

(3) "Some studies suggest that crack is no more intrinsically addictive than other drugs addicts have been able to quit."⁴⁴⁹

(4) "[Crack] seems to addict people faster than any other known substance, with the [possible] exception of cigarettes."⁴⁵⁰

(5) Monkeys will press a lever to get an injection of cocaine, amphetamine and *nicotine* until they die. Heroin and alcohol were also demanded but not so intensely.⁴⁵¹

445. Cowan, *How the Narcs Create Crack*, NAT'L REV. Dec. 5, 1986, at 26.

446. Kolata, *Experts Finding New Hope on Treating Crack Addicts: In Shift, Importance of Users' Environment is Stressed Over the Drug's Attributes*, N.Y. Times, Aug. 24, 1989, at A1, col. 1.

447. *Id.* at col. 5.

448. *Id.*

449. *Id.*

450. *Id.* at B7, col. 1.

451. *Id.*

(6) Intravenous cocaine is the rough equivalent of crack in addictive potential.⁴⁵²

(7) NIDA studies indicate that addicts appear to have found crack less addictive than nicotine and more addictive than alcohol.⁴⁵³

(8) 9 of 10 people who tried cigarettes became addicted; 1 of 6 who tried crack became addicted; 1 of 10 became addicted to alcohol.⁴⁵⁴

(9) One study showed that addicts consider heroin more addicting than cocaine.⁴⁵⁵

(10) In another study, addicts listed the most addicting drugs in order of heroin, cigarettes, alcohol, cocaine. These findings are consistent with numerous other studies.⁴⁵⁶

(11) There are drugs which can block the effects of cocaine and drugs which can combat the depression caused by cocaine (desipramine).⁴⁵⁷

A careful review of these findings will bring the truth about crack closer than a review of all the sensationalist stories the media has been running for the last four years.⁴⁵⁸ How then did we arrive at the stage where many people believe that *anyone* who uses crack would kill and prostitute their children? Peele answers:

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.* at col. 2.

458. Consider the following passage:

The desire for [crack] runs wild and takes madness into its service; any opinions or desires with a decent reputation and any feelings of shame still left are killed or thrown out, until all discipline is swept away, and madness usurps its place . . . When [crack] has absolute control of a man's mind . . . life is a round of orgies and sex and so on . . . So that whatever income he has will soon be expended . . . and next of course he'll start borrowing and drawing upon capital . . . When he comes to the end of his father's and mother's resources . . . he'll start by burgling a house or holding someone up at night, or go to clean out a church. Meanwhile, the older beliefs about honor and dishonor, which he was brought upon to accept as right, will be overcome by others, once held in restraint but now freed to become the body-guard of his desire for [crack] . . . Under the tyranny of his desire for [crack] he becomes in his waking life what he was once only occasionally in his dreams, and there's nothing, no taboo, no murder, however terrible, from which he will shrink. His desire tyrannizes over him, a despot without restraint or law.

PLATO, THE REPUBLIC, BOOK NINE (Middlesex ed. 1955) (deleting some archaic terms from the passage). This sad story sounds so familiar and could easily have been lifted from the latest magazine article on crack. However, the passage has been edited to substitute "desire for crack" for the author's term "master passion." The author was Plato, writing more than two thousand years before the invention of crack.

These claims are preposterous, the scientists and clinicians who encourage them are misrepresenting the facts, and we have reached a strange impasse in our civilization when we rely for information and moral guidance about habits on the most debilitated segments of our population-groups who attribute to addiction and drugs what are actually their personal problems.⁴⁵⁹

VI. CONCLUSION

The prohibition of cocaine and heroin is not justified by their greater deadlines or addictiveness than alcohol and tobacco. In fact, these legal drugs considered together are more deadly and addicting than heroin and cocaine.

459. Peele, *Control Yourself*, REASON, February 1990, at 23-25.