

Introduction: The Great Drug Policy Debate— What Means This Thing Called Decriminalization?

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A PROFOUND SENSE OF DISSATISFACTION CHARACTERIZES the contemporary American discussion of drug policy. From across the political spectrum a chorus of critical voices is heard, linking those who most typically see each other as ideological antagonists. Their common platform asserts that prohibitionist policies that are given force by the criminal law have failed to prevent the use of drugs, and that efforts to restrict drug use have created a plethora of social evils far worse than the problem of drug use itself. Enormous resources are expended on the effort to interdict the international and domestic commerce in drugs. The courts are clogged with defendants arrested for violating the drug laws and the jails and prisons are filled with inmates convicted of violating those laws, whether by property crimes designed to pay the inflated black-market prices of illicit drugs or by acts of violence spawned by the struggles that pervade the underground economy. The streets of the urban ghettos have become wastelands dominated by the often armed sellers, buyers, and users of drugs. HIV infection spreads among drug injectors under legal conditions that encourage the sharing of syringes and needles. Civil liberties are routinely violated as government agents prosecute the war on drugs. Only a radical change in policy, it is argued, will provide a remedy to this situation. Criminalization is a failure. Decriminalization must then be the answer.

But what means this thing called decriminalization?

Beyond the common commitment to a break with the use of the criminal law as the primary social weapon in the struggle against drug use, there is little agreement. For the minimalists among the advocates of reform, what is necessary is an end to the prosecution of people who have drugs in their possession, or who are engaged in small-scale, street-level trade. For yet others decriminalization implies the need to medicalize the problem, replacing policemen with physicians, punishment with treatment. Finally, increasingly, some have come to believe that only a maximalist conception of decriminalization can meet the challenge created by the disaster that the enforcement of prohibition has produced. Legalization of drugs and creation of a regulated market like that now prevailing for alcohol would be, from this perspective, the only effective remedy to the crisis we are facing. Each of these conceptions of decriminalization entails very different adjustments in the dominant policy perspective, carries with it very different implications for the risks of increased drug use, implies very different standards of tolerance for drug use, suggests very different roles for the functions of medicine and the criminal law.

It is a remarkable feature of the contemporary debate over the future of drug policy that it takes place with only the dimmest recognition of the extended and perspicuous discussion that centered on drug policy in the period following World War II and that all but ended in the mid-1970s. This historical amnesia is the more striking because in virtually all important respects the contemporary debate mimics what occurred in the earlier period. It is my purpose in this introduction to recall the earlier debate in order to place the current discussion into some perspective.

The Rise and Decline of the Decriminalization Debate: Post-World War II Era

For much of this century the United States has sought to confront the challenge of drug use with policies derived from a prohibitionist perspective (Musto 1973). The sale, possession, and use of controlled substances was deemed an appropriate subject of the criminal law. Punishing violators of such restrictive statutes was to serve the ends of

both specific and general deterrence. Physicians were restricted from prescribing a broad range of substances that were deemed to have no legitimate clinical purpose. Therapeutic options were virtually unknown, a reflection of both profound pessimism about the ability of medicine to help the drug user and the ideological dominance of those committed to law enforcement. In the face of periodic rises in drug use, public panic ensued. At such moments the severity of the punishment of drug law violators was intensified, the latitude available to judges to impose sentences restricted.

The Liberal Challenge

In the period following World War II, when an increase in heroin addiction provoked great consternation, American liberals took up the challenge of the broad critique of American narcotics policies (Bayer 1975a). Above all else, the liberal position was an exculpatory one, eschewing notions of blameworthiness and guilt that are central to the criminalization of drug use.

The perception of the addict as a victim of blocked opportunity was derived from the sociologists, to whom liberals turned for explanations of troubling behavior and who provided so much of the academic justification for the social policies with which liberalism came to be identified (Cloward and Ohlen 1960). Like the problem of juvenile delinquency to which it was so intimately linked in the public mind, addiction suggested to liberals the need to “finish the work of the New Deal” (*Nation* 1970, 228). This theme ran like a powerful leitmotif through virtually every discussion of heroin use in the journals of liberal opinion during the 1960s and early 1970s. Thus the *Nation* stated: “Society must come to realize that it is a cause—perhaps the major cause—of the affliction that it now observes with such fear and revulsion.” Dr. Joel Fort, writing in the *Saturday Review of Literature*, underscored the extent to which addiction was perceived as an indication of social distress by referring to heroin use as a “barometer” of the extent to which society was characterized by “poverty, segregation, slums, psychological immaturity, ignorance and misery” (1962, 30).

Typically, the response provoked by this understanding involved calls for the full range of social programs that would get at the “root causes” of deviancy—programs designed to attack chronic unemployment and

the grinding poverty of the underclass. Decrying the resources devoted to interdiction by the Nixon administration, the *Nation* asked: "Why . . . doesn't President Nixon devote more resources to the elimination of the social and economic problems which permit large scale drug abuse to take root?" (1971, 421).

Given the openness of postwar liberalism to deterministic theories of behavior, arguments for the psychopathological theories of heroin use seemed particularly congenial. The influence of mental health professionals—psychiatrists, psychologists, and social workers—on liberalism's perception of drug use cannot be overstated. Not only did they offer to explain discordant behavior in terms that avoided notions of personal guilt, but they also promised a technology of rehabilitation untainted by the brutality of punishment. Thus, the disease concept of addiction provided liberals with a perfect mechanism for achieving the very corrective ends that conservative law enforcement approaches had failed to attain.

With addiction defined as the expression of an underlying psychological disease, liberals could propose a range of treatment alternatives to punitive incarceration. Outpatient clinics providing psychotherapy as well as inpatient, hospital-based treatment were to become, at different moments, the focus of the liberal and reformist approach to drug users. Although clinics might suffice if they could control the heroin user's behavior, quarantine in hospitals for the purpose of treatment might also be necessary to help the addict and to protect the community. Predisposed toward noncoercive solutions, liberalism was by no means unwilling to embrace the imposition of therapeutic solutions. Indeed, no less a figure than Justice William O. Douglas, the exemplar of liberal jurisprudence, wrote in *Robinson v. California*¹ that a state might determine that "the general health and welfare require that [addicts] be dealt with by compulsory treatment involving quarantine, confinement or sequestration."

But within a decade liberals had turned on such confinement as both expensive and ineffective. Writing in 1971, David Bazelon, the noted liberal U.S. Court of Appeals judge, who had done so much to open the legal process to psychiatry and the behavioral sciences, stated: "It certainly sounds more enlightened to treat the drug user than to punish

¹ *Robinson v. California* 370 U.S. 676 (1962). This case declared that imprisonment of addicts for the status of addiction constituted cruel and unusual punishment.

him for his status. But my experience with the civil commitment process suggests that the differences between punishment and compulsory treatment do not justify the extravagant claims made" (Bazilon 1971, 48).

Medicalization of Drug Addiction

Despite the disenchantment with compulsory closed-ward treatment—a reflection of the due process transformation that was affecting the willingness to tolerate benign confinement of juvenile and mental patients—the hold of the deterministic perspective did not waver (Gostin 1991). The *Robinson* decision had embraced the conception of addiction as a disease and thus had subverted the moral foundations for the use of the criminal law. "It is unlikely that any state at this moment would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with venereal disease. . . . Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."² But the Court had spoken only of the *status* of addiction. Its decision had not extended the exculpatory perspective to the acts associated with that status. For almost a decade, from the mid-1960s onward, legal commentators struggled with this issue and liberal analysts had sought to broaden the meaning of *Robinson* to include those behaviors inextricably linked to the "disease of addiction" (Bayer 1978a), just as they sought to protect alcoholics from imprisonment for acts of public drunkenness. Pharmacological duress was the doctrine employed in the effort to extend *Robinson*. Whereas the Supreme Court had protected the addict as an addict from punishment, the proponents of pharmacological duress sought to extend the protective scope of the court's decision to those whose addiction compelled them to purchase illicit drugs (Lowenstein 1967). "The commission of such offenses is merely an involuntary submission to [a] compulsion" (Goldstein 1973, 153). Some went further and sought to extend the doctrine to property crimes committed to obtain narcotics on the black market (*Georgetown Law Review* 1971). Although ultimately unsuccessful before the courts, the effort to win approval for the doctrine of pharmacological duress underscored its proponents' determination to vanquish the still dominant status of the criminal law in the social response to drug use.

Paralleling the reformist assault on the theoretical and moral justifications for using criminal law in the struggle against drug abuse was a

² *Robinson v. California*, op. cit., 667.

deep concern about how the efforts to incarcerate drug users and those engaged in the small-scale street-level trade in drugs were affecting the criminal justice system itself. Long a point made by the critics of prohibition, these concerns were ultimately to find expression from individuals whose commitment to the efficient functioning of the agencies of law enforcement drew them to the minimalist conception of decriminalization. "Addicts guilty of no other crime than illegal possession of narcotics are filling the jails, prisons and penitentiaries of our country," declared Judge Morris Ploscowe in an appendix to the joint American Bar Association–American Medical Association (1963) study of the narcotics problem in 1963. Almost ten years later, when the demand for a less punitive response to drug use had begun to have some impact, a state investigation in New York stated: "The Commission could only conclude that the narcotics law enforcement efforts by the police of New York City was [sic] a failure, and a monumental waste of time, of money and manpower. The evidence was clear and compelling that the police effort was directed at the lowest type of street violator, the addict, and that the police work was having no appreciable effect upon narcotics traffic in New York City" (New York State Temporary Commission Investigation 1973, 46).

The most striking feature of the liberal challenge to the prevailing perspective on drug abuse policy was, however, not simply its embrace of the conception of addiction as a disease, and its rejection of the centrality of law enforcement to the effort to limit drug use. Rather, it was the growing belief that efforts to prohibit the use of narcotics in the treatment of the illness of addiction were a profound mistake (Bayer 1975c).

With the untoward social consequences of heroin use perceived as being largely the outgrowth of an unreasonable prohibitionist stance—one that ignored or distorted the history of the American narcotics clinics of the 1920s and the comparative social studies of England (see the article by Oppenheimer in this issue)—and with narcotic drugs seen as having a central role in the treatment of addiction, liberalism was able to launch its attack on enforced abstinence.

The Americanization of Narcotic Maintenance

In 1947 *Opiate Addiction* by Alfred Lindesmith, the sociologist and leading advocate of reform of America's narcotics policies, was pub-

lished with its powerfully argued call for allowing doctors to prescribe opiates to addicts. Several years later, Rufus King, a leading reform advocate among lawyers published "The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick" in the *Yale Law Journal* (1953). On a more popular level, *Harper's Magazine* published a reform proposal under the striking title "Make Dope Legal" (Stevens 1952).

In the period between the late 1950s and the mid-1960s reformers were increasingly vocal in their support for narcotic maintenance. That support found repeated expression in the journals of liberal opinion—*Commonweal*, *Commentary*, the *Nation*. The *New York Times* also spoke out editorially against the prohibitionist response to addiction. Invariably, the link between crime and drug use, so central to the prohibitionist perspective, was rejected. It was not heroin that produced crime, but rather prohibition that drove the addict to criminality. These arguments were shaped by and helped to shape the proposals of a number of reformist bodies (Berger 1956; New York Academy of Medicine 1955; American Bar Association–American Medical Association 1963).

Whether framed in terms of support for cautiously structured experiments, or in forthright calls for a nationwide network of maintenance clinics, all the proposals aired in this period, which was notable for its increasingly repressive criminal statutes and calls for compulsory closed-ward treatment by proponents of treatment, had in common certain significant features:

1. Although abstinence from narcotics use was held to be the preferred goal of treatment, these proposals all recognized that for some, if not all, "confirmed" addicts such a goal was unobtainable. For such addicts it was appropriate to provide minimal doses of opiates to prevent the onset of withdrawal distress. The clinical justification for maintenance was based on the assumption that addicts could be medically stabilized on narcotics and that when so stabilized they could function normally. What compelled the addict to seek narcotics was not the desire for euphoria and sedation, but rather a not fully understood psychological "imbalance."
2. None suggested that narcotic maintenance was appropriate for episodic users of heroin, or for the adolescent who had but a brief history of drug involvement. The establishment of clinics was to meet the needs only of the "deeply addicted," or "confirmed addicts." Drug-free treatment was the appropriate response to users who were less severely affected.

3. None urged that maintenance be extended to users dependent on nonnarcotic drugs—cocaine, for example.
4. The threat of diverting narcotics from appropriate clinical purposes to the illicit market was well understood. The exercise of great caution would be necessary when heroin was prescribed to addicts. Thus some proposals would have required the addict to return to the clinic for each of the four or five needed daily doses of heroin. Others would have given registered addicts up to two days of take-home supply.

Heroin maintenance was never to become a viable political option in the United States. A sanitized version of narcotic maintenance, however, was to make striking inroads through the willingness of local, state, and, most important, federal agencies to fund the rapid expansion of methadone maintenance in the early 1970s. Methadone, a synthetic, long-acting narcotic that could be taken orally, met each of the challenges posed by reformers since the end of World War II (Dole 1965). Clinics could stabilize former heroin addicts so that they were no longer driven to seek illicit sources of narcotics; they permitted medical supervision of addicts, who in the past would have been the target of police surveillance; they could undercut the need to engage in crime to purchase heroin. It is not the least of the ironies of the methadone solution that it was given important federal support during the administration of Richard Nixon, who had denounced heroin maintenance as a “concession to weakness and defeat in the drug struggle, a concession which would surely lead to the erosion of our most cherished values for the dignity of man” (quoted in Bayer 1976, 264), and that it was ultimately, if grudgingly, accepted by many black leaders who continued to denounce proposals for heroin maintenance as genocidal.

But the reality of methadone fell far short of the promise that advocates of narcotic maintenance had held out for two decades (Epstein 1974). It soon became clear that many addicts were uninterested in medically supervised care. What they wanted from narcotics was more than the stabilization of their condition. Dr. Robert Newman, director of the New York City Methadone Maintenance Program, drew the only possible conclusion:

When someone wants a heroin treatment program, when methadone maintenance is available that person is saying he or she is unwilling

to give up the narcotic effect that heroin will give. If the person no longer wanted to get high, then it would really be strange that he or she would prefer to go four or five or six times a day into a clinic where somebody is going to try to find a vein and inject some heroin. (*Contemporary Drug Problems* 1973, 180).

The Limits of Medicalization

It thus appeared in the early 1970s that the medical conception of decriminalization—at least insofar as heroin was concerned—had reached its limits. It was under these circumstances that liberal Republican Nelson Rockefeller of New York State, an architect in the mid-1960s of New York's compulsory closed-ward treatment approach to drug use and strong supporter in the early 1970s of methadone maintenance, made a radical and sweeping proposal for severe recriminalization of the problem (Bayer 1974). It was also under these circumstances that there first emerged a proposal that represented a radical departure from the reformist thrust of the past six decades. Medicalization had been the centerpiece of the call for decriminalization. Now some began to urge the demedicalization of addiction; but it was demedicalization of a very different kind from what Rockefeller was pressing. Adults who wanted to use drugs, including heroin, should be as free to purchase them as they were free to purchase alcohol.

While liberals and other drug reformers had little difficulty in supporting the legalization of marijuana, which was widely used by middle-class youth and largely viewed as relatively benign, this was not the case for heroin and other “hard drugs.” The radical conception of decriminalization posed severe problems for liberals, who had deeply committed themselves to the view that narcotic use reflected the profound inequities of American social life and who believed that legalization would result in a sharp rise in drug use. As a consequence, fissures developed between those committed to the libertarian and to the social welfare traditions of liberalism. Nevertheless the call for legalization did find expression in the journals of liberal opinion (Bayer 1975b).

In a January 1972 editorial, entitled “Society Is Hooked,” the editors of the *Nation* called for the “legalization of hard drugs and marijuana.” Significantly, however, instead of portraying maintenance as a humane solution to the problems of addiction, as was the case when proposed by reformers like Lindesmith, the editors acknowledged that their program would in all likelihood result in the “epidemic . . . spread[ing] still

more rapidly" (*Nation* 1972, 99–100). Gone, too, from the radical challenge to drug policy was the earlier article of liberal faith that addicts given access to heroin would be normal, that enforced abstinence was responsible for their dysfunctional state. Like the proponents of "harm reduction" almost 20 years later, those who pressed for radical change hoped only to contain the damages caused by drug use. But no other option seemed viable. With a pessimistic air, the editors of the *Nation* noted that society as well as the addict were "hooked"; there were no quick "fixes."

The untoward consequences of prohibition for those who did not use drugs were underscored by Peter Drucker in a signed editorial in the *Saturday Review of Literature* where he argued that the "main victims of this monstrous plague" were "the 99 percent of us who are drug free" (Drucker 1972, 26–7). Here was a blunt reversal of the liberal image of the 1960s that portrayed the addict as a victim, as a tragic figure. Only by providing drugs either free or at cost could crime be brought under control. Troubled by the implications of his proposal, Drucker questioned the "morality" of his recommendation, but concluded that the greater immorality was to sustain by law the victimization of the majority by a minority.

Liberal legal theorist Herbert Packer, who had long argued that the "victimless crimes" were an inappropriate target of the criminal law, also endorsed the legalization of all drugs. In "Decriminalizing Heroin," which appeared in the *New Republic*, he wrote: "Enforcing personal morals through the criminal laws is one of this country's principal self-inflicted wounds. We can allow sick people—as we should allow nations to choose their own roads to hell if that is where they want to go—I should have thought that to be the most important lesson of liberalism" (Packer 1972, 11). As with Drucker's essay, making drugs available to those who wanted them was no longer offered as a way of assisting the addict to live a "normal life" but, rather, as a way of giving him the option of traveling the "road to hell."

Nothing more tellingly reveals the difficulty that heroin legalization presented American liberals than the prolonged conflict it engendered within the American Civil Liberties Union. As early as 1970, some within the organization had begun to insist that John Stuart Mill's dictum on the sovereignty of the individual over his or her own self regarding behavior be applied without modification to all drug use. Thus Jeremiah Guttman, a board member of the New York Civil Liberties

Union, stated in a position paper designed to move the ACLU: "The right *not* to live should be as basic as the right to life. Whether a person chooses to end his life with a bullet through the brain, fifteen years of alcoholic indulgence, or five years of heroin should not be material" (cited in Bayer 1975b). In 1973 a committee of the board of directors of the ACLU that had considered the drug issue concluded that the libertarian commitment of the ACLU left no alternative but to endorse the freedom of adults to use narcotic and nonnarcotic drugs. The evidence it had considered had provided no justification for prohibition because no "direct" harms to others could be traced to drug use. Indeed the harm to others that could be traced to such use was a consequence of the prohibition itself. Only with those under 18 years of age was the physician to play a role as the source of a prescription for narcotics, and then only with parental consent.

This perspective, however, was not so easily accepted by the board of the ACLU where strong social welfare concerns were raised by members fearful of the extent to which a free market in drugs would have a profound impact on the nation's ghetto poor. Three years later, after considerable debate, when the ACLU board did adopt a new policy on drugs, it was riddled with the contradictions between, on the one hand, a libertarian model of decriminalization within which heroin would be sold under a regulatory regime similar to what prevailed for alcohol, and on the other hand, a medical model, which would require the use of prescriptions. "Nothing in this policy is to be construed as placing the ACLU in opposition to reasonable restraint such as already exists with respect to the production and sale of food, liquor, cigarettes, penicillin, insulin, methadone. . . ." (cited in Bayer 1978b).

The ACLU's tortured effort to confront the problem of narcotic drugs stood in sharp contrast to the ease with which the issue was resolved by two politically conservative libertarians, Milton Friedman, the free-market economist, and Thomas Szasz, the heterodox psychiatrist well known for his claim that mental illness was a myth, who were unencumbered by the social welfare concerns of late twentieth-century American liberals.

At the very moment when the ACLU was struggling with the heroin issue, Friedman wrote in *Newsweek*: "Do we have the right to use force directly or indirectly to prevent a fellow adult from drinking, smoking or using drugs? [The] answer is no" (cited in Friedman and Friedman 1984, 138-9). Beyond his principled position, however, Friedman

pointed out that the course of legalization was dictated by pragmatic concerns. Prohibition did not work. It did not prevent drug use; it made the life of both the addict and the nonaddict more miserable. Underscoring a point that would assume great salience two decades later, he concluded: "Legalizing drugs would simultaneously reduce the amount of crime and improve law enforcement. It is hard to conceive of any other single recourse that would accomplish so much to promote law and order."

Like Friedman, Thomas Szasz was not burdened by welfare liberalism's conception of addiction as determined by social deprivation. Thus he was able to articulate a position on drug use derived exclusively from adherence to a radically individualistic perspective.

Although references to the social response to addiction ran throughout Szasz's earlier, often polemical, attacks on the psychiatric establishment, his first fully developed statement on the issue appeared in *Harper's Magazine* in "The Ethics of Addiction" (Szasz 1972). Starting from the premise that individuals are capable of freely choosing among differing behavioral patterns, Szasz noted that drug use and addiction were the results of just such personal decisions. Linking the freedom to use drugs with the right to exchange freely in ideas, he asserted: "In an open society it is none of the government's business what idea a man puts into his head; likewise it should be none of the government's business what drug he puts into his body" (75). For Szasz, then, the social response to addiction was a microcosm of the struggle between collectivist and individualist values. "We can choose to maximize the sphere of action of the state at the expense of the individual or the individual at the expense of the state" (79). The willingness to prohibit the use of drugs as medically unwise, and the role of physicians in enforcing prohibition and in treating drug users against their will, comprised for Szasz a paradigmatic expression of the baleful development of the "therapeutic state."

Two years later these arguments appeared in elaborated form in the book-length polemic, *Ceremonial Chemistry: The Ritual Persecution of Drug Addicts and Pushers*. Using imagery drawn from the history of religion, Szasz argued in typically hyperbolic fashion: "What exists today is nothing less than a worldwide quasi-medical pogrom against opium and the users of opiates" (45). "I regard tolerance with respect to drugs as wholly analogous to tolerance with respect to religion" (53).

It is important not to overstate the extent to which calls for the legal-

ization of drugs had attained explicit support during the 1970s. What gave them resonance, however, was the radical ferment among intellectuals dating from the upheavals of the 1960s, a ferment that had subjected both the practice and ideology of social control to repeated attack. The “labeling” school sought to shatter the orthodox perspective on drug use and other detested forms of behavior (Becker 1963). Society created deviance out of difference (Kitsuse 1962). The process of labeling “deviant” behavior set in motion a series of events with dire consequences for people who were labeled as well as for society. Unlike the corrective posture of the “helping professions,” the sociologists associated with the “labeling” school saw in behavioral diversity an intrinsic and vital aspect of social life (Matza 1969). To those drawn to the plight of psychiatric patients, the “antipsychiatrists” like Szasz and R.D. Laing suggested that medical dominance and control were every bit as repressive as the imposition of legal sanctions (Sedgwick 1972). Coercion by physicians buttressed the agencies of social control and imposed dreadful suffering on the patient.

Finally, for those concerned about the scope of the criminal law, the effort to restrict personal behaviors that posed no direct threat to others had created a “crisis of overcriminalization” (Kadish 1968). Gambling, prostitution, drug use, sexual behavior between consenting adults—the entire range of “victimless crimes”—had been mistakenly subject to the criminal law, with terrible consequences for the courts, the prisons, police departments, and the very status of the law. “The criminal law is an inefficient instrument for imposing the good life on others” (Morris and Hawkins 1970, 2).

The intellectual ferment of the 1960s and mid-1970s exhausted itself with little by way of demonstrable impact on the radical reform of drug abuse policy. The criminal law remained dominant, although the advocates of a therapeutic model had done much to reshape the social response to drug use. The most significant reflection of the effort to medicalize heroin addiction was in the methadone maintenance programs that had been provided with a niche in the clinical panoply. As the years passed, however, the initial therapeutic optimism that accompanied the rupture with the commitment to abstinence all but vanished. Methadone clinics were increasingly viewed with hostility, as community eyesores, where addicts met to engage in the commerce in drugs including methadone itself. Another change in outlook resulted when the fashion in drug use shifted from heroin to cocaine, rendering

irrelevant many of the arguments for maintenance therapy rooted in the psychopharmacology of opiate use.

Finally, liberal intellectuals lost the capacity to inform the policy agenda across the full range of domestic problems as an aggressively conservative national administration came to Washington in 1980. When a renewed assault on drug use took shape—with its battle cry of “zero tolerance”—and a revitalized commitment to law enforcement took form, directed at both the international commerce in illicit psychotropic substances and at street-level trade, little by way of broad countervailing perspective was left to express the concerns that had animated the debate in earlier years.

The Revival of the Drug Policy Debate

Although David A.J. Richards, the legal philosopher, argued in 1981 that respect for human rights necessitated legalization of drugs, albeit under the supervision of physicians (1981), and William Buckley, the editor of the conservative *National Review*, announced his support for drug legalization in 1985 (Buckley 1985), they were the exceptions. Little sustained discussion took place until 1988, when suddenly a plethora of articles appeared calling for the decriminalization of drug use. At times these articles suggested that only outright legalization of all drugs would represent a coherent response to the crisis of drug use in America's cities. Thus Arnold Trebach of the Drug Policy Foundation, a center committed to fostering reformist thought, wrote in a special symposium issue of the *American Behavioral Scientist*:

I am now convinced that our society would be safer and healthier if all of the illegal drugs were fully removed from the control of the criminal law tomorrow. . . . I would be very worried about the possibility of future harm if that radical change took place, but less worried than I am about the reality of the present harm being inflicted every day by our current laws and policies. (1989, 254)

Others supported legalization for some drugs, medical control for others. Pete Hamill, the popular columnist, thus declared:

After watching the results of the plague since heroin first came to Brooklyn in the early fifties, after visiting the courtrooms and the morgues, after wandering New York's neighborhoods . . . and after

consuming much of the literature on drugs, I've reluctantly come to a terrible conclusion: The only solution is the complete legalization of these drugs." (1988, 26)

Cocaine, he asserted, should be sold through liquor stores, and heroin distributed through neighborhood health stations and drug stores to "registered addicts." Hamill would, however, retain the stiffest of criminal sanctions for those who "created new junkies" by selling narcotics to those not already addicted. Finally, in a strong attack on the social costs of prohibition that appeared in the *Atlantic Monthly*, Richard Dennis (1990) called for the legalization of cocaine but not of crack, the potent and smokable cocaine derivative that had so profoundly affected ghetto life in the late 1980s.

The Concept of Harm Reduction

Unlike the earlier appeals for the medical model of decriminalization that were predicated on a conception of narcotic addiction as a disease requiring the provision of maintenance doses as a form of treatment, support for medical intervention in the current period has assumed a different character. Borrowing from the experience and diction of Europe—but especially from Great Britain and Holland—reformers have embraced the concept of harm reduction (see the article by Oppenheimer in this issue). From this perspective the physician's role is not so much to treat—or normalize—the addict by providing drugs. Rather the task is to limit the potential injury associated with drug use. Thus, it became possible to consider the prescription of cocaine and other drugs in the hopes that the patient would be guided toward less self-destructive behavior. There is here no pretense of therapy, in the conventional sense.

From across the political spectrum the call for decriminalization has drawn support. U.S. District Court judge Robert Sweet (Kleiman and Saiger 1990) and Baltimore's black mayor, Kurt Schmoke (1989), have each denounced the prohibitionist strategy. Stephen J. Gould, writing in *Dissent* (1990), and Taylor Branch, in the *New Republic* (1988), have both issued attacks on the use of the criminal law. Most remarkable and in sharp contrast to the linkage between liberalism and drug reform in the 1950s, 1960s, and 1970s, noted conservatives in surprising numbers have been drawn to the reformist banner. The *National Review* has provided its pages to those who have claimed that decriminalization is a

cause to which conservatives should give their support. Echoing the position first enunciated by Milton Friedman almost two decades earlier, D. Keith Mano wrote:

Drug prohibition violates individual freedom . . . and the Jeffersonian pursuit principle. The *National Review* has done much to confer seriousness on the legalization debate and understandably, I think, it is a conservative issue at base. . . . Drug commerce between one consenting adult and another is nobody else's business. And a free market mechanism should obtain. Instead our welfare socialist approach has given monopoly privilege to organized crime by default. (1990, 52)

Nothing more distressed the conservative proponents of decriminalization than the commitment of the Reagan and Bush administrations to the ever greater reliance on the instruments of legal repression in the "war on drugs," a strategy that could only result in the enhancement of state power and the withering of freedom. In an open letter to William Bennett, the nation's "drug czar," Milton Friedman sought to recall the common principles that united conservatives in their opposition to the statist programs of their liberal opponents:

The path you propose of more police, more jails, use of the military in foreign countries, harsh penalties for drug users and a whole panoply of repressive measures can only make a bad situation worse. The drug war cannot be won by those tactics without undermining the human liberty and individual freedom that you and I cherish. (cited in Reinerman and Levine 1990)

To cultural conservatives who rejected the radical individualism so central to libertarians of whatever political stripe, and whose ideological roots could be traced to Burke rather than Mill, all such characterizations of the effort to repress drug use were profoundly mistaken, subverting the prospects of human virtue upon which the very existence of civic life in a democratic society was dependent (Kleiman and Saiger 1990). Thus was William Bennett archly critical of the intellectuals and fellow conservatives who would desert the struggle against drug use.

Drug use—especially heavy drug use—destroys human character. It destroys dignity and autonomy, it burns away the sense of responsibility, it makes a mockery of virtue. . . . Libertarians don't like to hear this. . . . Drugs are a threat to the life of the mind. . . . That's

why I find the surrender to arguments for drug legalization so odd and so scandalous. (1990, 32).

Although their arguments are rooted in a very different political perspective on American social life, black leaders have been equally vehement in their reaction against the calls for decriminalization and especially toward the maximalist call for legalization. In part a reflection of the cultural conservatism of the black clergy, this response also reflects the despair of those who have seen their communities devastated by drug use and the drug wars and who fear that legalization would represent nothing more than the determination to write off an expendable population. Committed as they are to greater public expenditures for treatment, many leaders have denounced as genocidal the calls for legalization of drugs, and even for halfway measures motivated by the philosophy of harm reduction (Dalton 1989).

The Debate over Costs

Despite the expected ideological exchanges provoked by the call for fundamental drug policy reform, the crucial and most dramatic feature of the debate over decriminalization in the late 1980s has been the extent to which it has *not* been shaped by reference to issues of liberty and the role of the state as the guarantor of social cohesion. Rather a set of more prosaic concerns has dominated the debate: the social costs generated by the very effort to limit the social costs of drug use. Cost-benefit analysis has provided the yardstick of analysis (Warner 1991). It is the willingness to embrace that social accounting technique and to employ its apparently nonideological methods that has united the liberal and conservative critics of the status quo.

If the maximalist, radical option of legalization has drawn more support in the late 1980s than at any moment since the imposition of prohibition in the century's second decade, the structure of the argument made against the use of the criminal law has not changed much since the challenge to criminalization gained some currency in the post-World War II era. Indeed, if anything is striking about the contemporary debate, it is how reminiscent it is of earlier conflicts, despite its markedly more sophisticated character.

Although the upsurge of critical analysis had already begun, the appearance in the fall of 1989 of Ethan Nadelmann's "Drug Prohibition in

the United States: Costs, Consequences and Alternatives” in *Science* marked an important juncture. Like those who preceded him, he painstakingly detailed the costs of drug prohibition. Vast expenditures—estimated at \$10 billion in 1987—corruption, crime, violence, the spread of HIV infection, international misadventures could all be traced to the effort to suppress drug use and commerce. When balanced against the achievements, the price was for Nadelmann beyond all reason. But what of the potential costs that would follow upon legalization? Would drug use and, more important, the most disabling forms of drug use increase? These are questions that Nadelmann approaches with some caution. His conclusions, however, are unmistakable: the risks of pursuing such an agenda have been exaggerated, even grossly distorted; the costs of not advancing a reform agenda—of legalizing cocaine, heroin, and “other relatively dangerous drugs”—are too great. Legalization would not only produce enormous benefits for society in general, and America’s ghettos in particular, but would enhance the health and quality of life of drug users who would be assured of access to drugs whose purity could be vouchsafed through government regulation.

Nothing more tellingly distinguishes the proponents of legalization and their antagonists than the very different estimations of the potential consequences that might attend an end to prohibition (Inciardi and McBride 1990). James Q. Wilson’s “Against the Legalization of Drugs,” which appeared in *Commentary* magazine, represents a forthright challenge to Nadelmann’s optimistic characterization. Legalization, Wilson asserts, almost certainly would produce a vast increase in drug use with devastating impacts on the most vulnerable. There would be terrible implications for American social life. With a shallow bow to his critics, Wilson concludes:

I may be wrong. If I am, then we will needlessly have incurred heavy costs in law enforcement and some forms of criminality. But if I am right and the legalizers prevail anyway, then we will have consigned millions of people, hundreds of thousands of infants, and hundreds of neighborhoods to a life of oblivion and disease. . . . Will we in the name of an abstract individualism and with the false comfort of suspect predictions decide to take the chance that somehow individual decency can survive amid a more general level of degradation? (1990, 28)

The current great debate over drug prohibition is being conducted in the face of an irreducible level of uncertainty about the potential conse-

quences of legalization. Although the antagonists each acknowledge that there are many unknowns about the consequences of taking even modest steps toward legalization, they bring fundamentally, and in most instances, unbridgeable assumptions about how the risks and benefits of reform should be weighed.

Conclusion

Despite the fact that the range of advocates for decriminalization is broader now than at any point in more than a decade, and that the coalition favoring a maximalist strategy of legalization is more vital than it has ever been since prohibition was instituted in the early part of the century, there is little reason to believe that the demand for radical change will have an immediate impact on policy. In fact, the prospects for even minimalist steps toward decriminalization are far weaker than in the 1970s when, under the threat of returning heroin-addicted Vietnam soldiers, the U.S. government made a major commitment to the medical management of addiction, and when middle-class pressure moved the decriminalization of marijuana use and possession toward becoming a politically viable option in a number of states and local jurisdictions. Indeed, it is no small irony that the current move for decriminalization has arisen precisely at a moment when America may have entered a neoprohibitionist era, one in which the social tolerance for the use of intoxicants—both licit and illicit—may be declining.

What, then, is the significance of the debate over decriminalization? First, and perhaps most important, the sharp assault on the contours of American drug policy has exposed the profound imbalance between public expenditures for law enforcement designed to repress drug sales and use and the funds available for the treatment of individuals whose drug dependency has resulted in personal misery. Even some who reject the need for radical change now recognize that current efforts to support the treatment of drug users who express an interest in managing their addiction to opiates through methadone maintenance or in achieving abstinence from other drug use are grossly inadequate.

Second, the decriminalization debate has forced a consideration of the rationality of policies that currently prohibit the use of a wide range of drugs. By compelling a discussion of the extent to which our conventions have brought us to define some drugs as licit and others as illicit, causing us mistakenly to lump relatively less damaging drugs with more

harmful substances, the proponents of decriminalization may foster a more reasoned discussion of public policy.

Finally, the advocates of decriminalization, no matter how limited or expansive their goals, have served to underscore the enormous economic and human costs of current prohibitionist policies. In so doing they have encouraged the search for alternatives to repression: the willingness of a number of state and local governments to tolerate or fund needle exchange programs in an effort to interdict the spread of HIV infection provides a striking example of such newly found openness.

In conclusion, the call for decriminalization—however broadly or narrowly defined—has revitalized the public debate over the fundamental structure of American drug policy. It has thus made possible a serious examination of the appropriate role of the state in regulating the behavior of competent adults, as well as its obligation to foster the conditions necessary for the existence of civic life and to provide care for the most vulnerable and even for the most socially despised. Perhaps more important, the decriminalization debate has shattered—if only for a moment—the dead weight of tradition that for more than a decade served to close off the possibility of critical inquiry. It is to the spirit of such inquiry that the two *Milbank Quarterly* issues on drug policy are devoted.

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