

# Drugs, the Criminal Law, and the Administration of Justice

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A COMMONLY HELD, BASIC TENET OF LIBERAL jurisprudence is that, in a free society, the criminal law should be used sparingly (Feinberg 1984; Packer 1968). Its use should be limited to controlling actions that harm others (Feinberg 1984, 10–16). It should not be casually available to those who wish to impose their particular views of virtuous conduct on others.

The most famous (and in many ways, most extreme) statement of this position was made by John Stuart Mill in *On Liberty*, originally published in 1859 (revised edition, 1956).

The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. (1859 [1956, 13])

Relying on this principle, Mill found it necessary to oppose laws prohibiting the sale of alcohol.

Other classical philosophers have held less extreme positions about the proper use of the criminal law. Burke (1790 [revised edition, 1955]), for example, might well have been suspicious of Mill's principle and the particular application to laws prohibiting alcohol. He states:

Government is a contrivance of human wisdom to provide for human *wants*. Men have a right that these wants should be provided for by this wisdom. Among these wants is to be reckoned the want, out of civil society, of a sufficient restraint on their passions. Society requires not only that the passions of individuals should be subjected, but that even in the mass and body, as well as in the individuals, the inclinations of men should frequently be thwarted, their will controlled, and their passions brought into subjection. (1790 [1955,68])

Burke would have been particularly suspicious of developing a position on the desirability of a particular law based only on an abstract principle:

But as the liberties and restrictions vary with times and circumstances and admit to infinite modifications, they cannot be settled upon any abstract rule; and nothing is so foolish as to discuss them upon that principle. (1790 [1955,69])

Instead, he would have looked for guidance to the “practice of their ancestors, the fundamental laws of their country,” or the “convention” that informs those fundamental laws.

From these observations, one cannot easily predict what position Burke would have taken with respect to the prohibition of alcohol. To the extent that he viewed drinking as a vice that undermined the requirements of civil society, Burke might well have supported prohibition. On the other hand, to the extent that drinking seemed to be a well-settled custom of the free men of England, and to be reasonably well regulated by convention, Burke, like Mill, might have objected to efforts to restrict liberty and ignore established conventions.

Recently, contemporary philosophers have followed Burke in questioning the primacy that Mill would give to the protection of individual liberty in the construction of social institutions. (I am following Amy Gutmann’s interpretation of such contemporary philosophers as Alasdair MacIntyre, Charles Taylor, Roberto Unger, and Michael Sandel [Gutmann 1985, 308].) Indeed, the “communitarian critics” of liberalism have argued that justice does not reside in institutions that protect individualism at all costs, but rather in “a community whose primary bond is a shared understanding both of the good for man and the good of that community” (MacIntyre 1981, 232–3). Because a common history plays an important role in developing these crucial shared under-

standings, traditions have an important position in these modern theories as well as in Burke's.

Yet the contemporary theorists want to go beyond Burke's commitment to tradition and found the justice of their "shared understandings" in practical reason as well as in tradition. (This much has reason gained in stature as a guide to individual and social virtue since Burke's time!) Thus, for example, Alasdair MacIntyre observes that "when a tradition is in good order it is always partially constituted by an argument about goods the pursuit of which gives to that tradition its particular point and purpose" (MacIntyre 1981, 42). Closer to the subject at hand, John Kaplan recommends abandoning Mill's principle as a guide to formulating heroin policy, attempting instead a serious effort to estimate the good and bad consequences of relaxing current restrictions on its availability (Kaplan 1983, 109-10).

The point is that while the liberal philosophical tradition makes a virtue of economizing on the use of the law to protect individual liberty, the law may also be seen within that tradition as an important instrument in *establishing* a liberal community.

The question to be addressed in this article is whether criminal laws directed at the sale and use of drugs like heroin and cocaine are helpful in establishing a liberal community. It is an important question.

United States law enforcement agencies now arrest more than 1,300,000 citizens each year for the possession, distribution, and sale of prohibited drugs (Bureau of Justice Statistics 1990, 418). More than 250,000 citizens, many of them minorities, are now in jails or prisons for drug offenses.

If the laws that put so many nonconformist citizens in "a terror of apprehension, rendering [their] privacy precarious, and [their] prospects in life uncertain" (Feinberg 1984, 4) cannot be justified as contributing to the maintenance of a liberal community, they should be abandoned. To explore this question, I begin by looking for philosophical guidance from Mill, Burke, and the contemporary theorists. In particular, I start with Mill's principle to explore the possibility of justifying laws against drug use even within its strict purview. This analysis exposes the various ways in which drug use does result in harms to others, and therefore properly makes drug use a concern of others. It also reveals some of the ways in which a liberal community can make moral claims on what might be seen as the purely private conduct of individuals, thereby giving scope for intrusive uses of the law in regulating individual conduct.

Then, because I am also impressed by Burke's advice that laws to curb passions might be necessary to civil society, and that, in any case, it is desirable to understand how the law is functioning in the "particular contrivances" that men have made to deal with the problem of drug abuse, I turn to a brief historical exploration of the role that drug laws have played in contemporary drug policy.

Finally, because I am also influenced by John Kaplan, I turn to the question of whether the laws have any important practical benefits, and whether they can be enforced fairly without doing too much damage to the institutions of the criminal justice system.

## The Philosophical Question

In seeking a philosophical justification for applying criminal law to the control of drug use, there are two reasons why it is helpful to start with Mill's classic statement about the proper role of the criminal law in a liberal society.

First, many agree with Mill's principle. Indeed, his ringing celebration of individual liberty has been echoed by scores of liberal political philosophers (see, for example, Rawls 1971). In somewhat less extreme forms, it has also formed the core of much liberal jurisprudence (Feinberg 1984; Packer 1968). Furthermore, it has found wide, durable appeal in the American political culture, which remains deeply suspicious of governmental interference—particularly when cloaked in claims of beneficence.

Second, on its face, Mill's strict principle seems to be the strongest indictment against using the criminal law to control drug use. Consequently, if an argument can be made for the propriety of regulating drug use even under Mill's extreme principle, it seems far more likely that one could justify its use under the different (and probably more favorable) principles associated with Burke and contemporary communitarian philosophers.

### *Mill's Position on Alcohol Prohibition*

To begin the analysis of Mill's position, one must first understand his position on efforts to prohibit the commercial distribution of alcohol in England. Not surprisingly, he was opposed to such laws. More surprising are his reasons. Two seem key.

First, although the defenders of such laws (including an organization called simply the "Alliance") had sought to insulate themselves from the criticism that they attacked private liberty by focusing control efforts on the commercial distribution of alcohol, Mill understood their ultimate purpose to be to discourage the private consumption of alcohol (Feinberg 1984; Packer 1968). Because Mill believed that the act of drinking belonged clearly in the private domain, and did not inevitably impose substantial and unavoidable harms on others, it was wrong for the state to discourage such conduct. In short, the Alliance, and particularly their secretary, who was the principal spokesperson, was wrong on the merits of the case.

However, Mill also objected to what he took to be the disingenuousness of the legislative proposals, "since the State might just as well forbid [the consumer] to drink wine as purposely make it impossible for him to obtain it" (Mill 1859 [1956, 90]). The disingenuousness was objectionable because the implicit deception made it difficult to have the kind of rational discourse that Mill thought was necessary to the proper formulation of public policy.

Second, and far more important, Mill objected to the philosophical basis for the prohibitionists' argument. He quotes the philosophical position of the secretary of the Alliance at some length to reveal the error of their position:

The Secretary . . . says, "I claim, as a citizen, a right to legislate whenever my social rights are invaded by the social act of another. . . . If anything invades my social rights, certainly the traffic in strong drink does. It destroys my primary right of security, by constantly creating and stimulating social disorder. It invades my right of equality, by deriving a profit from the creation of a misery I am taxed to support. It impedes my right to free moral and intellectual development, by surrounding my path with dangers, and by weakening and demoralizing society, from which I have a right to claim mutual aid and intercourse." (Mill 1859 [1956, 90])

With the target clearly outlined, he delivers his objection:

A theory of social right, the like of which probably never before found its way into distinct language: being nothing short of this—that it is the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular, violates my social right, and entitles me to demand from the legislature the removal of the

grievance. So monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify. . . . The doctrine ascribes to all mankind a vested interest in each other's moral, intellectual, and even physical protection, to be defined by each claimant according to his own standard. (Mill 1859 [1956, 90-1])

Thus, Mill is attacking the broad philosophical position taken by the leaders of the Alliance as well as their particular proposed policy.

Whether Mill would have been as opposed to the prohibition of alcohol if the leaders of the Alliance had been less disingenuous or extreme in their positions remains unclear. What is clear is that Mill was *not* opposed to some forms of alcohol regulation. He was willing, for example, to allow the continued taxation of alcohol on the grounds that something needed to be taxed, and it might as well be something that people could do without. What was wrong was to tax alcohol with the intent of discouraging consumption (Mill 1859 [1956, 102]).

He was also willing to allow some restrictions on who could sell alcohol. As he explained:

All places of public resort require the restraint of a police, and places of this kind peculiarly, because offenses against society are especially apt to originate there. It is, therefore, fit to confine the power of selling these commodities (at least for consumption on the spot) to persons of known or vouched for respectability of conduct; to make such regulations respecting hours of opening and closing as may be requisite for public surveillance, and to withdraw the license if breaches of the peace repeatedly take place through the connivance or incapacity of the keeper of the house, or if it becomes a rendezvous for concocting and preparing offenses against the law. (Mill 1859 [1956, 103])

What was wrong, again, was to limit licenses "for the express purpose of rendering them more difficult of access, and diminishing the occasions of temptation." Such actions were suitable only for the government of children, not free persons.

He was even willing to punish those individuals who had shown their inability to control their drinking by committing crimes while intoxicated.

Drunkness, for example, in ordinary cases, is not a fit subject for legislative interference; but I should deem it perfectly legitimate that

a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, personal to himself; that if he were afterwards found drunk, he should be liable to a penalty, and that if when in that state he committed another offense, the punishment to which he would be liable for that other offense should be increased in severity. (Mill 1859 [1956, 99])

Thus, even Mill was open to some discussion and debate about harms to others that could be caused by purveying or using psychoactive substances, and to search for some devices for controlling those harms. To the extent that drug use harmed others, a justification for legislative control could be established even under Mill's strict principle.

### *The Link Between Drug Use and Crime*

Perhaps the most obvious harm caused by drug use is crime. Indeed, many who support criminal laws against drug use do so precisely because they believe that drug use prompts otherwise law-abiding citizens to commit crimes. As evidence, they point to the fact that many of those arrested for murder, robbery, and burglary use drugs, and that criminal offenders who use drugs are among the most active and dangerous criminal offenders (Chaiken and Chaiken 1982; Chaiken and Johnson 1988; National Institute of Justice 1990).

The problem with this argument is that these facts do not prove that drugs cause crime (Chaiken and Chaiken 1990, 203–39). Perhaps those who are most prone to commit crimes also like to use illegal drugs. Perhaps the reason that drug users commit crimes is that crime is the only way they can earn enough money to pay for the drugs whose cost has been increased by making their sale illegal. Indeed, these alternative explanations gain increased credibility from experiments indicating that the direct pharmacological effects of many illicit drugs (including heroin and marijuana) is to make users pacific rather than aggressive—at least while they are under the influence of the drug (Miczek et al. 1990).

On the other hand, there is also physiological evidence indicating that some drugs do encourage aggression in humans and animals, and some crimes do seem to have been committed under the influence of drug-induced changes in perception or other physiological states (Miczek et al. 1990, 23). In addition, some drugs that make users pacific at one stage of metabolism, change their character at a later stage. As alco-

hol is metabolized, for example, it eventually releases compounds that tend to make people irritable and angry; when drug-dependent opiate users are deprived of opiates they too become irritable (Fagan 1990, 251; Miczek et al. 1990, 7). Finally, there is the worrisome fact that the drug most consistently linked to violence in the home and assaults among strangers in public locations is alcohol—a drug that is freely available (Miczek et al. 1990, 8).

Consequently, although the current observed correlation between drug use and crime cannot prove that drugs cause crime, it cannot be assumed that all of the observed relationship is accounted for solely by the personality of the users or the perverse effects of making drugs illegal. To be sure, if all drugs were made as freely available as alcohol, the observed relationship between drug use and crime might well change. Perhaps a smaller proportion of those using drugs would commit crimes, and more of the drug-related crimes would be associated with periods of intoxication and temporary irritability than with sustained economic need. The point is, however, that the relationship between drugs and crime would not disappear. Indeed, if the overall level of drug use increased as a result of the more ready availability and diminished moral stigma associated with use, the net effect of drug legalization on crime could be to *increase* the absolute level of drug-related violence. This could be true even as the *proportion* of drug users involved in crime diminished.

### *Drug Use and Other Harms*

Even if drug use does not cause crime, it may result in different kinds of harms to others. Some of these effects are tangible and directly attributable to drug use independent of the unintended side effects of current policies. Others are less tangible, or less immediately attributable to drug use in itself.

*Physiological Effects on Infants.* With one important exception, drug use (unlike smoking) does not usually affect the health of others with whom one is in contact. When a pregnant woman uses drugs, it produces an adverse effect on the fetus she nurtures (Besharov 1989, 6–11, 42; Ryan, Ehrlich, and Finnegan 1987, 295–9; Zuckerman 1989, 762–8). This has led some legislators to propose criminalizing such conduct, and a few prosecutors to prosecute pregnant women who use drugs under statutes designed to control other offenses (e.g., drug deal-



ing, or child abuse and neglect [Gomez-Ibanez 1990; *New York Times* 1989; Patner 1989]).

*Accidents Affecting Others.* Drug use also intoxicates people. When intoxicated people drive cars, or work with moving equipment, or direct aircraft landings, they pose immediate hazards, and sometimes inflict real harms on others (Kolata 1990; National Committee for Injury Prevention and Control 1989, 6146; *New York Times* 1987; *Washington Post* 1989). Indeed, researchers in New York and Philadelphia have discovered that when traffic fatalities are tested for cocaine as well as alcohol use, cocaine shows up in a large and disproportionate number of cases (National Committee for Injury Prevention and Control 1989, 119,123).

*Intoxicated Attacks on Others.* Being intoxicated makes people careless and negligent as well as clumsy. In such a state, ordinarily compelling internal inhibitions and external rules can be undermined. As our experience with alcohol teaches us, an assault against a spouse, a friend, or a child is far more likely when one is drunk than when one is sober (Room and Collins 1983). The same could turn out to be true for psychoactive drugs if they were even more commonly used than they are now.

*Dependence-induced Neglect of Others.* Some drugs also produce dependence; they motivate use long beyond prudential limits of finances and reasonable psychological commitment. Often, the dependence interferes with the ability of the drug user to discharge his responsibilities to employers, spouses, or children. As a consequence, these individuals are injured: the employer loses money, the spouse becomes impoverished and dispirited, the children lose the guidance and assistance they need to develop into responsible and resourceful citizens (Johnson et al. 1990, 44–55; National Commission on Marijuana and Drug Abuse 1973, 113–99).

*The Drain on Public Resources.* Finally, because we are all now connected to one another through systems of private and public insurance (to say nothing of the obligation of charity), when a drug user injures himself, or leaves his dependents in an impoverished state, he affects the material well-being of those who will be asked to share the burden of caring for him and his dependents. This, too, is a harm that drug users do to others (Bartels 1973, 460–1).

These are all tangible, direct, important ways in which drug use can affect the well-being of others in the society. Insofar as these are ac-

cepted as important harms to others that can be linked directly to drug use (rather than to the policies now regulating drug use, or to the characteristics of the people who tend to use drugs), they establish part of the justification for criminalizing drug use—even under Mill’s strict principle.

### *Drug Use and Paternalism*

Mill offered an exception to his general principle that criminal laws should be used only to reduce harms done to others for those whose judgment about their own best interests was unreliable. The obvious example was children. As Mill put it:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children. . . . Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury. (Mill 1859 [1956, 125])

On these grounds, Mill, and presumably we, would have had no objection to prohibiting drug use among children.

However, this exception may apply to more than just children. In Mill’s formulation, children are used as an example of a broader class of people who are “still in a state to require being taken care of by others.” That definition could conceivably cover those who are mentally ill. Another possibility is that it could cover those who had specifically shown themselves to be unable to use drugs in ways that did not interfere with their responsibilities to the rest of the society; for example, those who were referred to drug treatment programs because their drug use was implicated in criminal offending, or neglect of their children, or failures in school.

John Kaplan (1983) also raises the question of whether Mill would have “countenanced” broader laws to achieve the practical goal of protecting children (and others) from drugs, and offers the following points:

There is no doubt that, in a society such as ours, making heroin freely available to adults would render completely unenforceable any effort to prevent the young from having access to the drugs. . . . In all probability, Mill would have regarded this kind of reasoning (that such laws were necessary) as allowing the tail to wag the dog. . . .

At the very least, Mill would require that the benefits of protecting youth by prohibiting all access to heroin be balanced against the interference this would cause to the legitimate freedom of adults. . . . In reaching such a balance, we would have . . . to decide difficult empirical questions. . . . This kind of inquiry . . . seems to remove the issue from the realm of principle and place it in that of practicality. (1983, 104)

Thus, the broad exception for “paternalism” given by Mill offers substantial room for justifying the use of state authority to regulate drug use. Regulation may be appropriate for all who cannot be trusted to judge their own interests, or use them wisely. Furthermore, depending on empirical judgments, the controls may have to be wider to protect those who need to be protected. Mill, no doubt, would have resisted many of these extensions, but political philosophers who have a less atomistic vision of society, and a weaker commitment to the protection of liberty, might find room for these extensions.

### *Drugs, Slavery, and Responsibility*

Mill offered a second exception to his principle as an explanation of why a liberal state might reserve the right to prohibit individuals from selling themselves into slavery.

The reason for not interfering unless for the sake of others, with a person’s voluntary acts, is consideration for his liberty. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom. These reasons, the force of which is so conspicuous in this peculiar case, are evidently of far wider application. (Mill 1859 [1956, 125])

Whether drug use fits into this exception is unclear. It depends on whether we understand freedom in a liberal society as a right, or as a responsibility; and how we regard such psychological states as “intoxication” and “dependence.”

Most liberal political theory sees liberty as a right, and assumes that it is desired. One could equally well argue, however, that liberty, in the

form of being accountable for oneself, is also a *responsibility* in liberal societies. It is inalienable not only because it is desired by individuals, but also because society expects and requires people to keep themselves free so that whatever happens to individuals can be justly attributed to them.

Viewed from this perspective, a liberal society could reasonably consider it not only morally unattractive, but also an offense for someone knowingly and intentionally to place himself in a position of irresponsibility. Slavery is the most extreme example. One might, however, view making oneself dependent on drugs, or becoming intoxicated as similar problems of a lesser degree.

### *Community Standards and the Limits of Principle*

Thus, as John Kaplan argued almost a decade ago, Mill's principles are not a bar to the state regulation of drugs like heroin and cocaine (Kaplan 1983, 109–10). There are substantial harms to others that can be more or less directly attributed to the use of these drugs. There are members of society whose judgment about their own interests in drug use cannot be relied upon. Use of some kinds of drugs may arguably put citizens in a dependent, irresponsible state that is inconsistent with the rights and responsibilities of citizens in a liberal society.

Of course, none of these points implies that drug use, possession, or sale should necessarily be the object of a criminal prohibition. Other lesser forms of state regulation may be more appropriate.

Moreover, it is by no means clear that these arguments apply with equal force to all currently illicit drugs. It seems clear, for example, that among the currently illegal drugs the arguments for state control apply far more convincingly to cocaine and heroin than to marijuana or the hallucinogens.

Indeed, going through this analysis, one begins to sense the limitations of arguing the issue of drug regulation solely on the basis of abstract principles without reference to particular drugs, and specific policies. It is simply too hard to make the principles do the work of dictating a differentiated, detailed policy. The principles are too loose, and their application depends on too many uncertain empirical judgments.

Further, the principles seem to require a kind of consistency that, in the real world, is impossible to achieve. The current drug laws are writ-

ten so that if a psychoactive drug has some abuse potential and no legitimate medical use, it must be placed in a category that prohibits all but research uses of the drug regardless of the magnitude of its abuse potential. In effect, the law blots out the differences in these drugs on the grounds that they all represent some abuse potential and have no important medical application.

The strongest reasons that can be mustered for regulating heroin and cocaine provide equally strong justifications for regulating alcohol and tobacco, which are currently beyond the scope of the legislation that regulates the availability of psychoactive and dependence-producing substances.

Many of the extensions of Mill's principle that could be used to justify state regulation of drugs could be applied to gambling, borrowing money, and having children, as well as to the use of psychoactive substances. Yet it is inconceivable that these activities would be regulated in the same way that we regulate drugs.

These problems, of course, could be taken as evidence of the failure of our drug laws to meet the requirements of principle and consistency, and therefore of their immorality. That, in turn, can be seen as an important reason for changing them.

A different way of looking at the inconsistencies, however, is to see them as reflections of a historical process that properly makes claims on drug policy (Sandel 1982). In this conception, the reason we treat tobacco and alcohol differently from heroin and cocaine is not only that their pharmacological impact is different, but also because society encountered them in various ways and learned about them at a slower pace. To contemporary citizens, these drugs carry various meanings with their own philosophical weight and significance.

Indeed, it may be that our experience with alcohol constitutes one of the strongest reasons *not* to legalize drugs such as heroin and cocaine: We already have one huge drug problem. Why add another simply to be consistent? It may also be that we are sociologically better prepared to deal with the threat that alcohol represents than we are to deal with heroin and cocaine because we have accumulated a great deal of experience with this drug. That fact may also be relevant in deciding what our policy should be.

The point is simply that it is not only impractical, but also philosophically wrong to address the issue of drug policy solely from the vantage point of abstract principle (Sandel 1982). The principled arguments; the

tests of the logic that connects principles to specific judgments about drug policies; the search for inconsistencies in our handling of different drug problems; and the concern that the principles we use to justify (or rationalize) drug policy are far too broad because they would also justify actions that are clearly inappropriate are all helpful devices for criticizing and adapting our current drug policies. These devices push in a direction that is almost certainly right: toward a more precise and refined policy that narrows the scope of drug regulation and makes less glaring the observable inconsistencies in the regulatory treatment of varied psychoactive substances.

Nonetheless, in reaching a philosophical conclusion about a proper drug policy, some respect must be given to current community understandings of what these drugs are, and how they might properly be regulated, as well as to abstract principle. We cannot stand entirely outside our history or current politics in reaching a principled conclusion about drug policy without risking significant philosophical and practical errors. For that reason, as part of our philosophical investigation, it is important to understand how society and its policy makers seem to have understood the role of drug laws in the recent past.

## Drug Laws and Drug Policy: A Brief History of Thought

### *The Law Enforcement Era*

From about 1930 to 1960, one could say that law enforcement constituted the entirety of the nation's drug policy (Musto 1987, 210–29; Schur 1962, 191–8). The use of drugs was seen almost entirely as a moral question, with the proper state response being to establish and enforce a criminal prohibition against sale and use. If such use continued, it was not a sign that the laws were wrong or ineffective, only that more people needed to be educated about the moral hazards of drug use, and that more or tougher enforcement was needed to exorcise the evil of drug use from society. It was a time when society was most comfortable with the broad extensions of the Mill harm principle outlined above. Drug use did look like something that produced only harm, irresponsibility, and slavery.

### *The Emergence of Drug Treatment*

Starting in 1960, a new theme emerged in drug policy: the theme that drug users might be viewed as ill people who needed treatment rather than immoral people who deserved punishment (Musto 1987, 239). This view was championed by psychiatrists and physicians, who believed that they had something important to contribute to the solution of what was then only a small national problem.

In response, special treatment facilities for helping drug users recover were funded at both national and state levels (Musto 1987, 239). Equally important, authority was granted to divert drug users who had committed crimes to compulsory treatment programs, and also to compel drug users who had not been convicted of crimes to undergo treatment under civil commitment laws (Musto 1987, 239). The hope was that voluntary and compulsory drug treatment could achieve what the moral injunctions, threats, and purchasing inconveniences associated with laws criminalizing drug use alone could not: reduction of drug use among those who were simply not deterred by the laws.

### *Supply Reduction and Demand Reduction Strategies*

The late 1960s brought substantial increases in illicit drug use. The geological force in this epidemic was the growing, widespread use of marijuana. However, the wave of illicit drug use was capped by a virulent epidemic of intravenous heroin use in the nation's cities, and the widely celebrated use of psychedelics among some of the nation's cultural elites. In devising a response, the nation struggled between a "law enforcement" approach and a "medical" approach—between trusting in "cops" or trusting in "docs."

The ultimate response was a new formulation of the choices in drug policy. Instead of viewing the choices as between law enforcement and medical approaches, policy makers began discussing the issue in terms of "supply reduction" versus "demand reduction" approaches (Domestic Council Drug Abuse Task Force 1975, 1). To some degree, these terms continued to reflect the basic ideological and bureaucratic forces that had previously given us the choice between the law enforcement and medical approaches. Supply reduction efforts seemed to rely principally

on enforcement activities, thereby capturing the attention of previous supporters of the enforcement approach. For their part, demand reduction efforts seemed to rely mainly on drug treatment, thereby gaining the support of earlier champions of the medical approach.

Despite the close parallels in these conceptual schemes, the concepts of supply and demand reduction brought some important new developments to drug policy. For one thing, the shift from the medical approach to demand reduction created more conceptual room for the development of drug abuse *prevention* programs—including, in particular, the growth of drug education and mass media advertising about the hazards of drug use.

More significantly, however, the shift from law enforcement to supply reduction substantially narrowed the scope of law enforcement. In the era from 1930 to 1960, enforcement had been seen as a strategy that reduced *demand* as well as *supply*. Through the law's moral injunctions and threats, users were being targeted along with traffickers and pushers. In the era from 1970 to 1980, law enforcement was more narrowly targeted on drug dealers.

In this later era, the principal justification for investing in law enforcement efforts was the belief that laws and enforcement efforts directed against manufacturers, importers, and distributors would decrease the volume of drugs available at any given price, and would increase the average effective price of drugs. That, in turn, could be expected to reduce overall drug consumption—particularly among those who were not yet fully committed to drug use, but also among the committed by motivating them to seek treatment (Domestic Council Drug Abuse Task Force 1975, 2–4). Indeed, in theory, these measures would work to reduce overall levels of consumption even if the underlying factors influencing demand did not change.

There is some evidence to indicate that this approach worked to halt the most urgent part of the drug problem of the late 1960s and early 1970s, namely, the threatened growth of intravenous heroin use (Bartels and DuPont 1975). It did not, however, roll back heroin use substantially except through the process of attrition of current users. Some of the continuing problems of heroin use were mitigated by the development of publicly supported treatment programs specifically for heroin users (e.g., methadone maintenance clinics, and therapeutic communities) (Anglin and Hser 1990, 417–24).



### *The Cocaine Epidemic and the Limits of Federal Supply Reduction*

In the mid to late 1970s, an epidemic of cocaine use began in the United States. It started in the professional classes, where the adverse consequences of cocaine use were at first shielded from public view. The wealth and social position of the early cocaine users could, for a while, absorb the bad effects that cocaine was having on them. Thus, for a while, the epidemiological data made cocaine look more like marijuana use than heroin: lots of use, but few adverse consequences (Moore 1990a, 11).

By the early to mid 1980s, however, the disastrous consequences of cocaine use began to appear. The number of cocaine users showing up in the nation's emergency rooms and jails began to increase dramatically (Moore 1990a, 12). This was partly the result of the fact that the demands of frequent cocaine use had finally exhausted the resources of the relatively well-off people who were the leading edge of the epidemic. It was also the result, however, of the fact that cocaine use had migrated downward in the socioeconomic scale and was affecting people whose troubles showed up more rapidly in public facilities and registers. Another factor was the appearance of "crack"—a form of cocaine that proved particularly quick and powerful in inducing dependence, and was especially attractive to those with less money to spend on drugs (Moore 1990a, 12).

Federal drug policy was slow to respond to the particular threat represented by cocaine because it tended to see cocaine use against the backdrop of a much larger, more chronic drug problem. Nonetheless, when it responded, it tended to emphasize federal supply reduction efforts over all other approaches (Falco 1989, 25–8). The Department of State increased aid to foreign source countries, and pressured them to increase their drug control efforts. The Department of Defense was mobilized to assist the United States Customs Service, the Immigration and Naturalization Service (INS), and the Coast Guard in dramatically increased efforts to interdict drugs crossing the border by air, land, and sea (*National Journal* 1986, 2106–9; Simon 1990; U.S. Congress 1987). The Federal Bureau of Investigation (FBI) was at long last coaxed into joining the Drug Enforcement Administration (DEA) in investigating cases focused on high-level drug traffickers here and abroad.

### *The Reagan "Demand Reduction" Strategy*

The increased expenditures on supply reduction efforts, coupled with limited spending for drug prevention and treatment programs, "unbalanced" federal drug policy. It led many to claim that the Reagan administration neglected the demand reduction approaches that were a necessary complement of the supply reduction efforts.

In fact, one could argue that there *was* a Reagan demand reduction strategy; it was just one that was based on instruments other than drug treatment. The "Just Say No" campaign launched by Nancy Reagan had a remarkable resonance in the country. Many previously quiescent parents were mobilized to establish local community standards about drug use, and to advocate for more restrictive drug policies. These efforts came a little before an observed change in the attitudes of high school seniors toward drugs, and may partially account for that change (Black 1988).

Potentially as important was the huge effort made to encourage corporate America to crack down on drug use in their workforce, and to rely more on drug testing (Tyse and Dodge 1989). These were unconventional demand side instruments, and both their propriety and efficacy may be doubted. In describing trends in drug control policy, however, it would be wrong to ignore them.

### *Drug Laws as Demand Reduction*

Indeed, from the perspective of this article, there are two important features of the Reagan demand-side strategy. First, it emphasized the mobilization of private community groups, such as parents or employers, to control drug use rather than public agencies, such as schools or public health hospitals. Second, in seeking to discourage drug use, it took for granted the idea that drug use was wrong and dangerous, and sought to discourage it by establishing new standards of conduct and holding people accountable for misconduct rather than by trying to educate or make it easier for people to stop their drug use.

These characteristics of the Reagan demand-side strategy created a context in which law enforcement could once again be seen as a demand-side, as well as a supply-side, strategy. The imagined mechanisms by which criminal laws directed at drug use could practically reduce drug use are essentially three.

First, the promulgation and enforcement of the laws can be seen as serving the same function as public education. The law is seen as a collective understanding about the dangers of drug use, and the establishment of an individual responsibility to avoid drug use. Its promulgation seeks to remind individuals about the reasons for the law, and to increase the law's moral force and legitimacy. It produces its practical results by promoting voluntary compliance among those who are persuaded, and by authorizing others in the community to comment informally on behavior that lies well outside the law. In effect, the law and its promulgation are seen as a way of establishing, or sustaining, or giving force to a community norm.

A second is that where education and moral exhortation fails, deterrence through the threat of penalties for misconduct might still succeed. To hold users accountable for their actions, however, required the development of credible sanctions. Thus, for serious offenses, many states passed minimum mandatory sentences for drug laws; for lesser offenses, many states experimented with the use of novel forms of punishment such as "boot camps"; and for relatively minor offenses, states experimented with the confiscation of drivers' licenses (Task Force on Drugs and the Courts 1991, 5).

If deterrence fails, a third mechanism can be brought into play, namely, the use of continuing state control over individuals convicted of drug offenses to provide them with the motivation and assistance to abandon their drug use. In the case of ordinary crimes, this mechanism is called "rehabilitation," and is widely (but perhaps erroneously) discredited (DiIulio 1991, 104-13; Sechrest et al. 1979, 279). In the case of drug offenses, or of drug users convicted of nondrug offenses, rehabilitation takes the form of compulsory urinalysis programs imposed as a condition of probation or parole, compulsory drug treatment programs, or drug treatment programs inside prisons (Anglin and Hser 1990, 424-8, 437-9; M. R. Chaiken 1989; Wish, Toborg, and Bellasai 1988). The literature on these sorts of programs indicates that they are successful in suppressing drug use and criminal conduct among their participants (Anglin and Hser 1990, 425-6, 429, 438-9).

## The Effectiveness of Drug Laws

Thus, the current conception of the role of laws and law enforcement in drug policy encompasses the idea that these mechanisms can be effective

in reducing the supply of drugs (and through that mechanism, reduce overall consumption) and that they can directly affect the demand for drugs (through the mechanisms of moral exhortation, deterrence, and rehabilitation). An important question is whether there is any empirical evidence to support these views.

### *Supply Reduction Effectiveness*

The view that the drug laws can reduce the overall supply of drugs and thereby reduce consumption below what it would have been if the drug laws were not affecting the supply must overcome skepticism about the efficacy of enforcement efforts to reduce the supply, increase the price, and limit the availability of drugs. It must also overcome the belief that the demand for drugs is constant or “perfectly inelastic” so that the same quantity is consumed no matter what the price.

In considering the question of whether drug laws can reduce supply, it is important to keep in mind what is being claimed. It is not being claimed that the drug laws will eliminate all drugs being supplied to illicit markets in the United States, nor is it being claimed that the efforts will price the drug out of the reach of all consumers nor that all drug dealers will be arrested and prosecuted. The only claim is that the quantity of drugs supplied to illicit markets at any given price will be less than would be true in a world in which the drugs were legal, and that this will, given a constant demand for drugs, tend to increase the price and reduce the quantity of drugs actually consumed. Thus, evidence that drugs continue to come into illicit markets, or that some users still purchase the drugs, or that many dealers are still active is not necessarily evidence of a “failure” of supply reduction efforts. The crucial question is whether the quantity of drugs supplied at any given price has gone down, and by an amount sufficient to discourage a meaningful amount of drug use that would otherwise occur.

Note also that laws prohibiting the manufacture and sale of drugs produce their effects on the supply of drugs through two quite different mechanisms. The obvious one is that the laws expose drug dealers to arrest and prosecution by law enforcement agents. That risk must be taken into account by dealers, forcing them to engage in expensive activities to minimize the risk, and to demand a higher price from consumers as compensation for the risks they run (Moore 1977). That is what reduces the supply and increases the price of illicit drugs.

The less obvious mechanism is that the drug laws deny drug dealers

the ordinary protections they would have as legitimate businessmen. They cannot rely on the law to enforce contracts, nor to protect them from extortion or theft. In short, they are exposed to thieves as well as law enforcement agencies. That, too, increases their risk and forces them to invest in expensive security efforts, and to demand additional compensation for their danger.

The net effect of these mechanisms is to increase the price of illicit drugs substantially beyond the price that would be charged in a legal market for these drugs. Heroin is 60 times more expensive than legal morphine; illegal cocaine is 15 times the legal price (Moore 1990b). Illegality probably accounts for most, if not all, of these price differentials.

It is also true that there have been periods in our recent history when supply reduction efforts have clearly succeeded in limiting the supply of drugs. These are periods in which the measured price of drugs in illicit markets has increased even as the measured quantity of drugs consumed has fallen (Boyum 1989). There were supply reduction successes in dealing with heroin from Turkey in the early 1970s, and from Mexico in the late 1970s (Moore 1990b). There may also be a supply reduction success in dealing with marijuana over the last eight years (Moore 1990b). However, there has also been a supply reduction failure: the supply of cocaine seems, until very recently, to have increased despite enormous efforts to reduce it (Moore 1990b).

Supply reduction successes are not particularly valuable if they do not result in reduced consumption. Indeed, if the only consequences of law enforcement pressure are that the prices increase, with higher revenues to dealers, while quantity consumed remains constant, one might conclude that supply reduction efforts made the problem worse by enriching (at least in financial terms) the drug dealers who were part of the problem. To be valuable to drug policy, supply reduction efforts must succeed in reducing drug consumption. That claim runs up against the common view that, because many drug users are addicted, or because the underlying causes of drug use remain unaffected, supply reduction efforts will not succeed in reducing consumption.

In assessing these arguments, however, it is important, once again, to keep in mind what is being claimed. Some confuse the reasonable view that drug use is "inelastic" (i.e., *relatively* unresponsive to changes in price and availability) with the claim that drug use is "perfectly inelastic" (i.e., *entirely* unresponsive to changes in price and availability). Furthermore, they base their claims on the addictive quality of drugs.

Yet, they ignore the fact that there are many new users whose desire

for drugs might be less than absolute. They also ignore the fact that many users "mature out" of drug use voluntarily, and that the availability of drug treatment programs might provide a path out of drug use. The presence of new users, maturing-out users, and treated users in the overall population of drug users would make the aggregate demand for drugs far more elastic than one might at first assume (Moore 1977). In fact, the best estimates of the price elasticity of demand for drugs like heroin center around 0.2, which means that a doubling in the price of drugs would result in a 20 percent decrease in the level of use (for estimates of elasticity of demand for drugs other than heroin, see Moore 1990). This may not seem particularly significant until one remembers that the drug laws increase the price of drugs by much more than 100 percent.

Thus, there are some analytic and empirical reasons to believe that drug laws, operating on the supply of drugs, can reduce drug consumption even if the demand for drugs remains constant.

### *Demand Reduction Effectiveness*

The claim that drug laws can effectively reduce demand through moral injunction, deterrence, and rehabilitation is far more difficult to evaluate because it is a relatively new claim.

The first part of that argument (that moral injunction can succeed in reducing drug use) must overcome skepticism, based on beliefs about the assumed inelasticity of demand and the idea that "forbidden fruits" are more attractive than those that are legal and normal (Nadelmann 1988, 28-9). Empirical evidence here is harder to come by. It may well be that some whose inclinations are already antisocial and risk favoring may be additionally attracted to drug use by the fact that its use is officially discouraged. There may be others, however, for whom the official disapprobation works to reduce their inclinations to experiment—either directly by persuading them that drug use is a bad idea, or indirectly by the effect of the laws in mobilizing a more determined, sustained opposition to drug use by parents and others in the community. The net effect will depend on the initial distribution of individual orientations throughout the society, the credibility of the messages, and the reasonableness with which the obligations are enforced.

What seems more solid, however, is that both urinalysis and treatment under court order as an alternative to jail is successful in suppress-

ing crime and encouraging employment, improved parenting, and so on. There is some evidence to indicate that a program of continued urinalysis can motivate drug users to reduce their drug use, and presumably, improve their social functioning. There is also evidence to indicate that compulsory treatment programs as an alternative to jails and prisons can reduce drug use and criminal misconduct, and enhance employment (Anglin and Hser 1990). This part, at least, of the demand-side strategy seems to work.

It is thus by no means obvious that these laws are without practical effect in shaping the character of the drug problem the nation faces. They may prevent some drug use that would otherwise occur and help to encourage current drug users to abandon the habit.

Indeed, it is heartening that the laws finally seem to be taking effect even with respect to cocaine use (Black 1988; Office of National Drug Control Policy 1991, 4). Of course, one could claim that the changing attitudes and reduced cocaine use are really the result of hard-earned, concrete experience with the drug and the social learning that accompanies that experience, rather than the effect of laws. In this view, the laws simply float on top of social attitudes and neither influence nor are affected by them.

One could also say that when the community learns about something (for example, that cocaine use is dangerous for people), it wants to encode that learning in laws so that it can remember. Perhaps laws emphasize what has been learned, and extend that learning not only across individuals in the society without first-hand experience, but also into the future to try to warn future generations of the problem. In short, the laws may help to strengthen informal community norms, and to allow the passage of information from one generation to the next (Parachini 1986).

## The Fairness of the Laws

Over the long run, the effectiveness of the drug laws in mobilizing communities to resist drug use depends not only on the sense that they are, in fact, focused on a serious problem, and that they are effective in dealing with it, but also on whether they are perceived to fall fairly on the general population, and deliver their benefits somewhat equally.

There is a worry here, for the drug laws may be applied differently and produce different effects in well-organized communities on the one hand, and in less well-organized communities on the other. The concern is less about the fairness of the arrests than about the overall effects of drug enforcement.

Begin with the assumption that the illicit drug trade is far more likely to find a foothold in disorganized, poor communities than in better-organized wealthy communities. This will be true to some extent because the ties that bind the less well-organized communities to the norms of the broader society are weaker, in part because individuals in the communities might be more easily tempted by the economic opportunities associated with selling and the pleasures of drug use, and to a certain degree because police services are less adequate and more easily corruptible.

The effect of these forces is to create a world in which the poor community's commitment to controlling drug use will be weaker than that of other communities. Their loyalties will be divided. Most will want to resist drug use and drug dealing, but there will be others who wish to continue. Dealers, users, and relatives of both have an interest in maintaining the trade. Indeed, these incentives may become particularly strong if the local drug markets are supported by buyers from outside the community. These revenues will make local drug dealers even more economically powerful.

The net result is to create communities in which a great deal of drug enforcement will occur, but with little positive impact on the local communities. The arrests will not necessarily trigger any other response in the community because there are few other resources to be used in combatting the local problem, and many who are implicated in the trade. Lack of resources will prevent those arrested from defending themselves against the charges and shaping the disposition to their interests. In these communities, then, drug law enforcement may seem to be a vicious and cynical effort.

In contrast, in a better-organized, wealthier community with more economic opportunities, drug using and dealing will be attractive to a far smaller fraction of the population. Instead of building local markets that would be vigorously resisted, the users will go outside the community, usually to the poorer, less well-organized communities. The local dealers who operate will remain small scale. Law enforcement, which enjoys the support of the local community, will be able to keep the



problems small and localized. Indeed, any arrests that occur are likely to galvanize the community into more effective action across a wider front. Moreover, the parents and friends of the person arrested are likely to be able to defend the arrested person effectively, and to shape the dispositions in useful directions.

The net result of these dynamics, of course, is that the disorganized communities end up paying much of the price associated with having and enforcing laws against drugs while receiving few of the benefits. The better-organized communities pay less of the price, and obtain far more of the benefits. This observation has two crucial implications for the administration of the drug laws.

First, enforcement efforts must be supplemented with treatment and prevention efforts, not only generally, but particularly in communities that are disorganized and besieged by drug problems. This is important, not only to be effective, but also to be just and fair. Anything less than that leaves the entire system vulnerable to a charge of neglect and discrimination that must ultimately undermine the effectiveness of the laws.

Second, the drug laws must be enforced so as not only to respond to the interests and concerns of the local communities, but also to help build the community's own efforts to control the problem. Both the overall operations and the handling of individual cases should be influenced by the community's ideas about what is in their best interest in controlling the drug problem. This is no easy task—particularly in a world where the criminal justice system is already under pressure and overused.

## Effects on the Criminal Justice System

In reckoning the effects of using the criminal law to deal with drugs, one must also keep track of the impact of these laws on the institutions of the criminal justice system, and their ability to live up to their fundamental values and principles. One's first impression is that the heavy involvement of the criminal justice system in dealing with drug use cannot help but corrupt and demoralize the system.

One important consequence of using the criminal law to combat the drug problem is that the criminal justice institutions will be enlarged relative to other social institutions. Spending on police, courts, and pris-

ons is growing faster than spending on welfare and education (Strasser 1989, 36–41). That may be an important effect in its own right.

In addition, the sheer volume of drug cases may be weakening the state's capacity to dispense justice in other areas. Corrections expenditures as a proportion of state-level general expenditures have risen from 1.6 percent in 1979 to 2.4 percent in 1989 (Herman B. Leonard, personal communication, 1991). The response to cases of rape, robbery, and burglary may now be degraded, to say nothing of our ability to deliver any kind of civil justice (Task Force on Drugs and the Courts 1991, 7–9). That too may be a distorting corruption of the system.

The biggest concern is that the increased scale of drug arrests will end up corrupting the institutions of the criminal justice system because drug cases are intrinsically corrupting. To make drug arrests, police agencies must rely on some of their most intrusive investigative methods, including informants, undercover operations, and wiretaps (Manning 1980). In conducting such operations, police may be tempted by bribes, misled by informants, or spurred on to inappropriately aggressive investigations.

To handle the press of cases the police generate, the courts transform their process of adjudication into an administrative process in which procedural steps are eliminated and deals are made (Task Force on Drugs and the Courts 1991, 26–35). In this transformation, both the rights of defendants and the interests of the broader community may be sacrificed. Even in the best of circumstances, judges facing drug-involved defendants are motivated to consider offender characteristics as well as the seriousness of offenses in making their disposition, with significant implications for the apparent justice of the sentences meted out and the training that is demanded of court personnel.

In short, the institutions of the criminal justice system may be dramatically transformed by the difficulties of dealing with such a large quantity of drug cases. These effects may last long after the current drug crisis has abated.

There is some good news here. The pressure of dealing with the drug cases has occasioned important improvements in the orientations and performance of the criminal justice system. Among police agencies, many police executives have rediscovered their fundamental dependence on local communities to help them achieve their objective, and they have begun experimenting with new ways of policing cities that are designed to build working partnerships to deal effectively with local neighborhood

problems (Sparrow, Moore, and Kennedy 1990). These fledgling efforts promise to change the face of policing in the future, and to make the police less aloof and more helpful in restoring civility to urban streets. In the courts, some long overdue management reforms have been implemented that will not only reduce the costs of court processing, but also increase consistency and enhance accountability (Task Force on Drugs and the Courts 1991, 11–13, 19–35). Probation and corrections departments are undertaking a great many innovations and experiments with alternatives to incarceration (DiIulio 1991, 60–102). These are all innovations, partly occasioned by the drug crisis, that will improve the performance of the system in the future.

## Conclusion

The nation is paying a heavy price for confronting its drug problem, specifically the current epidemic of cocaine use, with the criminal justice system. By rolling out the criminal law, and the institutions of the criminal justice system, we are committing some of our most powerful (and precious) weapons to the fight. In judging whether this is wise, it is proper to be keenly aware of the potentially corrupting effect of this effort on the principles that properly guide a liberal state, and on the institutions of the criminal justice system. It is also proper to be skeptical of their effectiveness. Viewed from this vantage point, it seems clear that we are probably at (if not beyond) the limit of these systems to be used justly and well in dealing with drug use. Over the next few years, we should work hard to reduce our reliance on them and to build up our treatment and prevention systems.

At the same time, one should not let our concerns about these effects distract our attention from the consequences of failing to deal effectively with drug use in general, and the cocaine epidemic more particularly. True, there may have been natural limits to the cocaine epidemic that we are now living through. Left to expand according to its own rules, however, a cocaine epidemic will inflict a great deal of damage on the society. And not all of the adverse consequences of cocaine are caused by its illicitness.

Moreover, dealing with the cocaine epidemic through other institutions such as schools, public health system, and so on, would have created enormous consequences for those systems, which are already

straining under other demands. Indeed, it is hard to imagine a world in which school systems had to confront drug use without the assistance of criminal agencies, and in which the country's health system had to cope suddenly with more casualties of drug use.

Laws against drugs and the criminal justice system both have an important role to play in helping the nation deal with its drug problem. The challenge is to use these instruments skillfully, and with attention to the potential damage that using them can have for the society at large and for the instruments themselves. Indeed, as noted above, the challenge to criminal justice institutions might even be used to strengthen rather than weaken them. As the police reach out for more effective partnerships with communities, particularly poor, minority communities; as the courts reach for more varied dispositions and a principled basis for making them; and as the probation and corrections departments invent new forms of punishment alternatives to incarceration, we may come to see the criminal justice system as it ought to be seen: not as a device for exacting vengeance or for banishing individuals from the society in the vain hope that they will not return, but instead as a device for imposing collectively agreed-upon obligations on one another, and for ordering relations in a civil society.

The institutions of the criminal justice system are hardly society's favorites. Yet when they are used skillfully and well and justly to remind us of our duties to one another, they become an important part of what limits drug use in the society, and makes a liberal society possible.

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