

A Humane Economist's Case for Drug Legalization

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INTRODUCTION

Both federal and state law criminalize the use and possession of many types of drugs in the United States.¹ These drugs include marijuana, heroin, crack, cocaine, angel dust, PCP,² and LSD.³ To enforce this criminalization and reduce the use of illegal drugs, police and drug enforcement officials fight a "drug war."

I oppose the drug war. I also advocate legalizing drugs whose sale and use is currently illegal. Although not problem-free, the case for legalization is much stronger than the case for criminalization. I also know that many bright people believe the opposite. In this category, for example, I would put William Bennett,⁴ who recently resigned as President Bush's "drug czar,"⁵ and the noted political scientist James Q. Wilson.⁶ Nevertheless, I think they are wrong. My purpose in this Article is to give my case for legalization. My point of view is that of an economist, but also that of a

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¹ See, e.g. 21 U.S.C. §§ 812, 841, 843-44 (1988); CAL. HEALTH & SAFETY CODE §§ 11054-55, 11350-51.5 (West Supp. 1991); N.Y. PENAL LAW 220.06, 221.05 (McKinney 1989).

² Phenylcyclohexylpiperidine.

³ Lysergic acid diethylamide.

⁴ See Wicker, *Czar vs. Intellectuals*, N.Y. Times, Dec. 26, 1989, at 27, col. 1.

⁵ *Senate Confirms Martinez as Drug Control Director*, L.A. Times, Mar. 22, 1991, at A4, col. 1.

⁶ See Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb. 1990, at 21.

humane citizen. The facts and the analytic tools of economics help me understand how the illegal drug markets work and how legal drug markets are likely to work. This information is crucial for any serious discussion of the case for or against legalization. The facts and analysis by themselves, however, cannot decide the case. They must be combined with values.

Before making the case for legalization, let me make clear what legalizing drugs does and does not mean. Legalizing drugs means:

1. That every adult will know that she will be able to use drugs in peace, without fearing that someone will arrest her or send her to prison for her decision.
2. That each person will bear the consequences of her decision to use drugs. If an employer wants to fire her for using them, that is a risk the employee takes.

Legalizing drugs does not mean:

1. That drug users who rob, maim, and kill innocent people to support their drug habit should not be punished. They should be punished the same as others who rob, maim, and kill innocent people for any other reasons.
2. That airlines cannot test their employees for evidence of drug use. This is a contractual matter between the airline and the employee. The government does not have to take a position.⁷
3. That an airline passenger injured in an accident caused by an employee on drugs should not have legal recourse against the airline.⁸
4. That someone injured by a driver under the influence of drugs would not be able to sue that driver. The injured person

⁷ Indeed, the government should not intervene in employer-employee relationships. In my opinion, any contractual relationship between employer and employee is legitimate.

⁸ The common law presumes that an airline is liable for damages caused by an employee on drugs. *Cf. Note, Employee Drug Testing-Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969, 993 & n.149 (1988) (stating that courts may hold employer who fails to foresee and prevent risks of impaired employee liable for damage caused by employee). Of course, an airline should not be liable if it warned passengers in advance that it was not accepting the liability. *But see Jones v. Dressel*, 623 P.2d 370, 377 (Colo. 1981) (asserting that limitations of liability in airline tickets are invalid). Passengers could then decide for themselves whether to use this airline or one that did accept the liability.

would have the same legal recourse that he now has to sue a driver who injures him while driving under the influence of the drug named alcohol.

This Article addresses the question of legalization by analyzing the consequences that flow both from criminalization and from legalization. Part I examines the costs of criminalization. Part II analyzes the potential costs of legalization. Further, Part II discusses why some of these costs of legalization are a necessary price to pay and how some costs may be avoided altogether. The Article concludes that from an economic as well as a humane perspective legalization is the better alternative.

I. THE COSTS OF CRIMINALIZATION

Most of the case for legalization can be made by pointing out the problems with criminalization.⁹ These problems include an increase in the crime rate,¹⁰ crime being part of "business as usual" in the drug trade,¹¹ harm to those who use drugs,¹² increased costs to taxpayers,¹³ and violation of people's rights.¹⁴

A. Increase In Crime

Criminalization of drugs increases the cost of drugs. The increased cost results because making drugs illegal makes producing and selling them risky. Thus, producers and sellers are

⁹ Other authors have already done this and done it well. See Boaz, *The Consequences of Prohibition*, in *THE CRISIS IN DRUG PROHIBITION* 1 (D. Boaz ed. 1990) [hereafter Boaz, *Crisis*]; M. FRIEDMAN & R. FRIEDMAN, *THE TYRANNY OF THE STATUS QUO* 136-41 (1984); T. SZASZ, *CEREMONIAL CHEMISTRY* (1974); Boaz, *A Drug-free America — or a Free America?*, 24 U.C. DAVIS L. REV. 617 (1991); Nadelmann, *U.S. Drug Policy: A Bad Export*, 70 FOREIGN POL'Y 83 (1988); Nadelmann, *The Case for Legalization*, 92 PUB. INTEREST 3, 3-31 (1988), reprinted in *THE CRISIS IN DRUG PROHIBITION* 13 (D. Boaz ed. 1990) [hereafter Nadelmann, *Case*]; Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCIENCE 939 (1989) [hereafter Nadelmann, *Drug Prohibition*]; Ostrowski, *Thinking About Drug Legalization*, 121 POL'Y ANALYSIS 1 (1989); Friedman, *An Open Letter to Bill Bennett*, Wall St. J., Sep. 7, 1989, § 1, at 14, col. 3. In the main, I agree with these commentators. Nevertheless, some of their points bear repeating in a fresh way and other points that they did not make need to be made.

¹⁰ See *infra* notes 15-28 and accompanying text.

¹¹ See *infra* notes 29-36 and accompanying text.

¹² See *infra* notes 45-62 and accompanying text.

¹³ See *infra* notes 63-68 and accompanying text.

¹⁴ See *infra* notes 69-81 and accompanying text.

unwilling to sell unless they are compensated for the risk. Therefore, the prices of drugs rise upon criminalization to reflect that risk.¹⁵

Proponents of criminalization admit that criminalizing drugs raises their price substantially.¹⁶ Indeed, they base their case on this fact. As Wilson points out, the higher price caused by criminalization will reduce the use of drugs because the demand

¹⁵ The increased cost that results from criminalization is well illustrated by a comparison of two Colombian exports, cocaine and coffee. The following are data on the price per kilogram of cocaine at each level of the market in 1986:

Cost to Colombian refiner not including transportation to Miami ..	\$3,000
Cost FOB Miami (includes \$3,000 per kilogram charged by pilot) ..	\$6,000
Price FOB Miami (including Colombian refiner's \$15,500 per	
kilogram mark-up)	\$21,500
Price charged by Miami wholesaler	\$23,500
Price charged by Atlanta distributor	
(42 diluted ounces \$1500 per ounce)	\$63,000
Price charged by Atlanta dealer	
(36 diluted grams \$60 per gram)	\$90,720
Price charged by consumer/dealer	
(\$75 per gram)	\$113,400

Ricks, *Inside Dope*, Wall St. J., June 30, 1986, § 1, at 1, col. 6, 16, col. 2.

Note the large mark-ups at each level. Compare these prices and mark-ups to those of another Colombian export, coffee. The spot price — the price for immediate delivery, G. BANNOCK, R. BAXTER & E. DAVIS, *DICTIONARY OF ECONOMICS* 383 (1989) — of Colombian coffee on November 26, 1990 was 89.5 cents per pound. Wall St. J., Nov. 26, 1990, at C16, col. 6. The retail price of coffee in my local supermarket is about \$2.40 per pound, or about three times the spot market price. Coffee sold on the spot market is roughly analogous to cocaine in Colombia because transportation of coffee, being legal, is not so risky and therefore not so expensive. Note that the retail price of cocaine, \$113,400 per kilogram, is 37.8 times the equivalent of the spot market price of cocaine. Thus, these figures indicate a correlation between the retail price of an export and whether the export is criminalized.

¹⁶ Wilson claims that had heroin been legalized in the early 1970s, its price would have been reduced by 95%. See Wilson, *supra* note 6, at 22 (forcefully and persuasively presenting argument that criminalization substantially raises drug prices). This means that a heroin habit, which some economists estimate would cost \$150 per day, see Levine, Stoloff & Spruill, *Public Drug Treatment and Addict Crime*, 2 J. OF LEGAL STUD. 436, 437 (1976) (adjusted for inflation) (citing typical heroin habit in Detroit as estimated by Dr. Edward Leibson, Director of Wayne County Dep't of Substance Abuse Service), would cost only \$7.50 per day if heroin were legal.

for drugs is not totally inelastic.¹⁷

An unintended consequence of this higher price, however, is an increase in crime.¹⁸ As Wilson himself admits,¹⁹ some of those who continue to use drugs in spite of the higher prices steal to “earn” the additional money — \$150 per day in some cases²⁰ — required to support their habit. Thus, the criminalization of drugs increases crime.²¹ As a result of this increased criminal activity, innocent people — those robbed, burgled, and sometimes killed — suffer. According to a study commissioned by the Drug Abuse Council²² in 1975 (DAC Study), for a ten percent increase in the price of heroin in the Detroit area, the amount of property crime increased by 2.87 percent.²³ According to one survey, some local police officials believe that drug users commit twenty-five percent of auto thefts, forty percent of robberies and assaults, and fifty percent of burglaries and larcenies.²⁴ Using data from the FBI on the average value of property stolen, drug policy analyst James Ostrowski concludes that drug users commit about four million crimes per year and steal items worth \$7.5 billion.²⁵ Further, Ostrowski concludes that drug users commit 1,600 murders annually while committing property crimes.²⁶

Of course, it does not follow that these crimes would not have

¹⁷ See Wilson, *supra* note 6, at 22. For an explanation of the elasticity or inelasticity of demand, see generally W. BAUMOL & A. BLINDER, *ECONOMICS* 465-70 (1991).

¹⁸ See Ostrowski, *supra* note 9, at 16.

¹⁹ Wilson, *supra* note 6, at 25.

²⁰ See *supra* note 16.

²¹ Of course, when any activity is criminalized, those who persist in that activity are criminals by definition. Thus, the amount of crime will increase. This kind of crime, however, is not what advocates of legalization are referring to. They are referring to increased crime resulting from addicts turning to crime in order to afford drugs made costly because of drug laws. See *supra* notes 15-16 and accompanying text.

²² The Drug Abuse Council is a private, nonprofit organization that supplies information, policy evaluation, and research funding in the field of nonmedical drug use. THE DRUG ABUSE COUNCIL, INC., *A PERSPECTIVE ON “GET TOUGH” DRUG LAWS I* (1973).

²³ L. SILVERMAN, N. SPRUILL & D. LEVINE, *URBAN CRIME AND HEROIN AVAILABILITY* 13 (Public Research Institute, Center for Naval Analyses PRI 75-1 1975).

²⁴ See Ostrowski, *supra* note 9, at 11, 53 n.36 (citing GODSHAW, KOPPEL & PANCOAST, *ANTI-DRUG LAW ENFORCEMENT EFFORTS AND THEIR IMPACT* (Wharton Econometrics Survey for United States Customs Service 1987)).

²⁵ *Id.* at 11.

²⁶ *Id.* at 12, 54 n.39.

been committed had legalization significantly reduced the price of drugs. Some crimes by drug users may be due to disordered behavior caused by the drugs themselves.²⁷ Still, if only half of the crimes committed by drug users are due to the higher price (surely a low estimate) legalizing drugs would make living in the United States substantially safer. The authors of the DAC Study noted that "heroin use does not directly lead to crime through pharmacological effects on personality. The need for money to purchase this expensive drug, however, can lead addicts to commit revenue-raising crime."²⁸

B. Crime As Part of "Business As Usual"

Criminalization of drugs has led to crime being part of "business as usual" in the drug trade.²⁹ Drug suppliers and sellers often commit violent criminal acts in the course of their drug dealings. To understand why, consider what would happen if the government made sales of soft drinks illegal and imposed heavy fines and prison sentences on those who continued to sell them. No longer would the friendly neighborhood grocer continue to stock and sell Coca-Cola. Coke, however, would continue to be sold — but by different people. They would be people trained to

²⁷ See Rosenthal, *In Opposition to Drug Legalization*, 24 U.C. DAVIS L. REV. 637, 638 (1991).

²⁸ See L. SILVERMAN, N. SPRUILL & D. LEVINE, *supra* note 23, at 3. Some proponents of drug criminalization dismiss the impact of drug prohibition on crime, arguing that if every drug addict stole as much as is required to support his habit, then drug-induced thefts would be a large multiple of total thefts. They point out that a subset of the population cannot commit more thefts than are committed by the whole population. These critics are right. If, to take a hypothetical example, there are three million addicts, and if every addict needs to commit, and commits, 200 thefts per year, drug addicts alone would commit 600 million thefts. If the actual number of thefts by addicts and nonaddicts alike, however, is only 100 million, then addicts must commit less than 100 million thefts. This means that most addicts do not steal to support their habit.

The critics who make this argument, however, miss the point. Indeed, these critics unwittingly make the case that drug users could account for a substantial fraction of all thefts. Take the hypothetical case above, but assume that only 5% of the 3 million addicts commit 200 thefts annually. They would then commit 30 million thefts per year, or 30% of all thefts. In short, if even a small fraction of drug addicts stole to support their habit, they would still account for a significant percent of total thefts. This means that legalizing drugs would substantially reduce theft.

²⁹ See R. ASHLEY, COCAINE 144-55 (1975).

sell in illegal markets and willing to do what must be done to sell in such markets. They must be willing to threaten to kill those who cheat them in a sale. They must be willing to kill those who would inform on them. And because they would have few or no qualms about killing, they probably would be willing to kill those who compete with them. Crime, in short, is part of "business as usual" when the business is illegal. Thus, if Coca-Cola were outlawed, only outlaws would sell Coca-Cola. That statement is true, not only by definition, but in a more substantive way: the skills that help one survive in an illegal market are the skills of criminals.

The connection to illegal drugs is obvious. When drugs are illegal, only outlaws will sell drugs. Thus, those who produce and sell drugs regularly commit criminal acts as part of "business as usual." This in turn has led to increased drug-related violence. For example, the doubling of the homicide rate in Washington, D.C. in 1987, after police stepped up enforcement of drug laws, is likely due to murder of one drug dealer by another.³⁰ Tragically, one effect of these "turf wars" between dealers is that innocent people not even in the business are hurt and sometimes killed.³¹

A significant consequence of crime being part of "business as usual" in the drug trade is that organized crime now controls much of the drug traffic.³² New York State in the 1970s presents dramatic evidence that making drugs illegal makes the drug business attractive to organized crime. Before 1973, organized crime was not involved in the illegal drug business in New York.³³ In 1973, however, New York's governor Nelson Rockefeller pushed through a draconian drug law with mandatory prison sentences.³⁴ Organized crime then took over the illegal drug market in New York.³⁵

Even though no other analyst I know of has noted the connection, organized crime's takeover of the New York drug trade was predictable. When the penalties for selling drugs were much

³⁰ Nadelmann, *Case*, *supra* note 9, at 3.

³¹ David Boaz tells of a Washington, D.C. teacher who advises her fourth-graders to take a pillow and read in the bathtub because that is a place relatively protected from stray bullets fired in the drug war. Boaz, *Crisis*, *supra* note 9, at 1.

³² See R. ASHLEY, *supra* note 29, at 144-55.

³³ See *id.*

³⁴ *Id.* at 144.

³⁵ *Id.* at 144-55.

lighter, more civilized dealers could survive in the market. When the government made the penalties more strict, however, the civilized dealers were less willing and able than organized crime to do what was necessary to survive. They had neither the inclination to kill drug enforcement officials nor the connections to buy them off. Organized crime, on the other hand, was willing and able to commit criminal acts as part of "business as usual."³⁶ Thus, organized crime eventually came to dominate the drug trade because it was the only entity able to absorb the high costs of criminalization. Therefore, the surest way to get organized crime out of the drug business and to prevent crime from being part of "business as usual" in the drug trade is to make drugs legal.

C. An Aside on "Taking Away the Profit"

Some advocates of legalization — Baltimore mayor Kurt L. Schmoke,³⁷ economist Thomas Sowell,³⁸ and journalists Stephen Chapman³⁹ and Hodding Carter III⁴⁰ — have argued that making drugs illegal makes drugs more profitable and that legalization would make them less profitable and reduce the incentive to sell them. This argument, taken literally, is false. Criminalization makes dealing in drugs, in the short-run, less profitable and in the long-run has no effect on profitability. Legalization, on the other hand, makes drug-dealing, in the short-run, more profitable, and in the long-run has no effect on profitability.⁴¹

Consider what happens when the government makes illegal a drug that was previously legal. Take cocaine for example. Any person engaged in any stage of producing cocaine or getting it to market knows that he might be caught and that, if he is caught, he might be punished. For concreteness, assume that the producer is a wholesaler who receives the refined cocaine in the United

³⁶ See *supra* notes 32-35 and accompanying text.

³⁷ See Schmoke, *Drugs: A Problem of Health and Economics*, Wash. Post, May 15, 1988, at B1, col. 5.

³⁸ See Sowell, *Decriminalize Drugs*, San Francisco Examiner, Sep. 18, 1989, at A17, col. 5.

³⁹ See *Nancy Reagan and the Real Villains in the Drug War*, Chicago Tribune, Mar. 6, 1988, § 4, at 3, col. 1.

⁴⁰ See Carter III, *We're Losing the Drug War Because Prohibition Never Works*, Wall St. J., July 13, 1989, at A15, col. 3.

⁴¹ See generally D. Henderson, *The Economics of Illegal Drugs* (1978) (unpublished manuscript) (copy on file with U.C. Davis Law Review).

States, repackages it, and sells it to dealers. Given the amounts the wholesaler spends on his inputs, and the amounts he earns on his output, the new expected penalty makes wholesaling cocaine suddenly less profitable. The business might still be profitable enough to make him want to stay. Some wholesalers, however — those previously making just enough money to entice them to stay — were on the margin of leaving. The expected penalty drives these wholesalers out of the business. Once they exit, the supply of wholesale cocaine is lower. Even if the price of the refined cocaine stays constant, the price of the wholesale cocaine will rise, because there are fewer wholesalers and therefore less is sold. Competition by buyers for a lessened supply must cause the price to rise.⁴² As the price rises, profits will increase and in the long run eventually will return to their precriminalization levels.⁴³

This may sound like a semiforgotten lecture in Econ 101. That's the point, however. Writers on illegal drugs, even those like Thomas Sowell and Stephen Chapman who generally show a lot of sophistication in their economic understanding, are denying the basics of Econ 101. Simple economics says that when you make a business riskier, you make it less profitable in the short-run. Then companies that make too little profit leave the industry, which in turn causes the price of the industry's product to rise, and causes profits to return to normal in the long run.

Dealers will then earn a normal risk-adjusted rate of return. Profits of dealers will look higher than normal because the cost of imprisonment, fines, and bribes is not subtracted. Also, profits of successful dealers who are never caught will be higher than normal, just as profits of lottery winners are higher than normal. Looking only at the profits of dealers who successfully avoid capture, however, and concluding on that basis that the illegal drug business is abnormally profitable is like looking at the fortunes of only lottery winners and concluding that buying a lottery ticket is abnormally profitable.

Nevertheless, some of those who argue that legalizing drugs would remove profit may be getting at an important point. The profits to be made in illegal activities look unattractive to me and

⁴² See *id.* (examining correlation between criminalization of drugs and their profitability).

⁴³ For analysis of how and why increased costs reduce profit in the short-run and, by causing the exit of marginal firms, leave profit unchanged in the long-run, see generally W. BAUMOL & S. BLINDER, *supra* note 17, at 536-55.

to most readers of this Article, because we are not well-suited for dealing in illegal substances. The same profits may well look attractive to those most skilled in crime, however. Therefore, legalizing drugs would cause noncriminals to enter the business, thus increasing supply, which would reduce the price and thus the profits available to criminals, ultimately making the business unattractive to them. Although profits of the drug business would not necessarily fall, profits made by *criminals* in the drug business would decrease. If that was the point that Schmoke, Sowell, Chapman, and Carter meant to make, it is correct.⁴⁴

D. Harm to Drug Users

Criminalization hurts drug users in many ways. First, drug laws make what would be a cheap habit into a very expensive habit.⁴⁵ Drug users, therefore, have to spend much more of their income on drugs than would be the case if drugs were legal. In fact, Americans spent \$80 billion for illegal drugs in 1980.⁴⁶ Because the drug laws made these drugs at least ten times as expensive as if drugs were legalized,⁴⁷ \$72 billion of this was waste caused by the drug laws.⁴⁸ One result of this waste, of course, is that drug users have less to spend on food and other basics of life.⁴⁹ Thus, malnutrition is one effect of criminalization.

Second, the high price caused by drug laws causes some drug users to steal to support their expensive habits.⁵⁰ Thus, the drug laws introduce some drug users to the world of crime, an undesirable outcome for the users and for the rest of society.

Third, drug laws make it difficult for drug producers and sellers to establish reputations for supplying high-quality, reliable drugs.⁵¹ In the legal markets, producers often make large irre-

⁴⁴ See *supra* notes 37-40 and accompanying text.

⁴⁵ See *supra* notes 15-17 and accompanying text.

⁴⁶ See Ostrowski, *supra* note 9, at 15, 56 n.55 (citing NATIONAL NARCOTICS INTELLIGENCE CONSUMER'S COMMITTEE, NARCOTICS INTELLIGENCE ESTIMATE (1980)).

⁴⁷ See *supra* note 16.

⁴⁸ See Ostrowski, *supra* note 9, at 15. True, drug sellers collected this money, but the \$72 billion was simply compensation for risks that the dealers took and for expenditures — on planes, boats, guns, and electronics — to reduce this risk. So just this one category of costs imposed on drug users was \$72 billion, with no offsetting gain to anyone else.

⁴⁹ *Id.* at 15-16.

⁵⁰ *Id.* at 16; see *supra* notes 15-28 and accompanying text.

⁵¹ See, e.g., R. ASHLEY, *supra* note 29, at 153-54.

versible investments in advertising to signal potential consumers of their intent to produce quality products.⁵² Obviously, they cannot do that when the good they produce is illegal. Thus, drug users often do not know the quality of the drugs they buy. As a result, drug users often unknowingly obtain drugs that are made with dangerous substances, or drugs whose strength differs from what was promised. These drugs kill many drug users.⁵³

Fourth, laws against drug paraphernalia make the process of using drugs riskier.⁵⁴ Those who use needles to inject their drugs, for example, often reuse old needles because needles are illegal in the United States and thus new ones are difficult to obtain.⁵⁵ In this way, Acquired Immune Deficiency Syndrome (AIDS) is often transmitted from one drug user to another.⁵⁶ As many as 3,500 people die each year in the United States from AIDS contracted from unsterile needles, which is more than the combined death toll from overdoses of cocaine and heroine.⁵⁷ In contrast, Hong Kong, where needles are legal, has virtually no cases of drug-related AIDS.⁵⁸

Fifth, and finally, drug users are most obviously hurt by criminalization by imprisonment or by the threat of imprisonment. There were approximately 851,000 persons incarcerated in federal, state, or local prisons in 1987.⁵⁹ Over 96,000 were there for drug-law violations, and that number was expected to increase.⁶⁰ Over 400,000 people in the United States are arrested annually for marijuana possession.⁶¹ No one claims that time spent in jail is good for someone. In fact, one of the most effective antidrug advertisements currently on television is the one that starkly depicts a drug user facing the hell that is prison.

⁵² See Klein & Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981).

⁵³ Ostrowski estimates that up to 80% of the 3,000 deaths attributed to heroin and cocaine use each year are actually caused by these "black market" factors. See Ostrowski, *supra* note 9, at 14.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Kristoff, *Hong Kong Program: Addicts Without AIDS*, N.Y. Times, June 17, 1987, at A1, col. 3.

⁵⁹ See Nadelmann, *Case*, *supra* note 9, at 15.

⁶⁰ *Id.*; see also Ostrowski, *supra* note 9, at 20.

⁶¹ Grinspoon, *Psychopharmacological McCarthyism*, 2 THE DRUG POL'Y LETTER 6-9 (Fall 1990).

Some advocates of criminalization might say that the costs imposed by drug laws on drug users do not count because the users know the consequences of their actions and choose to risk these consequences anyway. In other words, too bad. No humane advocate of criminalizing drugs, however, can make this argument. In fact, most advocates of criminalization base their case on a strong desire to protect people from hurting themselves with drugs. For example, Wilson stated: "What are the lives of would-be addicts worth? I recall some people saying to me then, 'Let them kill themselves.' I was appalled."⁶²

I believe that Wilson's concern for would-be addicts is sincere. Surely he would care as much, or at least almost as much, about addicts as about "would-be addicts." If so, then he, and those on his side with the same humane values, must take into account the damage done to addicts by the very laws they advocate.

E. Costs to Taxpayers

Criminalizing drugs has substantially increased the burden on the American taxpayer. Governments at all levels in the United States spend about \$11 billion each year on the drug war.⁶³ This amounts to \$44 per American each year.⁶⁴ If drugs were legalized, the government could spend these funds on other uses, or could return them to the taxpayers.

Another cost to taxpayers resulting from criminalization is the foregone tax revenues that drug users would have paid had drugs been legal and taxed.⁶⁵ Because illegal drugs sell for at least ten times the price they would sell for in a legal free market,⁶⁶ the government could impose a one-hundred percent excise tax on legal drugs, and still the drugs would sell for only one-fifth or less of their current price.

The revenue that the government could collect by taxing drugs is substantial. Assuming that Americans spend \$80 billion annu-

⁶² Wilson, *supra* note 6, at 24.

⁶³ *Id.* at 25.

⁶⁴ This figure is based on an approximate United States population of 250 million people. See Vobejda, *1990 Census Figure Falls 3.8 Million Short of Projection*, Wash. Post, Dec. 27, 1990, at A1, col. 1.

⁶⁵ Of course, if the government were to tax drugs too heavily, this would simply push the drug market back to the underground. See Wilson, *supra* note 6, at 25. The solution to this is simply not to tax drugs too heavily.

⁶⁶ See *supra* note 16.

ally on illegal drugs,⁶⁷ and that this number would fall to \$8 billion if drugs were legal⁶⁸ (and if consumption did not increase), the government could collect an extra \$8 billion per year in revenues with a one-hundred percent excise tax. Of course, legalizing drugs could well increase consumption, making revenues even higher.

F. Violation of Other Rights

The case for or against drug legalization cannot be decided by considering only the economic facts about drugs. Personal values must also be considered. One of my highest values, indeed the one that was most important in my decision to immigrate to the United States, is freedom. By "freedom" I mean the right to decide what to do with one's own property, as long as it does not impinge on another person's freedom to use her property.⁶⁹

Of course, if people did believe completely in freedom, the case for drug legalization would be won. After all, at a basic level, freedom means the right to ingest anything you want in your own body. There is still a strong profreedom case for drug legalization, however, even for those who do not believe in the freedom to ingest.

The case is this. Drug laws and the drug war to enforce those laws have had a detrimental impact on the freedom of many Americans, including those who do not use drugs. In fact, the government must invade the freedom of users and nonusers alike if it is to successfully enforce the drug laws.

A drug war requires this invasion of freedom for one main rea-

⁶⁷ See *supra* note 46 and accompanying text.

⁶⁸ See *supra* note 16.

⁶⁹ Some philosophers may take exception to this definition of freedom. But even they understand and accept the meaning and importance of freedom at an intuitive and personal level. If you doubt that they do, then imagine (and I emphasize "imagine": I do not advocate that you actually do this) that you threaten to throw one of them on the ground and shave his head. If he tries to argue with you, imagine how he would argue. He would, probably early in the argument, say words to the effect that he has the right to have his hair as long as he wants it because it does not interfere with you. What if he did not try to argue with you, but instead just resisted your attempts to forcefully shave his head? Then, as eloquently as if he spoke, he would be demonstrating his belief in his own right to have his property unmolested. The bottom line is that for all the sophisticated objections you can make to my statement about what freedom is, believing in it and acting on it are as natural as breathing.

son: gains from exchange. Because both buyer and seller see themselves as better off as a result of a drug exchange, neither therefore has any incentive to report the other to the police.⁷⁰ Thus, to apprehend drug users or sellers, police must make aggressive attempts to find them. They must search people, including nonusers, knowing full well that the odds of finding drugs are maybe only one in one hundred. The police also know, however, that if they do not conduct searches, many drugs will illegally enter into the country and into people's bodies. In short, unless agents search people and objects that otherwise are not suspicious, many drug crimes will go undetected. Thus, as a result of these difficulties in enforcing the drug laws, drug enforcement officials must invade the rights of both users and nonusers.

For example, a pleasure boat could have one hundred pounds of cocaine on board and still not look suspicious. If the authorities uphold the principle that they should not search boats unless they have probable cause, however, the antidrug campaign will not be nearly as effective.

Further, the amount of drugs required to supply the drug habits of every American, even if every American had a drug habit, would fill a virtually infinitesimal fraction of the volume of goods shipped to the United States. Therefore, drug warriors need to levy large fines against those who do ship drugs. At first, this may sound unobjectionable. It means, however, that those who pay those fines may well be people who are totally innocent. For example, when the United States Customs Service found marijuana in containers aboard large commercial cargo ships arriving from Jamaica, it levied \$246 million in fines against the shipping companies.⁷¹ The Customs Service did not claim that these companies intentionally shipped the drugs.⁷² Nevertheless, the shipping companies, innocent of drug law violations, were forced to pay financial penalties aimed at enforcing criminalization.⁷³ The \$83.9 million fine against Sea-Land service, a subsidiary of CSX Corporation, would have more than wiped out its 1988 operating

⁷⁰ In economic terms, both the buyer and seller realize gains from exchange. For a basic exposition of this economic truth, see generally W. BAUMOL & A. BLINDER, *supra* note 17, at 4-5.

⁷¹ See *News/Trends: Drugs in the Hold*, FORTUNE, Feb. 13, 1989, at 12-16.

⁷² *Id.* at 12.

⁷³ See *id.* at 12-16.

income of \$81 million.⁷⁴ The \$103.8 million fine against Kirk Line was five times its annual revenues.⁷⁵

Another way criminalization of drugs affects nonusers' rights is seen at customs check points. Many people enter the United States from places like Mexico and Colombia, paying for the trip and making a few thousand dollars in profit by hiding a small amount of cocaine in their body cavities.⁷⁶ To deal with this, the United States Customs Service strip searches people.⁷⁷ Sometimes, if agents suspect that people are hiding drugs in their bodies, they detain them until they defecate.⁷⁸ What if they make a mistake and the person has nothing hidden? Too bad.

Further, the large amounts of money being exchanged in the illegal drug markets mean that someone coming to the bank with, for example, \$10,000 in cash, may be a dealer in illegal drugs. So some drug warriors desired, and Congress and the Reagan administration supplied, another weapon in the drug war: the power to force anyone engaging in a cash transaction for more than \$10,000 to report it to the federal government.⁷⁹ Thus was sacrificed the financial privacy of everyone who makes such large transactions.

Finally, what should drug warriors do when United States Customs planes cannot catch planes that are entering United States air space? If former Customs Commissioner William von Raab and a majority of the United States Senate had had their way, United States customs agents would have been allowed to shoot down planes and *then* find out if they carried drugs.⁸⁰

In all these ways, the war against drugs threatens the rights of users and nonusers alike. In short, *a serious war against drugs requires a serious war against freedom*. Not just against the freedom of drug users and sellers, but everyone's freedom. And that is just

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 12-16.

⁷⁶ See, e.g., *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985); Applebome, *Agent's Slaying Points Up Rise in Border Drugs*, N.Y. Times, Jan. 3, 1987, at 5, col. 1; Sisk, *Smugglers Use Novel Ways to Get Dope Across Border*, United Press Int'l, Nov. 23, 1985 (LEXIS, NEXIS library, Papers file).

⁷⁷ See *United States v. Arango-Correa*, 851 F.2d 54, 56 (2d Cir. 1988); *Velez v. United States*, 693 F. Supp. 51, 55 (S.D.N.Y. 1988).

⁷⁸ *Montoya De Hernandez*, 473 U.S. at 351; *Velez*, 693 F. Supp. at 55-56; Ostrowski, *supra* note 9, at 22.

⁷⁹ 26 U.S.C. § 6050I (1988); see Ostrowski, *supra* note 9, at 22.

⁸⁰ Boaz, *Crisis*, *supra* note 9, at 5.

what the drug war is causing in the United States today.⁸¹

II. PROBLEMS — REAL AND ALLEGED — WITH LEGALIZATION

The case for legalizing drugs is not problem free. Legalization would cause problems, but they are virtually certain to be fewer than — and different in a fundamental way from — the problems caused by criminalization.

Possible objections to legalization are that legalization would (1) allow people to use a harmful substance, (2) increase consumption of drugs, and (3) increase the harm caused to third parties by drug abuse.

A. *Allowing Use of a Harmful Substance*

Drugs can physically and psychologically harm users.⁸² By legalizing drugs, therefore, the government would allow an activity that causes harm to individuals. Even though drug use does hurt users, however, there are many activities that are currently legal in which people harm themselves. Indeed, people hurt themselves in all kinds of ways — by being workaholics, by eating doughnuts for breakfast, by smoking, by becoming alcoholics. In fact, alcohol use causes 50,000 to 200,000 deaths per year and

⁸¹ The drug war has also significantly invaded school curricula in the United States. Two cases that I know of personally will illustrate the point. In November 1990, my five year old daughter, who attends public school in California, brought home a red ribbon that stated "Just Say No to Drugs." Her teacher had handed these ribbons to her and her classmates. The teacher had asserted without explanation or elaboration that drugs are bad for children. Fortunately, my daughter did not understand what the teacher was talking about. When she came home and showed me and my wife the ribbon, she commented on how pretty it was, and that was the extent of her interest. My wife and I left it at that. Had my daughter been more curious, however, she could have felt great fear from hearing horror stories about drugs. Filling small children with fear of things that have no connection with their lives is incredibly abusive.

The other story concerns a friend's six year old daughter. His daughter's public school in Virginia required her to sign a statement promising that she would not sell drugs at school. Needless to say, she was perplexed by this. If she had understood what the school was requiring, however, she would have understood that authority figures whom she was expected to respect were treating her as a potential criminal. The psychological consequences of this could be quite detrimental. The government should not set up children to think of themselves as people who have to pledge that they are not criminals.

⁸² See Rosenthal, *supra* note 27, at 640-43.

tobacco use causes 320,000 deaths per year.⁸³ By contrast, the National Council on Alcoholism estimated that there were 3,562 deaths from all illegal drugs in 1985.⁸⁴ Yet the government does not imprison drinkers and smokers for harming themselves. Legalization would thus remove an arbitrary distinction between harmful legalized activities such as drinking and smoking on the one hand, and other drug use on the other.

Wilson counters this argument by claiming that cocaine and heroin, if legal, would cause much more harm than they do now because they would be so much cheaper and therefore so much more widely used.⁸⁵ If this is a sufficient justification for banning cocaine and heroin, however, then it would also justify banning alcohol. Yet Wilson seems to argue that because alcohol is legal, the government cannot reverse the law.⁸⁶ But the United States did reverse the law once. Why can't it do so again?

B. Increased Consumption

The most obvious problem legalization could cause is the one highlighted by Wilson: by removing the risk premium from prices, drug legalization would bring prices down to a fraction of their current level.⁸⁷ At these lower prices, many people who never would have considered using drugs will do so, and casual users may turn into regular users.

No one can deny that this view is plausible. The law of demand, one of the fundamental truths of economics, holds that all else being equal, people will demand more of a good whose price has fallen.⁸⁸ Of course, some advocates of drug legalization argue that all else is not equal. Milton Friedman, for example, claims that the "forbidden fruit" effect makes drugs more attractive, particularly to youth.⁸⁹ If the forbidden fruit effect is strong enough, it could completely offset the effect of the lower price on the amount of drugs consumed.⁹⁰ There is some evidence for Friedman's view. Whereas in 1982, 6.3 percent of American high school seniors smoked marijuana daily, that number was only 4

⁸³ Nadelmann, *Drug Prohibition*, *supra* note 9, at 943.

⁸⁴ *Id.*

⁸⁵ See Wilson, *supra* note 6, at 26.

⁸⁶ See *id.*

⁸⁷ See *supra* notes 15-16 and accompanying text.

⁸⁸ See W. Baumol & A. Blinder, *supra* note 17, at 461.

⁸⁹ FRIEDMAN, AN ECONOMIST'S PROTEST 227, 228 (2d ed. 1975).

⁹⁰ See *id.*

percent in Alaska, where marijuana was legal.⁹¹ Also, consumption of marijuana in the Netherlands declined significantly after the government legalized it in the 1970s.⁹²

Nevertheless, there is powerful opposing evidence against the forbidden fruit effect. For example, there was a large increase in heroin use after the British government began to hand out heroin to those who registered for it.⁹³

The case for legalization, therefore, cannot rest on the strength of the forbidden fruit effect. The effect is too uncertain. Nor does the case need to rest on this effect. Even if consumption of previously illegal drugs increased ten-fold, surely a possibility, all of those drug users would be people who *chose* to use drugs. Their using drugs does not necessarily impose costs on the rest of us. With drugs being legal, in fact, the costs on the rest of us would fall. First, we would not be spending in excess of \$11 billion a year⁹⁴ on enforcing drug laws. Second, we would not be subject to as much crime as we are now from drug users stealing to support their habits and from participants in the drug industry committing violence as part of "business as usual."⁹⁵

C. Harm Caused to Third Parties

Many proponents of criminalization believe that drug users necessarily impose costs on nonusers. Wilson, for example, states that "crack-dependent people are, like heroin addicts, individuals who regularly victimize their children by neglect, their spouses by improvidence, their employers by lethargy, and their co-workers by carelessness."⁹⁶ Specifically, advocates of criminalization contend that drug use results in lost work productivity, family and child abuse, and infants born dependent on crack. Are these charges true? And where true, are they relevant to whether drugs should be legal? To these questions I now turn.

1. Lost Productivity

Drug use possibly results in lost productivity in the workplace, and increased drug use due to legalization may further reduce

⁹¹ See Ostrowski, *supra* note 9, at 3.

⁹² Nadelmann, *Case*, *supra* note 9, at 29.

⁹³ Wilson, *supra* note 6, at 23.

⁹⁴ See *supra* text accompanying note 63.

⁹⁵ See *supra* notes 15-36 and accompanying text.

⁹⁶ Wilson, *supra* note 6, at 24.

productivity. An oft-cited study by the Research Triangle Institute (RTI Study) asserts that drug use causes an economic loss of \$26.4 billion each year in lost productivity.⁹⁷ Yet, the study gives very little *evidence* for this conclusion.⁹⁸ Further, the study's authors admit that "[t]he cause and effect relationships among . . . drug abuse, the work environment, and other social factors are not clear."⁹⁹ They even admit that "drug abuse may [!] be symptomatic of other . . . problems"¹⁰⁰ and that "[d]rug abusers may be self-destructive or have other personality disorders, low orientation toward achievement or low motivation."¹⁰¹ These personality traits would tend to lower productivity in the workplace independent of drug use. Thus, the extent to which lost productivity is due to drug use and the extent to which it is due to personality factors common to drug users is not clear.

Even assuming, however, that drug use itself significantly affects productivity, the users, not the rest of society, are the ones hurt. If drug users are absent from work much of the time, or if they are less productive even when at work, employers are free to pay them less or to fire them to reflect their lower productivity. People who play tennis have less time for work and are less productive as a result. They pay the price by doing without the added income they could have made by working harder. No one, however, advocates making tennis illegal so that these people will be more productive. The same principle applies to drug use. People who, by using drugs, decrease their own productivity are hurting only their income, not other people's. Thus, although legalization may increase drug use and therefore result in diminished worker productivity, this cost will fall on those who choose to use drugs, not on nonusers.

2. Family and Child Abuse

No doubt many drug users do physically and mentally abuse their children and their spouses.¹⁰² If legalization increases drug use, this abuse of innocent people could increase. But should we

⁹⁷ Ostrowski, *supra* note 9, at 19 (quoting H. HARWOOD, D. NAPOLITANO, P. KRISTIANSEN & J. COLLINS, ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS (1984)).

⁹⁸ See Ostrowski, *supra* note 9, at 18.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 19 (exclamation point added).

¹⁰¹ *Id.*

¹⁰² See Rosenthal, *supra* note 27, at 641-42.

be less concerned about a child who is neglected by a parent who is an alcoholic, a workaholic, or a tennis fanatic? All of these result from legal activities and yet each may result in abuse of a child or a spouse. We should try to end abuse whether the abuser is on cocaine or alcohol, and even if the abuser is sober.¹⁰³

Further, criminalization makes drugs expensive and may result in the drug user spending money on drugs to the detriment of her child or her spouse.¹⁰⁴ Legalization would significantly lessen this monetary abuse of the family because with legalization the cost of drugs would substantially decrease.¹⁰⁵

3. Infants Born Dependent On Drugs

According to Wilson, thirty to fifty thousand babies addicted to crack are born each year.¹⁰⁶ This number of "crack babies" could increase substantially if crack is legalized.¹⁰⁷ Moreover, babies are also born dependent on other illegal drugs. Admittedly, this is a difficult problem. Indeed, it is the only problem that gives me any doubts about the case for legalization.

This problem, however, is not unique to illegal drugs. Mothers who heavily use alcohol during pregnancy often give birth to babies with fetal alcohol syndrome. Yet, we do not ban alcohol. Further, there is a solution that is consistent with legalization. The solution is to hold women legally liable for their actions. When a crack baby is born, the doctor should be legally required to report that fact to the police and the woman should be criminally and civilly liable for this extreme form of child abuse. This penalty would provide a powerful deterrent for pregnant women contemplating use of crack.

There are four possible objections to imposing legal penalties on women who give birth to crack babies or to babies dependent on other drugs.¹⁰⁸ The first is that the solution would not be effective because women would continue to use the drug anyway.

¹⁰³ Moreover, if we deter someone from using cocaine as a way of stopping him from neglecting his child, isn't he likely to switch to some other addiction?

¹⁰⁴ See *supra* notes 45-49 and accompanying text.

¹⁰⁵ See *supra* notes 15-16 and accompanying text.

¹⁰⁶ Wilson, *supra* note 6, at 24.

¹⁰⁷ *Id.*

¹⁰⁸ See generally Powell & Hershenov, *Hostage to the Drug War: The National Purse, the Constitution, and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991).

This argument proves too much. Recall that the proponents of criminalizing drugs are the ones who point to the crack babies as partial justification for outlawing drugs. If these proponents of criminalization believe that harsh penalties will not deter pregnant women from using drugs, how can they believe that such penalties would deter drug consumption in general? The whole case for criminalizing drugs rests on the idea that harsh penalties *do* deter drug consumption. To the extent that penalties do not deter, there is no case for criminalizing drugs.

The second objection to my proposed solution to the problem of drug dependent babies is that to find a woman guilty of taking drugs, a court would have to have evidence from people who saw her take it. This argument is easily overcome: the drug dependent baby is *prima facie* evidence that the mother took drugs.

A third objection is that harsh penalties against mothers who give birth to drug dependent babies would deter many drug using mothers from having babies delivered in hospitals. This objection has some merit. Still, the number of mothers deterred from using good medical care could well be less than the number deterred from using drugs in the first place.

The fourth objection is that my solution amounts to legalizing certain drugs for all but pregnant women intending to give birth. True, that is my proposal. But why is this an objection? If pregnant women are the only people who can directly harm others by using certain drugs, then they are the only ones who should not be allowed to use drugs.

CONCLUSION

The case for drug legalization is much stronger than the case for criminalization. From an economic as well as a humane perspective, legalization makes more sense. Most of the problems that people think of as being caused by drugs are not caused by drugs *per se*. Rather, they are caused by drug laws. True, drug use could well increase if drugs were legal. The main costs of drug use, however, would fall on those who choose to use drugs, not on the innocent parties who bear much of the cost today.

Further, the morally proper way to prevent drug use is to persuade people, not to imprison them. Persuasion would be much easier when the message is credible. And the message would be much more credible when spoken by people who are not threatening with prison sentences those who are unpersuaded. If any-

thing should make humane advocates of criminalization rethink their position, it is the following conversation between a caller and then drug czar William Bennett on "The Larry King Show:"

CALLER: My question is to Mr. Bennett. Why build prisons? Get tough like Arabia. Behead the damned drug dealers. We're just too darned soft.

BENNETT: It's actually — there's an interesting point. One of the things that I think is a problem is that we are not doing enough that is morally proportional to the nature of the offense. I mean, what the caller suggests is morally plausible. Legally, it's difficult. But say —

LARRY KING: Behead?

BENNETT: Yeah. Morally I don't have any problem with that.¹⁰⁹

¹⁰⁹ *The Larry King Show*, (CNN television broadcast, June 15, 1989), *quoted in Crackmire*, THE NEW REPUBLIC, Sep. 11, 1989, at 7.