

## Substance Abuse and the Criminal Law

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The United States, and to a lesser extent, much of the rest of the free world are plagued by two drug problems: (1) The harm that drugs do to people and (2) the harm that criminal laws against drugs do to people. The first group of harms are pretty well documented, and have been presented at this conference among other places. There is no doubt that illegal drugs have caused great harm to much of the populace (though it is worth noting that probably legal drugs like tobacco and alcohol have done far more harm<sup>1</sup>). Of course, defenders of anti-drug laws note that the reason marijuana, cocaine, and heroin cause less harm than cigarettes and alcohol is that the very fact of their illegality reduces their overall consumption.<sup>2</sup> Consequently, they argue that unless such drugs remain illegal, they will cause as or greater problems than tobacco and alcohol.<sup>3</sup>

### Introduction

The harm that criminal laws against drugs do are frequently, but wrongly blamed on drugs. *E.g.*: “You think drugs don’t do harm. Tell that to the widow of the law enforcement officer who was killed while trying to make a drug bust.” What the speaker does not realize is that drugs did not cause the death of that officer. Attempts at drug interdiction did.<sup>4</sup> Is the “war on drugs” worth it? I’m tempted to say “Ask the slain officer’s widow”? But candidly that is not a fair question. Just as in a war that should be fought, soldiers will be killed, and on a big picture basis, their deaths may be worth it. But, I’m not sure that the war on drugs belongs in that category.

The fact that drugs such as marijuana, heroin, and cocaine are not legally available means

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<sup>1</sup> In 2000, there were 2,687 more alcohol-induced deaths (18,539) than drug-induced deaths (15,852) in the United States, according to the Center for Disease Control and Prevention. Arialdi M. Minino & Betty L. Smith, *Deaths: Preliminary Data for 2000*, NATIONAL VITAL STATISTICS REPORTS, Oct. 9, 2001, at 17, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr49/nvsr49\\_12.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr49/nvsr49_12.pdf); JL Fellows et. al., Center for Disease Control and Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs — United States, 1995–1999*, 51 MORBIDITY AND MORTALITY WEEKLY REPORT 300 (2002), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf>.

<sup>2</sup> Alcohol use rates respond to the legal availability of alcohol. For example, “Lowering the drinking age in the early 1970s was accompanied by increases in consumption, while alcohol consumption and alcohol-related fatalities showed marked declines after 1987, when most states had increased the drinking age to 21.” THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, 9 (2007), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs07/ndcs07.pdf>

<sup>3</sup>The goal of drug laws is to reduce drug use and prevent the harm that results from drug use. OFFICE OF NATIONAL DRUG CONTROL POLICY, MARIJUANA MYTHS & FACTS, 22 (n.d.) [http://www.whitehousedrugpolicy.gov/publications/marijuana\\_myths\\_facts/index.html](http://www.whitehousedrugpolicy.gov/publications/marijuana_myths_facts/index.html) (last visited March 6, 2008); Proponents of keeping illegal drugs illegal point to the markedly higher use rates of legal drugs, alcohol and tobacco, compared to that of illegal drugs to illustrate the relationship between use and legality. “Roughly 109 million Americans used alcohol at least once a month. About 66 million Americans used tobacco at the same rate. But less than 16 million Americans used illegal drugs at least once a month.” DRUG ENFORCEMENT AGENCY, SPEAKING OUT AGAINST DRUG LEGALIZATION, 15 (2003) [http://www.dea.gov/demand/speakout/speaking\\_out-may03.pdf](http://www.dea.gov/demand/speakout/speaking_out-may03.pdf) (last visited March 6, 2008).

<sup>4</sup>Of course, technically, the drug dealer proximately caused the agent’s death by his unlawful shooting. But as between drugs and drugs being criminal, the latter is more responsible for the death than the former.

that the only place one can purchase such items is from a criminal. If by the wave of a magic wand, we could eliminate the demand, no problem. Nobody wants drugs, the dealers are out of business, problem solved. The trouble is that the real world doesn't work that way. In the real world people want these drugs. As a result they buy them from the only available source: criminals. And frankly, if criminals are in the risky business of selling the drugs to make money, you can be sure that they won't be cheap.

Well what harm does this do? A brief, but incomplete, catalogue includes the death of DEA agents and other police officers<sup>5</sup>, gang members killing each other (and innocent bystanders) in turf wars over drug territories<sup>6</sup>, drug pushers trying to hook teenagers with "free samples" to ensure a continuing clientele<sup>7</sup>, overcrowded prisons<sup>8</sup>, populated substantially with drug dealers and users<sup>9</sup>, and sky rocketing prison costs to ensure continued housing of drug dealers and other criminals<sup>10</sup>, a substantial increase in crime by would be users who have to turn to prostitution, robbery, and even murder to obtain money to afford their drugs because of the inflated prices charged by criminals.<sup>11</sup>

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<sup>5</sup>Of 633 known police assassins between 1997-2006, 112 were known drug dealers. FEDERAL BUREAU OF INVESTIGATIONS, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, Table 19, (2007), available at <http://www.fbi.gov/ucr/killed/2006/table19.html>; Twenty seven officers nationwide were killed while attempting to make drug related arrests. *Id.* at Table 43 available at <http://www.fbi.gov/ucr/killed/2006/table43.html>.

<sup>6</sup>Many of the victims of homicide in New Orleans are people involved in the "drug trade and the turf wars and crimes of vengeance that it creates." Police predict that as much as 15 percent of the city's homicides involve innocent bystanders. Steve Ritea, *In the Wrong Place*, TIMES-PICAYUNE, Feb. 12, 2004, at Nat'l 1, available at <http://www.nola.com/speced/cycleofdeath/index.ssf?/speced/cycleofdeath/wrongplace.html>; see also Kathleen Cullinan, *The Killing of Three Bonita Men Linked to Drug Turf War, Investigation Reports Reveal*, NAPLES DAILY NEWS, February 27, 2008, at A1, available at <http://www.naplesnews.com/news/2008/feb/27/killing-three-bonita-men-linked-drug-turf-war-inve/>.

<sup>7</sup>"If you're a drug dealer you have to target a new audience all the time . . . . It's Marketing 101 for drug dealers." DALLAS (AP), *Drug Dealers Target Younger Customers*, USA TODAY, May 8, 2007, available at [http://www.usatoday.com/news/nation/2007-05-08-drug-dealers-youth\\_N.htm?csp=34](http://www.usatoday.com/news/nation/2007-05-08-drug-dealers-youth_N.htm?csp=34) (Quoting DEA spokesman Garrison Courtney). Drug dealers mix drugs with candy, give the drugs names like "cheese" and "strawberry quick" instead of calling it what it really is (e.g., heroin or methamphetamine), and price the drugs extremely low (\$2 a dose for "cheese") in order to appeal to children. *Id.*; see also Joe Palazzolo, *Drug Dealers Target Youth with 'Cheese'*, THE BALTIMORE EXAMINER, May 11, 2007, available at [http://www.examiner.com/a-722140~Drug\\_dealers\\_target\\_youth\\_with\\_cheese.html](http://www.examiner.com/a-722140~Drug_dealers_target_youth_with_cheese.html) (Capsules containing a mix of heroin and cough medicine are commonly referred to as "starter heroin.").

<sup>8</sup>At the end of 2006, 23 State prison systems operated at more than 100% of their highest capacity. The Federal prison system was operating at 37% above its rated capacity. Additionally, seventeen States operated at between 90% and 99% of their highest capacity. WILLIAM J. SABOLET ET. AL., PRISONERS IN 2006, 5-6 (2007), available at <http://www.ojp.gov/bjs/pub/pdf/p06.pdf>.

<sup>9</sup>Drug offenders comprise 53% of all federal prisoners. WILLIAM J. SABOLET ET. AL., PRISONERS IN 2006, 9 (2007), available at <http://www.ojp.gov/bjs/pub/pdf/p06.pdf>.

<sup>10</sup>"In 2007, according to the National Association of State Budget Officers, states spent \$44 billion in [state] tax dollars on corrections. That is up from \$10.6 billion in 1987, a 127 percent increase when adjusted for inflation." Counting money from bonds and the federal government, total state spending on corrections was \$49 billion. At the current rate prisons are expanding, experts predict states will spend an additional \$25 billion by 2011. Adam Liptak, *More than 1 in 100 U.S. Adults are in Prison*, INTERNATIONAL HERALD TRIBUNE, February 29, 2008, available at <http://www.iht.com/articles/2008/02/29/america/29prison.php>

<sup>11</sup>Because illegal drugs are priced at hundreds of times their actual cost, drug users must often turn to crime to finance their habits. Consequently, the higher the price of the drug, the more the user needs to steal in order to buy

So what should we do? Should we simply withdraw from the drug enforcement business and let the former criminals continue their marketing and hope that legitimate entrepreneurs will enter and perhaps drive out the criminals? Hardly. We need to be pro-active to prevent drugs from becoming (or remaining) a serious health problem. But we do need to eliminate, or at least reduce, the harm that comes from drugs being criminal.

My proposal is for the Government to go into the business of selling marijuana, cocaine, and heroin. The Government should sell these items at cost, thereby eliminating any likelihood of criminals being able to compete. I would not, however, simply allow anybody to buy the drugs. Potential purchasers would be given information regarding the drugs, including such things as the difference between smoking, and otherwise ingesting, marijuana. They would also be apprised of all of the potential bad things the drugs do (like impairment of depth perception and judgment<sup>12</sup>). Only after reading this information, and passing a test on it (similar to a driver's license test) would a person be allowed to buy the drug of his choice.

There is one further role that I would assign to Government: Negative advertising, as the Government currently does with cigarettes. Negative advertising has worked to reduce consumption.<sup>13</sup> With the money saved from the staggering costs of the war on drugs, the Government should be able to literally saturate the airwaves with negative drug messages. Hopefully, this will reduce the demand for drugs, though candidly nobody knows how much.

Of course, there is the possibility that these limitations on purchase may still leave room for the underworld peddler. I do not believe that there would be much room, however. The price differential would be so great that all but the most incompetent purchasers would still choose to

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the drug. *Twelve Reasons To Legalize Drugs*, <http://www.druglibrary.org/think/~jnr/12reason.htm>, reprinted from THE PRAGMATIST, Aug. 1988; “[t]he illegality of drugs increases crime, partly because some users turn to crime to pay for their habits . . . .” DRUG ENFORCEMENT AGENCY, DRUG LEGALIZATION: MYTHS AND MISCONCEPTIONS, Ch. 2, available as a reprint at <http://www.druglibrary.org/Schaffer/debate/myths/myths3.htm> (Quoting James Q. Wilson, *Against the Legalization of Drugs*, COMMENT, Feb. 1990, at 21, 26.).

<sup>12</sup> “Studies [on drivers under the influence of marijuana] show that performance deficits have been found in tracking, reaction times, visual function, and divided attention.” DOUGLAS J. BEIRNESS & CHRISTOPHER G. DAVIS, CANADIAN CENTRE ON SUBSTANCE ABUSE, DRIVING UNDER THE INFLUENCE OF CANNABIS 2 (2006), available at <http://www.ccsa.ca/NR/rdonlyres/56FFA36B-58FC-402C-9DFF-2257514FDE7B/0/ccsa0114812006.pdf> (Citing studies by e.g., Ashton 2001; Berghaus and Guo, 1995).

<sup>13</sup> Targeted mass media campaigns in conjunction with school programs have proven to be effective in preventing youth from smoking. “The results provide powerful evidence of the influence of mass media messages on health behavior decisions made by young people.” U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTER FOR DISEASE CONTROL AND PREVENTION, REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 76-77 (2000), available at [http://www.cdc.gov/tobacco/data\\_statistics/sgr/sgr\\_2000/00\\_pdfs/FullReport.pdf](http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2000/00_pdfs/FullReport.pdf); In 1988 California passed Proposition 99, which allocated money to programs dedicated to reducing tobacco use, one of which was negative advertising. Since the passage of Proposition 99 California's smoking prevalence has declined substantially giving it the second lowest adult smoking rate in the United States. In 2003, smoking prevalence was down approximately 29 percent since the enactment. Press Release, California Department of Health Services, 9th Circuit Court of Appeals Upholds California's Tobacco Education Media Campaign (Sept. 28, 2004) (on file with author), available at [http://www.dhs.ca.gov/tobacco/documents/press/pressrelease\\_04-58.pdf](http://www.dhs.ca.gov/tobacco/documents/press/pressrelease_04-58.pdf).

buy from the government even if the user does have to pass what he/she may consider a stupid test.

I have chosen to limit my proposal to heroin, cocaine, and marijuana. Consequently there may still be room for the underground meth lab. My sense is that meth is marketed to people who cannot afford heroin or cocaine. So because of the great harm that meth can do, and the likelihood of reduced demand if current users could substitute cocaine or heroin for the same or less money, the market for meth would be sufficiently small so as to be manageable.

Under my proposal, sale of drugs outside of Government stores would continue to be criminal. Thus marijuana, cocaine, heroin, and of course meth dealers would still be subject to prosecution. What my proposal seeks to do is reduce demand for a drug dealers product so that the number of such dealers will be reduced to a tiny fraction of today's numbers.

Let us look at the advantages of this proposal. First, there will be a lot fewer deaths than we have under the current system. Among the lives saved will be police officers who will no longer be the target of drug dealers. Innocent citizens will be saved from the murders committed by drug users to get drugs. Additionally, they will be saved from being murdered by drug dealers to whom they owe money. And, of course, to the extent that gang wars are over drug distribution territory, these killings will also no longer happen.

Second, the criminals who sell these drugs will be out of business. This not only includes organized crime, which is significant in itself. It also includes terrorist organizations. The president of the United States' own report suggests that 18 of the 42 terrorist organizations operating in the United States finance themselves by selling drugs.<sup>14</sup> Thus my proposal will not only take a bite out of crime, it might take a bite out of terrorism itself.

Third, drug dealers will no longer have an incentive to get teenagers hooked on drugs. Today, the lifeblood of the drug dealer is obtaining new customers. Hence giving drugs to teenagers is not an uncommon practice.<sup>15</sup> Once the Government controls the distribution of drugs, this will no longer be the case<sup>16</sup>. The Government obviously has no interest in hooking a teenager, and the drug dealer has no financial incentive because once the teenager reaches 18<sup>17</sup>, he

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<sup>14</sup>As of February 2007, 18 of the 42 organizations on the State Department's List of Foreign Terrorist Organizations are linked to illicit drug trafficking. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, 27 (2007), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs07/ndcs07.pdf>

<sup>15</sup> See *supra* note 7.

<sup>16</sup>According to the National Survey on Drug Use and Health, alcohol and tobacco, which are government controlled drugs, have a 10 percent lower rate of abuse or dependency for past-year users between the ages of 12-17 than that of marijuana, which of course is not a government controlled drug. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, 5 (2007), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs07/ndcs07.pdf>.

<sup>17</sup>I prefer 18 to 21 because I think it will further reduce a drug dealer's incentive to hook teenagers. If the dealer can get a potential customer hooked at 14, he would have him for seven years if the age for legal purchase were 21.

will be able to buy drugs from the government store.

A fourth advantage is likely to be a significant reduction in the prison population. Because so high a percentage of our prisons are populated by drug dealers and drug users,<sup>18</sup> it stands to reason that substantially reducing the number of drug dealers and drug users who commit drug related crimes will gradually reduce the prison population. Of course, when this happens there will be more room to incarcerate violent offenders, perhaps for a longer period of time if that is deemed socially desirable. Obviously, we will also reduce the need to build prisons and perhaps can use that money on schools or highways. Or better still, we could use the funds to build new drug rehabilitation facilities, and make them available to current drug addicts at little or no cost.

With all of these positive virtues emanating from my proposal, are there any potential problems that should give us pause? I have identified two: (1) The Government by selling drugs may appear to be endorsing them, and (2) The ready availability of drugs may increase total drug use. I will address each of these in turn:

Undoubtedly, Government “drug” stores send a mixed message. It advertises against drugs, yet it makes drugs available to the populace. I am convinced, however, that if the advertising and the negative message in the booklets upon which potential drug users will be tested are strong enough, the populace will understand that the Government’s willingness to sell drugs in no sense amounts to an endorsement.

The other concern is that the ready availability of drugs might increase the total drug use. Thus the harm that comes from drugs themselves, as opposed to drugs being criminal, might actually escalate. I do not deny that this is possible. I am virtually certain that some number of people will use drugs because they are legal, who otherwise wouldn’t have used them. Although nobody can be sure, I would expect, given the negative advertising and the fact that our hypothetical law abiding person was never previously sufficiently tempted to use drugs when they were illegal, that the number will be relatively small.

Furthermore, these people have to be traded-off against those who will never use drugs because they avoided being victimized by the drug dealers’ “free samples.” Whether the number of people who will use drugs because they are cheap and legal exceeds the number who will not use drugs because they weren’t hooked as teenagers is not clear. If I had to guess, I would guess that my proposal would bring about an actual reduction in drug use.

Buttressing my guess is the documented fact that initiating drug use at a young age is a

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<sup>18</sup>Drug offenders comprise 53% of all federal prisoners. WILLIAM J. SABOL ET. AL., PRISONERS IN 2006, 9 (2007), available at <http://www.ojp.gov/bjs/pub/pdf/p06.pdf>.

strong predictor of later drug use in adulthood addicts became such by or before age 20.<sup>19</sup> By insulating this segment of the population from the drug dealer's profit motive, the number of drug addicts are likely to be reduced. First time buyers from Government stores are almost certainly less likely to become addicted than first time buyers from drug pushers.

Even if I am wrong, however, I still like the proposal. As between the adult who voluntarily ingests drugs after receiving and understanding Government issued warnings and the child who is hooked on drugs by a drug dealer, I would rather protect the child. The adult makes his choices and takes his chances. The child really cannot.

Second, even if there is more total drug use, it will tend to be safer. Presumably the Government is not likely to sell defective cocaine which can kill somebody even if used properly. The drug dealer might, and historically drug dealers have.<sup>20</sup> Consequently, even if there is more drug use under my proposal, the negative consequences emanating therefrom are likely to be less.

Do I consider this proposal an absolute foolproof panacea to cure all the drug-related ills of the world? No. Do I consider it a first step worthy of implementation despite the risk? Absolutely.

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<sup>19</sup>There is strong evidence that "the younger children are when they first use marijuana, the more likely they are to use cocaine and heroin and become dependent on drugs as adults." OFFICE OF NATIONAL DRUG CONTROL POLICY, FACTS & FIGURES: MARIJUANA, <http://www.whitehousedrugpolicy.gov/drugfact/marijuana/index.html> (last visited March 6, 2008) (Citing a 2002 SAMSHA report, JOSEPH C. GFROERER ET. AL., INITIATION OF MARIJUANA USE: TRENDS, PATTERNS AND IMPLICATIONS, 63 (2002), available at <http://www.oas.samhsa.gov/MJinitiation/MJinitiation.pdf>). The report found that 62 percent of adults age 26 or older who initiated marijuana before they were 15 years old reported that they had used cocaine in their lifetime. The percent of adults 26 or older that reported using cocaine in their lifetime is significantly lower, 28.8 percent, for individuals that used marijuana for the first time between the age of 18-20. GFROERER at 63; see also THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, 2 (2007), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs07/ndcs07.pdf> ("[Y]oung people who do not initiate drug use by age 18-20 are unlikely ever to develop a drug dependency problem.") *Id.*

<sup>20</sup>Fentanyl tainted heroin or cocaine caused hundreds of overdoses and some deaths in recent years. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, 32 (2007), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs07/ndcs07.pdf>