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AN ARGUMENT IN FAVOR OF DECRIMINALIZATION

Kurt L. Schmoke*

[The addict] is denied the medical care he urgently needs; open, above-board sources . . . are closed to him, and he is driven to the underworld where he can get his drug, but of course, surreptitiously and in violation of the law . . . .¹

I. INTRODUCTION

The foregoing observation, made seventy-four years ago on the heels of the passage of the Harrison Narcotic Act,² identifies two inescapable facts which have persistently hampered the federal government's attempts to stamp out narcotics use through prohibition. First, drug³ addiction⁴ is a disease⁵ and addicts need medical care.⁶ Second, in the absence of access to legitimate sources of drugs, addicts will look to the criminal underworld for the drugs they cannot

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¹ E. BRECHER & THE EDITORS OF CONSUMER REPORTS, LICIT & ILLICIT DRUGS 50 (1972) (hereinafter E. BRECHER] (quoting Editorial Comment, 21 (O.S.), 10 (n.s.) AM. MED. 799-800 (Nov. 1915)).

² Harrison Narcotic Act, ch. 1, 38 Stat. 785 (1914); see E. BRECHER, supra note 1, at 50; infra notes 33-36 and accompanying text (discussing the Harrison Narcotic Act). The Harrison Narcotic Act, the first significant piece of federal anti-drug legislation, regulated, under the taxing power of Congress, the manufacture, importation, sale and possession of opium, coca products, and their derivatives. See generally PRESIDENT'S COMM'N ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 188-97 (1986) [hereinafter AMERICA'S HABIT] (discussing the early history of drug legislation in the United States).


The term "drug" means (A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or offi-
otherwise obtain.\textsuperscript{7}

\begin{quote}
cial National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clauses (A), (B), or (C) of this paragraph; but does not include devices or their components, parts, or accessories.
\end{quote}

\textit{Id.} The Controlled Substances Act of 1970, § 101, 21 U.S.C. § 802(17) (Supp. 1989); defines "narcotic drug" as follows:

The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

(B) Poppy straw and concentrate of poppy straw.

(C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, egegonine, and derivatives of egegonine or their salts have been removed.

(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.

(E) Egegonine, its derivatives, their salts, isomers, and salts of isomers.

(F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

\textit{Id.}; see also infra note 8 (discussing the scheme of federal drug prohibition legislation).

4. The Controlled Substances Act, 21 U.S.C. § 802(1) (1988), defines "addict" as follows:

The term "addict" means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.

\textit{Id.}

5. See Robinson v. California, 370 U.S. 660, 667 (1962); see also Linder v. United States, 268 U.S. 5, 18 (1925) (stating that narcotics addicts "are diseased and proper subjects for [medical] treatment."); AMERICAN MEDICAL ASS'N, REPORT NNN OF THE BOARD OF TRUSTEES, DRUG ABUSE IN THE UNITED STATES: A POLICY REPORT 241 (1988) [hereinafter REPORT NNN]. In Robinson, the Court struck down as violative of the eighth and fourteenth amendments, a California statute which made narcotics addiction a crime. The Court stated that "in the light of contemporary human knowledge, a law which made a criminal offense of a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment . . . ." Robinson, 370 U.S. at 666.

6. See, e.g., Linder, 268 U.S. at 18; REPORT NNN, supra note 5, at 241.

7. See AMERICA'S HABIT, supra note 2, at 203 (noting that "the Federal government's early success in decreasing the supply of narcotic drugs from licit sources . . . to drug users forced those users to seek out illicit sources of supply."); see also NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, RESEARCH ISSUES 17, DRUGS AND CRIME: THE RELATIONSHIP OF DRUG USE AND CONCOMITANT CRIMINAL BEHAVIOR 13 (1976) [hereinafter DRUGS AND CRIME] (noting that drug-prohibition laws "create subsequent socioeconomic patterns, such as an illegal drug market and a complex pattern of illegal activity to sustain it" and that such laws are "feasible only in a tightly regulated society or an isolated community."); \textit{cf.} Wisotsky, \textit{Exposing the War on Cocaine: The Futility and Destructiveness}
In spite of these two facts, under a policy of prohibition, the United States has attempted to eradicate drug use by imposing criminal sanctions on drug-users and dealers. In furtherance of this policy, the United States has made a herculean effort—spending nearly seventy-five years and untold billions of dollars—to circumvent the of Prohibition, 1983 Wis. L. Rev. 1305, 1321 (stating that “prohibition does not completely destroy demand . . . ”).

8. At the federal level, drug prohibition has been effectuated in the form of various revenue measures which inflict penalties and incarceration on violators. For example, with respect to opium and cocaine, the Harrison Narcotic Act provided for registration of, and payment of a special tax by, any person in the business of dealing in opium, coca leaves, or their derivatives. See Harrison Narcotic Act, ch. 1, § 1, 38 Stat. 785, 785 (1914); AMERICA’S HABIT, supra note 2, at 196.

Possession of any of the covered drugs was proscribed by § 8 of the Harrison Narcotic Act, which declared that “[i]t shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs . . . .” Harrison Narcotic Act, ch. 1, § 1, 38 Stat. 785, 785 (1914). Despite the Acts “revenue-raising veneer, however, its regulatory purpose was acknowledged from the beginning.” AMERICA’S HABIT, supra note 2, at 197.

With respect to marijuana, Congress enacted the Marihuana Tax Act, ch. 553, 50 Stat. 551 (1937), which “was nominally a revenue measure patterned after the Harrison Narcotic Act.” AMERICA’S HABIT, supra note 2, at 207. “It required . . . any person whose business related to marijuana to register and pay a special tax.” Id. While nominally a revenue measure, the Supreme Court noted that the Act also had a regulatory purpose:

In enacting the Marihuana Tax Act, the Congress had two objectives. “First, the development of a plan of taxation which will raise revenue and at the same time render extremely difficult the acquisition of marihuana by persons who desire it for illicit uses and, second, the development of an adequate means of publicizing dealings in marihuana in order to tax and control the traffic effectively.”


In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended in scattered sections of 18, 19, 21, 26, 31, 40, 42, 46, 49 U.S.C.), in order “to consolidate the myriad of [federal] laws dealing with drug trafficking and abuse that had been adopted over the years.” Id.; see AMERICA’S HABIT, supra note 2, at 228. Title II of this Act, 21 U.S.C. § 841(a) (1988), makes it “unlawful for any person knowingly or intentionally—(I) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance . . . .” Id. Courts generally have found this section applicable to addicts who possess controlled substances for their own use. See, e.g., United States v. Moore, 486 F.2d 1139, 1157 (D.C. Cir. 1973) (finding that “the conclusion [is] inescapable that Congress rejected the notion of excusing addicts from guilt for possession . . . .”), cert. denied, 414 U.S. 980 (1973).

The Act defines “controlled substance” as: “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco . . . .” 21 U.S.C. § 802(6) (1988) (emphasis added). See generally id. § 812 (listing controlled substance Schedules I & IV).

9. See Benoit, Drugs: The Case for Legalization, FIN. WORLD, Oct. 3, 1989, at 33 (noting that “[t]he federal government has increased anti-drug spending sixfold over the past decade, to $7.9 billion”); Weintraub, President Offers Strategy for U.S. on Drug Control, N.Y. Times, Sept. 6, 1989, at A1, col. 6 (noting that President Bush’s proposed drug control strat-
reality that drug addiction is a public health problem, not a law enforcement problem.\textsuperscript{10}

The results of prohibition have been predictable.\textsuperscript{11} The criminalization of narcotics, cocaine and marijuana, has not solved the problem of their use.\textsuperscript{12} Millions of Americans regularly use illegal drugs\textsuperscript{13} for reasons which vary as do the races,\textsuperscript{14} income levels\textsuperscript{15} and degrees of dependence\textsuperscript{16} of the individual users. Further, prohibition has not

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egg called for a $7.9 billion program); see also Hamowy, Introduction: Illicit Drugs and Government, in Dealing With Drugs: Consequences of Governmental Control I (R. Hamowy ed. 1987) \cite{DEALING WITH DRUGS} (stating that “[i]n terms of expenditures, the federal government’s attempt to enforce the laws against illicit drugs constitutes the most expensive intrusion into the private lives of Americans ever undertaken . . . . [T]he expenses incurred by the various federal agencies in their seemingly endless war against illicit drugs are massive.”).

10. The idea that drug abuse is a public health problem and not a law enforcement problem is not new. In 1936, August Vollmer, who in the course of his career served as a police chief, professor of police administration and President of the International Association of Chiefs of Police, wrote the following:

Drug addiction, like prostitution and like liquor, is not a police problem; it never has been and never can be solved by policemen. It is first and last a medical problem, and if there is a solution it will be discovered not by policemen, but by scientific and competently trained medical experts whose sole objective will be the reduction and possible eradication of this devastating appetite.


11. As we learned from alcohol prohibition, demand for mood-altering substances, such as alcohol or other types of drugs, show no sign of significant decline when prohibited, see Nadelmann, The Case for Legalization, Pub. Interest, Summer 1988, at 13. Moreover, “there are substantial reasons to doubt that tougher laws and policing . . . [play] an important role in reducing consumption.” \textit{Id.} “As was the case during Prohibition, the principal beneficiaries of current drug policies are the new and old organized-crime gangs.” \textit{Id.}

12. For example, despite prohibition efforts, the government recently estimated that the number of users of cocaine increased from 1.2 million in 1976 to 5-6 million in 1984. \textit{See America’s Habit, supra note 2, at 18; see also Hamowy, supra note 9, at 2} (noting that “despite [the] staggering costs of prohibition, the availability and use of the major illicit drugs do not appear to have decreased.”).


14. For example, while a 1983 survey of callers to a cocaine hotline indicated that the average caller was white, a 1985 survey of callers showed an increasing number of minority callers. \textit{America’s Habit, supra note 2, at 23.}

15. As one report noted, “[s]urveys of cocaine users demonstrated there is no ‘typical’ cocaine user,” \textit{Id.} at 23. Furthermore, cocaine use “has spread geographically and to different socio-economic groups.” \textit{Id.}

16. The United States’ National Drug Control Strategy (commonly known as the “Bennet Plan”), makes the following observation:
effectively limited the availability of drugs. Rather, by eliminating access to legitimate sources for drugs, prohibition has virtually ensured the continued profitability of the illicit drug trade and an ample supply of illicit drugs for the addicts. What prohibition has accomplished has been to ignore the addicts' need for medical treatment while making the illicit drug trade a multi-billion dollar business. This situation, in turn, has lead to a vast increase in drug-related crime and spawned an evil worse than addiction: the dis-

Drug use takes a number of distinct forms. There are those who take a given drug just a few times—or only once—and, for whatever reason, never take it again. Others take drugs occasionally, but can and do stop, either voluntarily or under some compulsion. There may be a small number of people who use drugs regularly—even frequently—but whose lives nevertheless go on for the most part unimpeached. But there remain a large number of Americans whose involvement with drugs develops into a full-fledged addiction.

BENNET PLAN, supra note 13, at 10.

17. See Hamowy, supra note 9, at 4 (noting that "based on the lowest NNICC estimates, the amount of illicit cocaine entering the United States . . . increased by 274 percent between 1978 and 1984").

18. See Wisotsky, supra note 7, at 1307 (stating that "in a world of imperfect controls, law enforcement pressure inevitably creates lucrative entrepreneurial opportunities in the black market; trafficking in cocaine is extraordinarily profitable precisely because it is illegal."); see also E. BRECHER, supra note 1, at 522 (noting that "[w]hat prohibition does accomplish is to raise prices and thus to attract more entrepreneurs to the black market.").

19. See BENNET PLAN, supra note 13, at 2 (stating that "drugs are available to almost anyone who wants them.").

20. See id. at 39 (noting that under current federal funding levels, "many [drug treatment] programs simply do not have the space or the funds to meet the local demand for drug treatment," and that in 1987, "about 834,000 individuals received some form of drug treatment—roughly 40 percent of this 'best chance' population.").

21. Estimates of the yearly value generated by illicit drugs vary from $27 billion to $110 billion. See AMERICA'S HABIT, supra note 2, at 5; see also Benoit, supra note 9, at 33 (stating that "[p]rofits from the sale of illegal drugs are now up to an estimated, untaxed $50 billion . . .").

22. See Wisotsky, supra note 7, at 1308 (stating that "the black market promotes and finances murder, theft, organized crime, tax evasion, corruption of public officials, international arms trafficking, subversion, terrorism and other socially damaging phenomena.").

In asking the criminal justice system to put an end to drug use and addiction, the United States has diverted the system's limited resources and still failed to conquer the problem. The only drug related changes since passage of the Harrison Narcotic Act are that there are now more kinds of drugs and more potent drugs. See Nadelmann, supra note 11, at 7-8 (noting that "a particularly potent form of heroin known as 'black tar' has become increasingly prevalent [and] a powerful synthetic opiate, Dilaudid, is beginning to compete with heroin as the preferred opiate"); Synthetic Heroin Seen as Cause in 18 Deaths, N.Y. Times, Dec. 25, 1988, at A43, col. 4 (reporting that "China White, a powerful synthetic heroin that plagued California in the early 1980's [had] surfaced in western Pennsylvania, killing 18 people . . .").

Prohibition has also created more addicts, see Brecher, Drug Laws and Drug Law Enforcement, in PERSPECTIVE ON DRUG USE IN THE UNITED STATES (B. Segal ed. 1986) (noting that heroin addiction has doubled since 1914); and more crime. See Nadelmann, supra note 11, at 3 (noting that "[i]n Washington, D.C., drug-related killings, largely of one drug dealer by
This Article discusses the reasons why a policy of prohibition has not only failed to solve the drug abuse problem, but has made the problem worse. In response to such failings, this Article recommends, as an alternative to a drug-policy based on law enforcement, a measured and carefully implemented program of drug decriminalization based on the public health system. An alternate name for another, are held responsible for a doubling in the homicide rate . . . .

23. Due to escalating drug-related crime, more than a dozen major cities in the United States now have so called "war zones," which are: places where drug dealers shoot it out to command street corners, where children grow up under reign of 'narcoterror' and civil authority has basically broken down . . . where the level of concentrated violence has risen so high that city services barely function, not simply because workers and administrators blatantly redline the areas as in the past or for lack of resources, but also out of well-grounded fear for their lives. Moore, Dead Zones, U.S. NEWS & WORLD REP., Apr. 10, 1989, at 22. As a result, "unmaintained public housing is literally crumbling [in the war zone areas], and garbage piles up obscenely in vacant lots . . . . Ambulances, firefighters and utility workers often request police escorts, if they go in at all." Id.

24. See Nadelmann, supra note 11, at 6 (stating that "many of the drug-related evils that Americans identify as part and parcel of the 'drug-problem' are in fact caused by our drug-prohibition policies."); infra text accompanying notes 63-98; see also Barnett, Curing the Drug-Law Addiction, in DEALING WITH DRUGS, supra note 9, at 75 (stating that "[t]he harmful side-effects of drug laws have been noted-by a number of commentators . . . .").

25. It is important to note that this Article proposes a system for "decriminalization" of drugs—not "legalization". Decriminalization "is generally taken to mean reducing or eliminating criminal penalties for the use and perhaps sale of drugs, while retaining some form of legal disapproval." Church, Thinking the Unthinkable, TIME, May 30, 1988, at 15. For purposes of this Article, decriminalization, or medicalization, refers to a system of partial prohibition based on: (1) a particular drug's relative potential for harm; (2) gradual de-emphasis of the criminal justice systems role; and (3) an expanded role for the public health system in drug abuse treatment and prevention. See infra text accompanying notes 133-39; cf. J. Gettman, Remarks at the Drug Policy Workshop held in Baltimore, Maryland 18 (Aug. 4, 1988) (on file at Hofstra Law Review).

Advocates of drug decriminalization do not base their position on a belief that people have an inherent right to use drugs, as do libertarians who propose legalization. Advocates simply view decriminalization as preferable to present policies. This view reflects the notion that decriminalization is a means to a much desired end: controlling the problem of drug abuse through the public health system, not the criminal justice system. This pragmatic approach was displayed recently by the participants in a conference creating the International Anti-Prohibition League on Drugs, which resulted from "the growing perception among narcotics experts that the traditional strategy of trying to stem the drug trade had failed." Riding, Europe Panel Favors Lifting Ban on Drugs, N.Y. TIMES, Apr. 2, 1989, at A6, col. 1; see also Nadelmann, supra note 11, at 4 (stating that "when one seriously compares the advantages and disadvantages of the legalization strategy with those of current and planned policies, abundant evidence suggests that legalization may well be the optimal strategy for tackling the drug problem."); S. Jonas, Remarks at the Drug Policy Workshop held in Baltimore, Maryland 9 (Aug. 4, 1988) (on file at Hofstra Law Review).

26. See infra pp. 48-53 (categorizing this Author's recommendations for a system of
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this policy is "medicalization."

II. THE FAILURE OF PROHIBITION

A. Historical Perspective

To understand why the criminal justice system has not only failed to solve the problem of drug abuse but has made it worse, requires an understanding of the inherent contradiction underlying our current drug-policy, and how drugs came to be illegal in the first place.

In the 19th century, opium based drugs as well as cocaine and marijuana were easily accessible and widely prescribed by physicians in the United States. The first significant attempt by a municipality to ban drug use came in 1875, when the City of San Francisco passed an ordinance closing Chinese opium smoking dens. The ordinance, however, was not passed out of any concern for addiction, but out of a concern that the Chinese opium dens were being frequented by white women and men of "good family." Thus, one of the first attempts to prohibit drug use stemmed from 19th century America's obsession with race.

Legalizing drugs does not mean condoning their abuse. Rather, it means recognizing drug abuse as a serious medical problem, and treating it as such. It means addressing the economic and social ills that make so many of our citizens vulnerable to drugs. And it means fighting with different weapons, not conceding defeat. To legalize drugs would mean taking billions from valiant but wasted interdiction and law enforcement efforts and spending it instead on education and rehabilitation.

Benoit, supra note 9, at 34.

27. See infra notes 44-47 and accompanying text.

28. See Hamowy, supra note 9, at 9 (stating that "there were no effective legal impediments to purchasing either cocaine or opiates throughout the country before the twentieth century. These drugs were sold over the counter by pharmacies and were also available from general stores, groceries, and through mail-order houses.").

29. See E. Brecher, supra note 1, at 3, 8.

30. See America's Habit, supra note 2, at 188.

31. One commentator noted that the San Francisco ordinance and [the movement to limit access to opium and its derivatives appears to have been precipitated not by a concern for the addictive properties of the drug, which physicians were aware of, but by anti-Chinese sentiment . . . . The intent of physicians, legislators, and other social reformers who lobbied for these laws was to protect whites from what was commonly regarded as a loathsome Oriental vice.

Hamowy, supra note 9, at 12.

32. See id. at 12 (arguing that the impetus of legislation prohibiting opium dens had a racist origin). In addition, in the mid-1910s, blacks "became another potent racial image in the drug debate." H. Morgan, Drugs in America: A Social History 1800-1980, at 93
Similarly, the Harrison Narcotic Act, the first federal anti-drug law, was not passed primarily as an effort to fight addiction or drug trafficking, but in compliance with the United State's treaty obligations under the Hague Convention, under which each of the signatories agreed to regulate opium traffic within their own borders. The Act required that anyone who manufactured, sold or prescribed narcotics be licensed and pay a special tax, and imposed standards for the distribution of narcotics. The Act was, therefore, on its face no more than an economic regulation, and was never intended to prohibit the use or sale of narcotics and cocaine.

(1981). Indeed, throughout history a great deal of drug legislation has been tainted with racial bias:

The Near Easterner had symbolized apprehensions about the adverse personal and social effects of cannabis use. Stereotypes of the Chinese had summarized fears about the social dangers of opium smoking. In decades to come the Mexican and marihuana, and the black or Puerto Rican and heroin would figure in the debate. This imagery revealed apprehensions about these ethnic groups and a desire to control their behavior or isolate them.

Id. at 93-94.

33. Harrison Narcotic Act, ch. 1, 38 stat. 785 (1914).

34. International Opium Convention, Jan. 23, 1912, 38 Stat. 1912, T.S. No. 612; see America's Habit, supra note 2, at 195 (stating that "[i]n response to [its] international obligations [under the Hague Opium Convention], the United States passed the Harrison Act . . . ").

35. Article I of the International Opium Convention requires that "[t]he Contracting Powers shall enact efficacious laws or regulations for the control of the production and distribution of raw opium unless existing laws or regulations have already regulated the matter." International Opium Convention, Jan. 23, 1912, art. 1, 38 Stat. 1912, 1930.

36. The Harrison Narcotic Act was enacted to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes. Harrison Narcotic Act, ch. 1, 38 Stat. 785 (1914). The constitutionality of the Act was upheld in United States v. Doremus, 249 U.S. 86 (1919).

37. In Linder v. United States, the Court noted that "[t]he declared object of the [Harrison] Narcotic [Act] is to provide revenue, and this court has held that whatever additional moral end it may have in view must be reached only through a revenue measure and within the limits of a revenue measure." 268 U.S. 5, 17 (1925) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916)). In Linder the Court went on to state the following: Obviously, direct control of medical practice in the States is beyond the power of the Federal Government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure. The [Harrison Narcotic Act] levies a tax . . . and may regulate medical practice in the States only so far as reasonably appropriate for or merely incidental to its enforcement. It says nothing of "addicts" and does not undertake to prescribe methods for their medical treatment.

Id. at 18.

38. See E. Brecher, supra note 1, at 49 (stating that "[f]ar from appearing to be a
The Harrison Narcotic Act specifically allowed doctors to prescribe and dispense narcotics “in the course of [their] professional practice.” Since the medical establishment took the position, and still does, that addiction is a disease, this would have allowed the prescription of narcotics to treat addiction. The Treasury Department, however, saw it differently. The Supreme Court settled the matter in Webb v. United States and held that it was illegal for a doctor to prescribe narcotics for the sole purpose of keeping addicts comfortable. This decision was astounding since it went against prohibition law, the Harrison Narcotic Act on its face was merely a law for the orderly marketing of opium, morphine, heroin, and other drugs.

39. Section 2 of the Harrison Narcotic Act provides, in pertinent part: “[n]othing contained in this section shall apply . . . (a) [t]o the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only . . . .” Harrison Narcotic Act, ch. 1, § 2, 38 Stat. 785, 786 (1914) (emphasis added).

40. The concept of addiction as a disease gained some acceptance by the medical profession as early as 1877:

The search for the causes of addiction, whether rooted in heredity, personality, or environment, inevitably created a body of thought oriented toward seeing drug use and addiction as a disease. By 1877 the New York Times reflected some medical opinion in holding that “[i]t is not a vice which afflicts [addicts], but a disease, which presents as marked and as specific a symptomatology as do many of the better known diseases, and requiring, as they do, proper medical aid and symptomatic treatment to effect a cure . . . .” By the 1920s, drug treatment had moved through all the phases that marked both medical and social change . . . . But the disease concept now widened to include the mind as well as body. Treatment must draw on ideas from psychology and psychiatry, sociology, public health, as well as medicine and pharmacology. “Cure” for the drug addict would become as endless as living itself.

H. Morgan, supra note 32, at 67, 87 (citing N.Y. Times, Dec. 30, 1877) (emphasis added); see also Report NNN, supra note 5, at 241 (American Medical Association noting that “dependency is the product of complex hereditary and environmental factors . . . [and] is properly viewed as a disease, and one that physicians can help many individuals control and overcome.”); Jaffe, The Swinging Pendulum: The Treatment of Drug Users in America, in Handbook on Drug Abuse 3, 4 (1979) (stating that by the 1920s “it was clear that a substantial number of clinicians viewed opiate dependence as a clinical syndrome, rather than as the manifestation of a moral deficit.”).

41. After passage of the Harrison Narcotic Act, this clause was interpreted by law-enforcement officers to mean that a doctor could not prescribe opiates to an addict to maintain his addiction. Since addiction was not a disease, the argument went, an addict was not a patient, and opiates dispensed to or prescribed for him by a physician were therefore not being supplied “in the course of his professional practice.”

E. Brecher, supra note 1, at 49 (quoting the Harrison Narcotic Act).

42. 249 U.S. 96 (1919).

43. Id. at 99-100. While the Court subsequently sought to narrow Webb in Linder v. United States, 268 U.S. 5 (1925), the earlier enforcement efforts under Webb “had a damaging, long-term impact.” America's Habit, supra note 2, at 203. Consequently, “[b]ecause of
commonly accepted medical norms and the apparent intent of Congress. As a result of Webb, "it was absolutely forbidden under pain of criminal prosecution for a doctor to provide any narcotic to an addict except for a brief period to aid detoxification," and methadone maintenance; long term management of addiction by physicians, was illegal until 1974. Hence, addicts lost access to the legal market for narcotics, and were left with only the black market as a source for their drug purchases.

Since 1914, the United States has spent billions of dollars trying to rid itself of this black market through a policy of prohibition—the same policy which caused the emergence of the market in the first place. Under a policy based on such an inherent contradiction, it is no wonder attempts to eradicate drug use through law enforcement have failed.

B. Nature of Addiction

Our current drug policy is self-defeating and destined to fail for precisely the reasons suggested by American Medicine in 1915. Addiction is a disease. The American Medical Association ("AMA") stated: "it is clear that addiction is not simply the product of a failure of individual willpower . . . it is properly viewed as a

the mere threat of prosecution under the [Harrison Narcotic Act], the 'interest of physicians in these cases [of narcotic addiction] declined and 'they even began to refuse to prescribe.'" Id. (quoting C. TERRY & M. PELLENS, THE OPIUM PROBLEM 91 (1928)).

44. See supra note 40 and accompanying text.
45. See E. BRECHER, supra note 1, at 49-50 (noting that "a law apparently intended to ensure the orderly marketing of narcotics was converted into a law prohibiting the supplying of narcotics to addicts, even on a physician's prescription." (emphasis in original)); see also supra notes 33-38 and accompanying text (discussing congress' original motivation in enacting the Harrison Narcotic Act).
46. Trebach, The Need for Reform of International Narcotics Laws, in DEALING WITH DRUGS, supra note 9, at 128.
47. Methadone is "[a] synthetic opiate of approximately the same strength as morphine." BLACK'S LAW DICTIONARY 894 (5th ed. 1979). See generally E. BRECHER, supra note 1, at 135-82 (discussing the use of methadone in drug treatment).
48. See Trebach, supra note 46, at 128 (stating that "[s]ince 1974, it has been legal, although haltingly so, for doctors to prescribe oral methadone to narcotic addicts for long-term maintenance.").
49. See supra notes 1, 7, 18, and accompanying text (discussing the development of and reliance on the black market).
50. See supra note 9 and accompanying text (discussing expenditures for drug prohibition).
51. See supra note 1 and accompanying text.
52. See REPORT NNN, supra note 5. (discussing the historical trend leading to the present day conclusion that drug and alcohol addiction is a disease).
disease, and one that physicians can help many individuals control and overcome.” Moreover, many addictions are, for most users, lifetime afflictions that are impervious to the criminal justice system’s threat of punishment.

C. Development of a “Black Market”

As predicted in *American Medicine,* since our current drug policy has closed legitimate sources of drugs to addicts, they have turned to the black market for their supply. Similar to the lessons learned during alcohol prohibition, when the government bans a substance that millions of people are determined to use—either out of foolishness, addiction or both—violent criminal syndicates will conspire to manufacture and sell that substance for the enormous black market profits to be attained. The legal prohibition of narcotics, cocaine and marijuana demonstrably increased the price of those drugs in the black market. This increase in price produces the kind of profits that attract major criminal enterprises willing to take any risk to keep their product coming to the American market. As a result, the United States in the last ten years has become absolutely

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53. REPORT NNN, supra note 5, at 241.
54. For example, with respect to heroin, the Consumers Union noted that “heroin is a drug most users go right on using despite the threat of imprisonment, despite actual imprisonment for years, despite repeated ‘cures’ and long-term residence in rehabilitation centers, and despite the risks of disease and even death.” E. BRECHER, supra note 1, at 528.
55. See supra note 1 and accompanying text.
56. See supra notes 1, 7, 18 and accompanying text.
57. In the case of alcohol prohibition, one commentator has noted that “[w]hile millions of Americans either gave up drinking or drank less under prohibition, millions of others, to be sure, continued their imbibing. Eventually, . . . the continuing demand for drink could be provided for only by the illegal manufacture and sale of alcoholic beverages.” L. ENGELMANN, INTEMPERANCE, THE LOST WAR AGAINST LIQUOR 177 (1979); cf. WHITE HOUSE REPORT, supra note 13, at 151 (stating that “[t]he enormous profits generated by the illicit drug industry in the United States have attracted some of the most violent criminals to the trade”).
58. For example, an importer can purchase a kilogram of heroin for $10,000 and by the time that kilogram passes through the hands of several middlemen (wholesalers, retailers and purchasers), its street value can reach $1,000,000. See Brecher, supra note 22, at 9. The situation with cocaine is worse. In a 1979 analysis a DEA agent demonstrated how $625 worth of coca leaves would have a street value in the United States of $560,000. See P. EDDY, H. SABOGAL & S. WALDEN, THE COCAINE WARS 48 (1988). The analyst further calculated that if Columbia processed fourteen metric tons of cocaine per year, a number he considered conservative, it would produce almost $8 billion a year in potential revenue from raw materials worth only $8 million. Id. Within one year after this estimate was made “the best estimate of the size of the Bolivian coca crop was 58,275 metric tons.” Id. at 49; see also Wisotsky, supra note 7, at 1324 (stating that “[a]lthough prohibition is not completely successful, enforcement pressures succeed in making cocaine more expensive and less available then it would be otherwise.”).
inundated in illicit drugs. Tougher laws, greater efforts at interdiction and stronger rhetoric at all levels of government and from both political parties have not, and will not, be able to stop it. Punishment will not deter the illicit drug trade and neither will internecine conflicts (including murder) among the traffickers. Such conflicts are just a way of reducing the competition. As a result, the unprecedented violence and corruption that began in South America has now been brought to the cities and streets of the United States.

III. THE RESULTS OF PROHIBITION

A. Crimes Committed by Addicts

If the drug laws of the United States simply did not achieve their purpose, perhaps there would be insufficient reason to get rid of them. However, our drug laws are doing more than not working—they violate Hippocrates' famous admonition: first do no harm. While law enforcement efforts have not eradicated the supply of illicit drugs, they have substantially increased the price of such drugs. This creates a financial problem for the substantial

59. See Benoit, supra note 9, at 33 (noting that over the past decade the amount of cocaine on the street has increased tenfold).
60. Cf. Berke, Study Finds Flaws in U.S. Effort to Stop Airborne Drug Smuggling, N.Y. Times, June 9, 1989, at A18, col. 3 (stating that "[i]ntensified Federal efforts to curb the smuggling of cocaine and marijuana into the United States . . . have been largely ineffective . . . ").
61. Other commentators have expressed similar frustration with the rhetoric surrounding the drug problem. See BENNET PLAN, supra note 13; Nadelmann, supra note 11, at 31 (stating that "[t]he past twenty years have demonstrated that a drug policy shaped by exaggerated rhetoric designed to arouse fear has only led to our current disaster.").
62. The drug lords and cartels of South America are responsible for most of the recent, brutal murders in their countries. For example, in Medellin, Colombia, there are approximately 10 drug-related murders per day, "a per-capita murder rate that is nearly nine times that of New York City and the highest in the world for a city that is not at war." Uhlig, In 'Machine-Gun City,' Life's Not Worth a Song, N.Y. Times, June 7, 1989, at A4, col. 1; see infra note 81 and accompanying text (providing examples of drug-related violence within the United States).
63. As Professor Nadelmann pointed out:
The fact that drug-prohibition laws and policies cannot eradicate or even significantly reduce drug abuse is not necessarily a reason to repeal them. They do, after all, succeed in deterring many people from trying drugs, and they clearly reduce the availability and significantly increase the price of illegal drugs. These accomplishments alone might warrant retaining the drug laws . . . .
Nadelmann, supra note 11, at 11.
64. Under the Hippocratic Oath, physicians swear not only to act for the benefit of their patients, but to "abstain from whatever is deleterious and mischievous." THE GENUINE WORKS OF HIPPOCRATES 1 (F. Adams trans. 1939) (reprinting the Hippocratic Oath).
65. See Nadelmann, supra note 11, at 7 (stating that "[t]he mere existence of drug-
number of addicts who are poor.\textsuperscript{66} Further, eighty-five percent of the addicts who seek free treatment are turned away.\textsuperscript{67} This, in turn, leads many addicts to commit crimes to support their habit,\textsuperscript{68} and the non-drug-using population is frequently the silent victim of these crimes.

\textbf{B. Overload of the Criminal Justice System}

At current funding levels, the criminal justice system cannot—without sacrificing our civil liberties—handle the sheer volume of drug-related cases.\textsuperscript{69} In 1985, over 800,000 arrests for drug abuse

prohibition laws, combined with a minimal level of law-enforcement resources, is sufficient to maintain the price of illicit drugs at a level significantly higher than it would be if there were no such laws.

\textsuperscript{66} See \textit{Drugs and Crime}, supra note 7, at 11 (stating that "[d]emographically, criminal activity and narcotics are both associated with disadvantaged urban areas.").

\textsuperscript{67} See supra note 20.

\textsuperscript{68} See \textit{Drugs and Crime}, supra note 7, at 8 (stating that "[t]he vast majority of contemporary addicts support their addictions by committing crimes . . . ."); see also \textit{White House Report}, supra note 13, at 55. An untreated addict will commit a crime every other day to maintain his habit. See \textit{Bureau of Just. Statistics, U.S. Dep't of Just., Report to the Nation on Crime and Justice} 51 (1988) [hereinafter \textit{Report to the Nation}]. On the other hand, statistics recently compiled by the Maryland Drug and Alcohol Abuse Administration, indicate that crime rates go down among addicts when treatment is available. See \textit{Maryland Drug and Alcohol Abuse Administration, Unpublished Data} 9 (1988).

For example, of the 6,910 Baltimore residents admitted to drug abuse treatment in fiscal year 1987, 4,386 or 63\% had been arrested one or more times in the 24-month period prior to admission to treatment. \textit{Id.} Whereas, of the 6,698 Baltimore City residents who were discharged from drug treatment in fiscal year 1987, 6,152 or 91.8\% were not arrested during the time of their treatment. \textit{Id.} These statistics tend to support the view that one way to greatly reduce drug-related crime is to assure addicts access to drug treatment without having to resort to the black market.

\textsuperscript{69} See \textit{American Bar Ass'n, Criminal Justice in Crisis, A Report to the American People and The American Bar on Criminal Justice in the United States: Some Myths, Some Realities, and Some Questions for the Future} 39 (1988) [hereinafter \textit{ABA Report}] (stating that "[a]s currently funded, the criminal justice system cannot provide the quality of justice that the public legitimately expects and that the people working within the system wish to deliver."). The problem is clearly not due to lack of effort or competence. "Drug law enforcement has never been more effective than it is today in making arrests, seizing drugs and property, toppling drug cartels, and locking up drug dealers. Yet drug availability continues to rise . . . ." \textit{White House Report}, supra note 13, at 53. There are simply not enough law enforcement officers, prosecutors, judges, corrections officers, or jails to handle the tremendous volume of drug arrests. As the American Bar Association noted:

[Drug] cases are accommodated by the prosecutor and the courts but only by further distortion of a system that already lacks adequate resources. Crowded dockets compel additional plea negotiation of both drug and non-drug cases, and defense lawyers and prosecutors are burdened with caseloads that defy effective representation for either side. Court delays are magnified, and still further down the line, treatment programs, parole and probation officers, and prisons are incapable of dealing with the number of people the courts are placing under their supervision.
violations were reported by law enforcement agencies nationwide.\textsuperscript{70} While this number is large, it hardly reflects the annual total of drug violations committed in the United States.\textsuperscript{71} Yet, we do not have adequate prison space, under both the federal and state systems, to house the number of drug offenders we are arresting now.\textsuperscript{72} Building more prisons will not help in any significant way—it is not possible to build enough prisons to hold all of America’s drug offenders.\textsuperscript{73} Further, the cost of such an undertaking would far exceed what American taxpayers would be willing to pay.\textsuperscript{74}

Clearly, the billions we are spending under our current drug policy is not enough. A further cost, not translatable into dollars, is reflected in the number of predatory crimes of violence that are going uninvestigated, unprosecuted and unpunished because of the enormous effort being put into the war on drugs.\textsuperscript{75} It is the individual citizen and our communities that are paying the price of that neglect.

America’s effort to prosecute and imprison its way out of the ABA REPORT, supra, at 46-47. This situation is similar to that existing during the era of alcohol prohibition, when “[t]he volume of prohibition cases was great enough to put a serious strain on the state and federal prison and jail facilities.” L. ENGLERMANN, supra note 57, at 159.

\textsuperscript{70} See REPORT TO THE NATION, supra note 68, at 67. This amount constituted seven percent of all reported arrests in 1985. Id. Drug abuse violations, for purposes of these statistics, were defined as the sale, manufacture and/or possession of cocaine, heroin, marijuana or synthetic and other manufactured drugs. Id.

\textsuperscript{71} See Nadelmann, supra note 11, at 3 (stating that in 1987 “more than thirty million Americans violated the drug laws on literally billions of occasions.”).

\textsuperscript{72} In New York City, for example, felony drug arrests in the first three months of 1989 rose 35\% from the same period the previous year while drug convictions increased 55\%. See Lee, Attack on Crack: More Arrests, Fewer Long Sentences, N.Y. Times, May 31, 1989, at B3, col. 1. Most of these defendants are permitted to plea-bargain and receive lesser sentences since “city jails and state prisons were ‘at 100 percent capacity.’” Id. At the federal level, drug offenders now account for “more than one-third of the 44,000 federal prison inmates.” Nadelmann, supra note 11, at 15; cf. BENNET PLAN, supra note 13, at 1 (noting that “[f]elony drug convictions now account for the single largest and fastest growing sector of the Federal prison population.”).

\textsuperscript{73} See Nadelmann, supra note 11, at 3 (noting that “[i]n New York and elsewhere, courts and prisons are clogged with a virtually limitless supply of drug-law violators”).

\textsuperscript{74} “Recent studies . . . indicate that building costs per cell for prisons range from $40,000 to $70,000 and operating costs from $10,000 to $20,000 per year.” WHITE HOUSE REPORT, supra note 13, at 54.

\textsuperscript{75} See Moore, supra note 23, at 22 (noting that “[l]ike MASH units in war, overburdened war-zone police districts apply triage to crime reports, focusing mainly on murders and shootings and ignoring burglaries.”); see also WHITE HOUSE REPORT, supra note 13, at 2-3 (stating that “[t]he amount of time and resources diverted to drug enforcement leave many criminal matters unattended or delayed because our police . . . are inundated with drug cases.”).
war on drugs has wasted enormous resources—both in money and personnel—attacking the fringes of the problem (the users and small time pushers), while the heart of the problem—the traffickers and their profits—goes unresolved. Our criminal justice system prosecutes and incarceraes only the tip of the drug problem “iceberg”—and that tip is far larger than we have the capacity to handle.

C. Failed Supply Side Policies

Not only can we not prosecute our way out of the drug morass, we cannot interdict our way out of it either. Lately, there have been calls for stepped up border patrols, increased use of the military and greater pressure on foreign governments, in order to decrease the incoming supply of illegal drugs. Assuming that such efforts would reduce the supply, that reduction would not alleviate the chaos in our cities, and might make it worse.

For example, even if we quadrupled the amount of cocaine we currently interdict, the world supply of cocaine would still far outstrip U.S. demand. The statistics on opium are equally unnerving; the U.S. demand is no more than 3.5% of the total opium produced. With such an oversupply, improved interdiction may increase the perceived risk to producers and importers, which may, in turn, increase the price. However, it will not even begin to dry up the black market in heroin or cocaine.

D. Victimization of Children

Perhaps the most far-reaching damage resulting from our drug laws has been the victimization of our children. Some have been

76. This observation is also true of the United States' experience during alcohol prohibition, where “[t]he big-time violators, those able to accumulate money and power, too often escaped the clutches of the law, while the small-time violator was frequently arrested and successfully prosecuted.” L. ENGELMANN, supra note 57, at 159-60.


78. According to statistics recently cited by the American Medical Association, Latin America produced 162,000 to 211,400 metric tons of cocaine in 1987. See REPORT NNN, supra note 5, at 239. This is five times the amount needed to supply the U.S. market. Id; see also P. EDDY, H. SABOGAL & S. WALDEN, supra note 58, at 48 (estimating the Bolivian coca crop to be 58,275 metric tons).

79. REPORT NNN, supra note 5, at 239.

80. While it is true that drug prohibition probably does keep some children from experimenting with drugs, drugs are still widely available to, and widely used by, students despite prohibition. See, e.g., Winston, 13% of 6th Graders Said To Use Drugs, Balt. Sun, Nov. 1, 1989, at 1A, col. 4 (noting that “adolescent drug use is no longer declining as it had earlier in
killed as innocent bystanders in gun battles among drug traffickers. Many others, especially those living in the inner city, are frequently barraged with the message that selling drugs is an easy road to riches—far easier than hard work and good grades. Drug pushers, with their wads of money, become envied role models for young people seduced into joining the illegal trade. In many cities, small children act as lookouts and runners for drug pushers, just as they did for bootleggers during Prohibition.

E. Spread of AIDS

The 1980's have brought another major public health problem made worse because of our drug laws: AIDS. Eleven states ban non-prescription distribution, or possession, of syringes. As a result, contaminated intravenous-drug needles are now the principal means of transmission for HIV infection. The users of drug needles infect the decade," and "students can still get drugs if they want them.").

81. See, e.g., Girl Killed in Drug Shooting, N.Y. Times, Jan. 1, 1989, at A32, col. 1 (reporting that "[a] 12-year-old [child] was shot and killed . . . by machine gun fire that erupted during a drug transaction . . . ."). Adults have also been innocent victims in drug-related shootouts. See, e.g., Hevesi, Drug Wars Don't Pause to Spare Innocent, N.Y. Times, Jan. 22, 1989, at A25, col. 1; see also BENNET PLAN, supra note 13, at 1 (stating that "[r]eports of bystander deaths due to drug-related gunfights and drive-by shootings continue to climb.").

82. The attraction of money and "the prestige afforded by wealth and its trappings compete for the loyalty of children challenged to choose between a life of school, employment and responsibility . . . and the glamour, expensive cars, and fast life of the drug lord . . . ." WHITE HOUSE REPORT, supra note 13, at 2. As for education, decriminalization will not end the "Just Say No" and similar education programs. On the contrary, decriminalization will allow reallocation of law-enforcement dollars toward improving such programs. What decriminalization will end, however, is the competing message of "easy money" conveyed by the drug dealers.

83. See DRUGS AND CRIME, supra note 7, at 11 (noting that "[b]oth criminality and experimentation with narcotics among adolescents stem in part from exposure to adult models . . . . [And] the notoriety, glamour and symbols of material success sometimes associated with [adult criminals] makes it easier to identify with them than with conventional role models."); Terry, Drug Riches of the Capital Luring Poor Youth Down a Bloody Path, N.Y. Times, Apr. 2, 1989, at A1, col. 1, A25, col.1 ("[p]ushed by poverty and pulled by a perverse interpretation of the American dream of material wealth at almost any cost, hundreds of teen-agers, adults and many children have joined the lucrative crack-selling business.").

84. See WHITE HOUSE REPORT, supra note 13, at 2.


87. In New York City, where most of the nation's AIDS cases are reported, intravenous-
not only those with whom they share needles, but also their sex partners and their unborn children. In a political climate where all illicit drug use is condemned, and where possession of a syringe can be a criminal offense, few jurisdictions have been willing to initiate a needle exchange program. Along with our failure to give illegal drugs to cancer patients with intractable pain, this is a graphic example of our blind pursuit of an irrational policy.

F. Helping the Smugglers and Ignoring the Addicts

Another way that our current drug laws have exacerbated the drug problem has to do with the art of smuggling. It is easier to smuggle small amounts of highly concentrated drugs than larger amounts of less concentrated drugs. Consequently, as our interdic-

drug users now account for the most new cases of AIDS. Id.; see Bennett Plan, supra note 13, at 1 (stating that “[i]ntravenous drug use is now the single largest source of new HIV/AIDS virus infections . . . .”); see also Nadelmann, supra note 11, at 21 (stating that “[t]oday, over 50 percent of all people with AIDS in New York, New Jersey, and many other parts of the country, as well as the vast majority of AIDS-infected heterosexuals throughout the country, have contracted the disease directly or indirectly through illegal intravenous drug use.”); Schwartz, The AIDS Connection: Drug Addicts with Dirty Needles, 244 Nation 843, 843 (1987) (stating that “today the [HIV] virus appears to be spreading most rapidly among intravenous drug users.”). “By 1991, the U.S. Public Health Service predicts, a cumulative total of 72,900 addicts will have contracted AIDS, compared with 23,366 reported so far.” Fackelmann, HIV and IV Drug Abuse, 135 Sct. News 168, 168 (1989).

88. See Schwartz, supra note 87, at 843 (stating that “[i]nfeeted addicts, in turn, transmit the virus to their sexual partners . . . .”).

89. See Fackelmann, supra note 87, at 168 (stating that “[f]emale addicts can pass HIV to their unborn children, and 75 percent of all reported pediatric AIDS cases occur in cities where AIDS is prevalent among drug abusers . . . .”).

90. See supra note 8 and accompanying text.

91. See Givens & Kenney, supra note 86.

92. New York City recently initiated a needle-exchange program which is believed to be the first such program in the country. See Raymond, First Needle-Exchange Program Approved; Other Cities Await Results, 259 J. A.M.A. 1289 (1988). Under this program, addicts were provided free, sterile needles upon attending a drug counseling session. Id. The program has been assailed, however, by some community leaders, who charge it is “a genocidal campaign against black and Hispanic people.” Marriott, Needle Exchange Angers Many Minorities, N.Y. Times, Nov. 7, 1988, at B8, col. 1.

The program in New York was ended by the administration of the new Mayor, David Dinkins. See Lambert, Health Chief is Criticized on AIDS Shift, N.Y. Times, May 10, 1990, at B1, col. 5. However, “[f]ree needles are distributed in Portland, Ore., Seattle, Tacoma, Wash., Boulder Colo., and San Francisco and in Holland, Scotland, Italy, Canada and Australia. Bleach programs are common in several cities and countries.” Id. at B8, col. 6.

93. While “[r]esearch has shown that there remain specific cases of extreme pain, usually in terminal-cancer illnesses, that respond only to heroin,” legislation to legalize the use of heroin in such instances has been consistently opposed by the White House. Easing the Agony, L.A. Daily J., Feb. 22, 1984, at 4, col.1, col. 2.

94. For example, “marijuana dealers in both the producer countries and the United
tion efforts have increased, drug traffickers have turned to smuggling purer forms of their product. The average purity of cocaine has risen from 12 to 60 percent since 1980. A similar increase has been found for heroin.

Lastly, our drug laws have hurt Americans in still another more subtle way. Our fear and dislike of drug use has become so pervasive that all humanitarian considerations toward the health and well-being of the addict are ignored. While we mandate disclosure of the percentage of alcohol in liquor, and we regulate the concentration of aspirin and all other over-the-counter drugs, we allow adulterated illicit drugs to be sold to adults and children.

IV. THE DECRIMINALIZATION OF DRUGS

A. Reduction in Crime

While the decriminalization of drugs will not eradicate the evil of drug abuse, it will alleviate many of the problems that prohibition has created. First and foremost, decriminalization will eliminate the profits of the illegal drug trade by giving addicts access to legitimate sources of drugs. Elimination of black market profits will effectively

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95. See DRUGS AND CRIME, supra note 7, at 10 (noting that “when pressure [from interdiction efforts] is put on the illicit drug distribution system, it generally reacts by making available drugs of higher potency and less bulk.”); see also E. BRECHER, supra note 1, at 522 (stating that “what prohibition [of drugs] achieves is to convert the market from relatively bland, bulky substances to more hazardous concentrates which are more readily smugglable and marketable . . . ”).

96. See Nadelmann, supra note 11, at 7.

97. See id. at 7 (noting that the “average purity [of heroin] [had] risen from 3.9 percent in 1983 to 6.1 percent in 1986.”).

98. See E. BRECHER, supra note 1, at 6-7. Brecher states that “one of the most disastrous effects of current narcotics laws and attitudes—is the rise of a deviant addict subculture, cut off from respectable society and without a ‘road back’ to respectability.” Id. at 7.

99. Under 27 U.S.C. § 205, it is unlawful to sell, ship, or deliver alcoholic beverages which are not labeled to “provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof, . . . the net contents of the package, and the manufacturer or bottler or importer of the product.” 27 U.S.C. § 205(e)(2) (1982) (emphasis added).

100. The Federal Food Drug, and Cosmetic Act prohibits “[t]he introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded.” 21 U.S.C. § 331(a) (1988). For purposes of § 331, a drug is “adulterated” “[i]f it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium.” Id. § 351(b) (emphasis added).
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eliminate the market itself, and all of its attendant evils. 101

B. Treatment for Addicts

While the case for decriminalization on an economic level is overwhelming, decriminalization is not without its risks. Providing legal access to currently illicit substances carries with it the chance—although by no means the certainty—that the number of people using and abusing drugs will increase. 102

Comprehensive new drug treatment programs, 103 funded with tax-dollars saved from dismantling the massive drug-law enforcement bureaucracy, would, however, provide a humane response to any increase in the drug-using population. The question then becomes not whether decriminalization leads to any increase in the drug-using population, but whether the benefits of decriminalization, both in economic and social terms, outweigh any consequent rise in drug use and abuse, 104 in view of the proposed comprehensive drug-treatment programs. 105

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101. See supra text accompanying notes 56-62 (discussing the negative effects of the black market).

102. Not all commentators believe that legalization would increase the use of drugs. Ethan Nadelmann, for example, has said that it is “impossible to predict whether legalization would lead to much greater levels of drug abuse.” Nadelmann, supra note 11, at 28. He adds that “[t]here are, however, reasons to believe that none of the currently illicit substances would become as popular as alcohol or tobacco, even if they were legalized.” Id. at 29.

103. Cf. Berke, Seized Assets to Go to Areas Hardest Hit by Drugs, N.Y. Times, Apr. 13, 1989, at A25, col. 1 (discussing the proposal to use assets seized from drug dealers to fund drug treatment programs).

104. See supra note 103 (citing the Bennet Plan and media reports concerning a national drug strategy proposed by the United States Government).

105. Addiction, for all of its attendant medical, social and moral problems, is but one evil associated with drugs. See Stewart, Quid Pro Quo: Stay Drug Free and Stay on Release, 57 Geo. Wash. L. Rev. 68, 68 (1988); see also Report Links Crime to Drug Use, 24 TRIAL 95, 95 (1988) (stating that “[t]he proportion of state prisoners who were under the influence of an illegal drug when they were incarcerated increased from 25 percent in 1974 to 35 percent in 1986”); McBride & McCoy, Crime and Drug Using Behavior, 19 CRIMINOLOGY 281, 281 (1981) (noting that “[t]he assumption that a causal relationship exists between crime and drugs was the underlying justification for the establishment of the National Institute on Drug Abuse”); NIJ ‘Astounded’ to Learn: 56% of Arrestees Studies Use Drugs, 17 CRIM. JUST. NEWSL., July 1, 1986, at 4; Broad-Based Study Analyzes Data on Drug-Related Crime, 15 CRIM. JUST. NEWSL., Mar. 1, 1984, at 6-7.

New research by the National Institute for Justice documents widespread use of drugs among those arrested for serious non-drug felonies. Stewart, supra, at 69. Based on confidential urinanalysis of arrestees, 54 to 90 percent of those arrested for serious crimes tested positive for cocaine, phencyclidine (PCP), heroin, marijuana, or amphetamines. Id. at 70.
C. The Mixed Message of Tobacco and Alcohol

The case for the decriminalization of drugs becomes even stronger when illegal drugs are looked at in the context of legal drugs.\textsuperscript{106} In 1985 alone, approximately 390,000 people died from tobacco related diseases.\textsuperscript{107} Despite this fact, millions of people continue to smoke\textsuperscript{108} because they are addicted to the nicotine contained in cigarettes.\textsuperscript{109} Yet, with the exception of taxes\textsuperscript{110} and labeling,\textsuperscript{111} cigarettes are sold almost without restriction.\textsuperscript{112} Cigarettes are cheap, widely available and widely advertised except on television.\textsuperscript{113} Despite their highly addictive nature, they are not even classified as a drug.\textsuperscript{114}

\textsuperscript{106} Some commentators have suggested a correlation between the legality of a drug and its abuse. For example, Professor Nadelmann has stated the following: \"It is worth observing that the increases in the potency of illegal drugs have coincided with decreases in the potency of legal substances . . . . It is quite possible . . . that the subculture of illicit-drug use creates a bias or incentive in favor of riskier behavior and more powerful psychoactive effects. If this is the case, legalization might well succeed in reversing today's trend toward more potent drugs and more dangerous methods of consumption.\" Nadelmann, supra note 11, at 8.

\textsuperscript{107} See Berke, U.S. Report Raises Estimate of Smoking Toll, N.Y. Times, Jan. 11, 1989, at A20, col. 4 (noting that according to an American Cancer Society estimate \"[t]he number of deaths attributed to smoking in 1985 was placed at 390,000, an increase over past estimates that put the figure closer to 300,000\")\}; see also Tolchin, Surgeon General Asserts Smoking is an Addiction, N.Y. Times, May 17, 1989, at A1, col. 2, col. 4 (noting that smoking is a \"habit said to be responsible for 320,000 deaths annually in the United States.\")

\textsuperscript{108} A recent federal report estimated that \"more than 50 million Americans continue to smoke . . . .\" Berke, supra note 107, at A20, col. 4.

\textsuperscript{109} The Surgeon General of the United States has declared that nicotine addiction is as addictive as heroin and cocaine. Tolchin, supra note 107, at A1, col. 2. Furthermore, in an annual report on the health consequences of smoking, the Surgeon General found that \"[t]he pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine . . . .\" Id. at col. 4.

\textsuperscript{110} See 26 U.S.C. \$ 5701(b),(c),(d) (1988) (providing for rates of tax on cigarettes, cigarette papers and cigarette tubes).

\textsuperscript{111} 15 U.S.C. \$ 1333(a)(1) (1988) (requiring warnings on cigarette packages, advertisements and billboards). Section 1333 also mandates labeling on all cigarettes manufactured, imported, or packaged for sale or distribution in the United States without a warning. Id. \$ 1333(a)(2).

\textsuperscript{112} Manufacturers and export warehouse proprietors are, however, subject to bond, permit, report, packaging, tax and records requirements. See 26 U.S.C. \$\$ 5711-13, 5721-23, 5731, 5741 (1982 & Supp. 1987).

\textsuperscript{113} It is \"unlawful to advertise cigarettes . . . on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.\" 15 U.S.C. \$ 1335 (1988)

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Utilizing the standards applied to illicit drugs, tobacco should be a controlled substance. Making cigarettes illegal, however, would be an open invitation to a new black market, because millions of people who presently smoke would continue to smoke because they are addicted to nicotine. The resulting illegal tobacco trade would completely overwhelm our criminal justice system just as the illegal drug trade does now. Moreover, the U.S. Treasury would lose billions of dollars in taxes. Consequently, no rational person would advocate criminalizing tobacco. Nevertheless, what is abundantly clear with respect to tobacco is painfully ignored with respect to illegal drugs.

Alcohol, like tobacco, is also a drug that kills thousands of people each year. Alcohol plays a part in approximately 25,000 automobile fatalities annually and is frequently involved in suicides, non-automobile accidents, and crimes of violence. Millions of people are killed or injured each year because of alcohol-related accidents. In fact, about 2 out of every 5 people in the U.S. will be in an alcohol-related crash in their lifetimes.


115. See sources cited supra note 3.

116. See sources cited supra notes 107-09 (discussing the Surgeon General's classification of nicotine as an addictive drug such as heroin and cocaine).

117. See supra text accompanying notes 69-76.

118. It is estimated that roughly $10 billion dollars is collected by "the various governments in the United States . . . from excise taxes on tobacco products . . ." R. TOLLISON & R. WAGNER, SMOKING AND THE STATE 10 (1988).

119. In 1980, an estimated 97,528 deaths were attributable to alcohol use. SECRETARY OF HEALTH AND HUM. SERVS., U.S. DEP'T OF HEALTH AND HUM. SERVS., SIXTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 12 (1987) [hereinafter SIXTH SPECIAL REPORT].

120. "In 1986, there were 46,056 highway deaths, of which 23,987 (52.1 percent) were alcohol related." NATIONAL COUNCIL ON ALCOHOLISM INC., FACTS ON ALCOHOLISM AND ALCOHOL RELATED PROBLEMS (1987) (citing NATIONAL CENTER FOR STATISTICS AND ANALYSIS, FATAL ACCIDENT REPORTING SYSTEM, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (1986)). In fact, "[a]bout 2 out of every 5 people in the U.S. will be in an alcohol-related crash in their lifetimes." Id. (citing NATIONAL CENTER FOR STATISTICS AND ANALYSIS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DRUNK DRIVING FACTS (1987)).

121. The estimated number of suicides attributable to alcohol use in 1980 were 8,061. SIXTH SPECIAL REPORT, supra note 119, at 12. This figure represents approximately 30% of all suicides. Id.

122. Approximately 11,000 non-automobile accidents in 1980 were attributable to alcohol use. Id.

123. Fifty percent of all homicides in 1980 (approximately 12,000) were attributable to alcohol use. Id. In addition, 62% of those convicted for assault were under the influence of alcohol at the time of the offense. Id. at 27. The number rapes committed under the influence of alcohol was 52%, and the number of other violent crimes committed under the influence of alcohol was 49%. Id. In Washington D.C., "about 80 percent of District children who required foster care this year came from homes where there is some kind of drug involvement." Norris, Drug Crisis Fueling Need For Foster Care, Study Finds, Wash. Post, Nov. 2, 1988, at
Americans are alcoholics, and alcohol abuse costs this nation billions of dollars each year in health care and lost productivity. Alcohol prohibition, however, proved to be one of the worst social experiments ever undertaken.

Two important points must be made with respect to alcohol prohibition. First, when alcohol Prohibition was repealed in 1934, significant mistakes were made that should not be repeated in the event illicit drug use is decriminalized. Specifically, when alcohol was legalized, no significant efforts were made to educate the public as to its dangers. Alcohol use was advertised and associated with happiness, success and social acceptability. Second, notwithstanding claims to the contrary by critics of decriminalization, there are marked parallels between the era of alcohol prohibition and our current drug policy. There are important lessons to be learned from our attempts to ban the sale and use of alcohol.

During alcohol Prohibition, the government tried to keep alcohol from millions of people who refused to give it up. As a result, our cities were overrun by criminal syndicates enriching themselves with the profits of bootleg liquor and terrorizing anyone who got in

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A1, col. 5. "The increase in drug use also has spawned a marked increase in related problems such as child battering, neglect, and children who test positive for the AIDS virus . . . ." Id.

124. See Sixth Special Report, supra note 119, at 12. "An estimated 18 million adults 18 years old and older currently experience problems as a result of alcohol use." Id. at 24. "These problems may include symptoms of alcohol dependence such as loss of memory, inability to stop drinking until intoxication, inability to cut down on drinking, binge drinking, and withdrawal symptoms." Id.

125. It is estimated that in 1983, "alcohol abuse cost the United States almost $117 billion . . . . Of this amount, nearly $71 billion is attributed to lost employment and reduced productivity and $15 billion to health care costs." Id. at 43.

126. See S. Cashman, Prohibition: The Lie of the Land 2 (1981) (stating that "prohibition brought about greater corruption in city government and an increase in gangsterism and racketeering . . . . the most persuasive indictment of [alcohol] prohibition.").

127. Id. at 28; see also E. Brecher, supra note 1, at 265 (discussing the repeal of prohibition and noting that it was brought about by "the slowly dawning awareness that alcohol prohibition wasn't working.").

128. See supra note 119-23 and accompanying text (providing facts and figures concerning the dangers of alcohol).

129. A modern example of such advertising is an ad depicting two young attorneys staring in admiration at a colleague who, as the caption states, was both on law review and had the "good taste" to drink the advertised brand of hard liquor. Advertisement, Time, Oct. 23, 1989, at 17.


131. See, e.g., Id. (noting that "[l]aws alone would never quench mankind's age-old thirst for intoxicating liquor.").
their way.\textsuperscript{132} We then looked to the criminal justice system to solve the crime problems that alcohol prohibition created.\textsuperscript{133} However, the criminal justice system—outmanned, outgunned and often corrupted by enormous black market profits—was incapable of stopping the massive crime wave that Prohibition created,\textsuperscript{134} just as it was incapable of stopping people from drinking.\textsuperscript{135}

V. RECOMMENDATIONS

Congress, in order to reduce the black market in illegal drugs, should begin taking incremental steps toward making drugs less of a criminal justice responsibility and more of a public health responsibility. Therefore, this Article makes the following recommendations, which focus on taking the profit motive away from black market sources, and on expanding public health responsibility.

A. Recommendation: Expand the role of the public health system in the treatment and prevention of drug abuse.

1. United States drug policies and practices should be revised to ensure that no narcotics addict need get his or her drug from the “black market”. In particular,
   a. Methadone maintenance should be expanded so that, under medical auspices, every narcotics addict who applies for treatment can receive it;
   b. Other forms of narcotics maintenance, including cocaine and heroin maintenance, should be made available, along with methadone maintenance under medical auspices. It will be up to the physician to determine whether the person requesting maintenance is an addict. Drugs will not be dispensed to non-users; and

\textsuperscript{132.} See S. Cashman, \textit{supra} note 126, at 27-55 (discussing the problems that emerged during prohibition).

\textsuperscript{133.} As one author observed:
The appalling moral collapse which followed in the wake of the Eighteenth Amendment and the first World War caused the almost complete breakdown of law enforcement throughout the United States, and made it possible for the underworld to take over the importation, manufacture, distribution, and sale of illegal liquor . . . .


\textsuperscript{134.} In fact, the very evils which Prohibition sought to prohibit actually flourished: In considerably less than two years the whole vast machinery of underworld domination was running smoothly . . . and the money was pouring in at the rate of millions of dollars a month . . . . With prosperity came expansion and consolidation, and by the middle of the 1920’s, by force of arms and through the payment of large sums to politicians and officials, the gang chieftains had become virtually all-powerful.

\textit{Id.} at 126.

\textsuperscript{135.} See \textit{supra} note 57 and accompanying text.
c. End the requirement that persons be addicted for at least one year before being eligible to enter a methadone treatment program. 136

2. Ban all advertising of drugs including alcohol and tobacco.

3. End government restrictions on research targeted to the potential medical uses of drugs.

4. Allow cancer patients to use Schedule I drugs for intractable pain. 137

5. Institute a clean needle exchange program as a way to reduce the spread of AIDS. 138

6. The federal government should lead a coordinated approach to adolescent drug education.

7. Develop community based programs designed to reach at-risk youths. These would include education, employment and mentor programs.

B. Recommendation: Redefine the role of the criminal justice system in the fight against drugs.

1. Establish a high level commission to study the potential impact of decriminalization. Particular emphasis should be placed on developing substance control policies based upon the relative potential for harm which a drug possesses. The commission should also be responsible for determining if there should be a national standard for decriminalization and what role the states will play.

2. Immediately eliminate criminal penalties for simple possession of marijuana. 139 Revise all other criminal statutes on drugs in accordance with the findings of the commission concerning the relative harm of drugs.

3. Limit drug testing to pre-employment examination affecting the health and safety of others, or when an employer has a reasonable suspicion of impairment, or as a monitoring service during a comprehensive rehabilitation and treatment program.

4. Increase the penalties for driving while impaired.

5. Impose mandatory jail terms on those who finance the impor-

136. See generally, E. Brecher, supra note 1, at 135-82 (discussing the development and use of methadone as a method to “cure heroin addicts).


138. See supra notes 87-92 and accompanying text.

139. Marijuana is currently listed as a Schedule I controlled substance and its possession is, therefore, prohibited. See 21 U.S.C. § 821 (1988). This recommendation for legalization is based on the fact that marijuana is not “strongly identified as a dependence-causing substance.” See Nadelmann, supra note 11, at 25. Indeed, “there . . . appears to be little evidence that occasional marijuana consumption does much harm.” Id.
tation and/or distribution of illicit drugs.

6. Adopt legislation to make it a crime to sell to children any drug that possesses the potential for serious harm to the health of children (except drugs prescribed for medical use by physicians). Such legislation would include cigarettes and alcohol as well as those drugs currently deemed illicit.

7. Recommendations A(1)(a), (b) and B(2) should not have to await the findings of the Commission and should be implemented immediately.

VI. CONCLUSION

In the ongoing debate about the decriminalization of drugs, there are two lessons to be learned from Prohibition. One is that the only language drug criminals understand is money. Therefore, the way to put them out of business is to take away their profits.

The second lesson has to do with the way in which drugs should be made a public health responsibility. Unlike alcohol, where the United States went from Prohibition to encouragement of alcohol consumption—leaving the public health system to deal with the consequences—any form of decriminalization *must* be accompanied by a reallocation of resources to education, treatment, and prevention programs designed to keep non-users away from drugs and current users off drugs.

Decriminalization is a means to a much desired end—getting the criminal justice system out of the business of trying to control the health problem of drug abuse and putting that responsibility where it belongs—in the hands of our public health system. The goal in the war on drugs should not be less supply, more jails or even the death penalty. It should be less profit for black marketeers and less demand. This goal will only be achieved through increased efforts at treatment and prevention. The drug traffickers can be beaten and the public health of the United States can be improved if we are willing to substitute common sense for rhetoric, myth and blind persistence.