A Drug-Free America — or a Free America?

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INTRODUCTION: THE DRUG PROBLEM

Human beings have used mind-altering substances throughout recorded history. Why? Perhaps because, as one acquaintance put it in a recent conversation, there is a God-shaped void in most people's lives. Perhaps because we fail to love one another as we should. Perhaps because of the social pressure for success. Perhaps because — and this is what really irks the prohibitionists — we enjoy drugs' mind-altering effects.

Though the reasons for drug use are numerous, the governmental response has been singular: almost as long as humans have used drugs, governments have tried to stop them. In the sixteenth century the Egyptian government banned coffee. In the seventeenth century the Czar of Russia and the Sultan of the Ottoman Empire executed tobacco smokers. In the eighteenth century England tried to halt gin consumption and China penalized opium sellers with strangulation.

The drug prohibition experiment most familiar to Americans is the prohibition of alcohol in the 1920s. The period has become notorious for the widespread illegal consumption of alcohol and the resultant crime. Movies such as Some Like It Hot typify the popular legend of the era. The failure of Prohibition, however, is not just legendary. Consumption of alcohol probably fell slightly at the beginning of Prohibition but then rose steadily throughout

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2 See Ostrowski, Thinking About Drug Legalization, 121 Pol'y Analysis, May 25, 1989, at 1, 29-33; see also T. Szasz, supra note 1, at 183-212.

3 Ostrowski, supra note 2, at 270.

4 Id.

5 Id.
the period. Alcohol became more potent, and there were reportedly more illegal speakeasies than there had been legal saloons. More serious for nondrinkers, the per capita murder rate and the assault-by-firearm rate both rose throughout Prohibition.

Most of the same phenomena are occurring with today's prohibition of marijuana, cocaine, and heroin. Use of these drugs has risen and fallen during the seventy-seven years since Congress passed the Harrison Narcotics Act, with little relationship to the level of enforcement. In the past decade, the decade of the "War on Drugs," use of these drugs seems to have declined, but no faster than the decline in the use of the legal drugs alcohol and tobacco. In the 1980s Americans became more health- and fitness-conscious, and use of all drugs seems to have correspondingly decreased. Drug prohibition, however, has not stopped thirty million people from trying cocaine and sixty million people from trying marijuana. Prohibition also has not stopped the number of heroin users from increasing by one hundred fifty percent and the number of cocaine users from increasing by ten thousand percent. Moreover, prohibition has not kept drugs out of the hands of children: in 1988 fifty-four percent of high school seniors admitted to having tried illicit drugs; eighty-eight percent said it was fairly easy or very easy to obtain marijuana; and fifty-four percent said the same about cocaine.

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8 Ostrowski, supra note 2, at 1. Even more telling is that both of these rates fell for 10 straight years after repeal. Id.


10 See, e.g., Stripling, Altered Tastes—Drug-Use Habits Are Changing, but the Future's Cloaked in Smoke, Seattle Times, Feb. 19, 1991, at K1, col. 3 (discussing how at various times Americans have lowered drug use and at other times increased drug use).

11 See, e.g., id. (stating that drug use among middle class may be declining).

12 See generally Wisotsky, Breaking the Impasse in the War on Drugs 219-20 (1986).

13 See Dennis, The Economics of Legalizing Drugs, Atlantic, Nov. 1990, at 126, 128 (discussing drug use over last 25 years).

14 Ostrowski, supra note 2, at 27 (discussing increase in drug use since 1915).

15 Berke, Student Survey Detects Decline in Use of Crack, N.Y. Times, Mar. 1,
Although drug prohibition has not curtailed drug use, it has severely limited some fundamental American liberties. Programs such as "Zero Tolerance," which advocates seizing a car or boat on the mere allegation of a law enforcement official that the vehicle contains drugs,\(^\text{16}\) ignore the constitutional principle that a person is innocent until proven guilty.

In attempting to fashion a solution to "the drug problem," one first needs to define the problem society is trying to solve. If the problem is the age-old human instinct to use mind-altering substances, then the solution might be God, or evolution, or stronger families, or Alcoholics Anonymous. History suggests, however, that the solution is unlikely to be found in the halls of Congress. If, on the other hand, the problem is the soaring murder rate, the destruction of inner-city communities, the creation of a criminal subculture, and the fear millions of Americans experience on their own streets, then a solution may well be found in Congress — not in the creation of laws but in their repeal.

This Article proposes that the repeal of certain laws will force individuals to take responsibility for their actions; the repeal of other laws will provide individuals the right to make important decisions in their lives free from outside interference. Together these changes will create the society in which drugs can, and must, be legalized. Legalization of drugs, in turn, will end the

need for the government to make the intrusions into our fundamental rights as it does so often in its War on Drugs.

I. THE FUTILITY OF PROHIBITION

A. The War on Drugs

Prohibition of drugs is not the solution to the drug problem. For the past ten years the United States has waged a "War on Drugs." The goals of this War were simple: prohibit the cultivation or manufacture of drugs, prohibit the import of drugs, and prohibit the use of drugs. As the aforementioned statistics demonstrate, the War has not achieved its goals.

Prohibitionists, however, sometimes claim that the United States has not yet "really fought a drug war." The prohibitionists argue that a "true drug war" would sharply lower drug use. They feel that the government has not fully committed itself to winning this battle. One need only look at the War on Drug's record, however, to see the commitment:

* Congress passed stricter anti-drug laws in 1984, 1986, and 1988. Congress and state legislators steadily increased penalties for drug law violations, mandating jail time even for first offenders, imposing large civil fines, seizing property, denying federal benefits to drug law violators, and evicting tenants from public housing.

* Federal drug war outlays tripled between 1980 and 1988, and the federal government spent more than $20 billion on antidrug activities during the decade. Adjusted for inflation, the federal government spends ten times as much on drug-law enforcement every year as it spent on prohibition enforcement throughout the Roaring Twenties.

* Police officers made more than one million drug law arrests

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17 See supra notes 11-15 and accompanying text.
19 Id. at 52-56.
21 Id. at ___.
22 Id. at ___.
23 Id. at ___.
in 1989, more than two-thirds of them for drug possession.25

* The number of drug busts tripled during the 1980s, and the number of convictions doubled.26

* America’s prison population more than doubled between 1981 and 1990, from 344,283 to 755,425.27 Prisons in thirty-five states and the District of Columbia are under court orders because of overcrowding or poor conditions.28 An increasing percentage of these prisoners are in jail for nonviolent drug law violations.29

* The armed services, Coast Guard, and Civil Air Patrol became more active in the drug fight, providing search and pursuit planes, helicopters, ocean interdiction, and radar. Defense Department spending on the War on Drugs rose from $200 million in 1988 to $800 million in 1990.30

* The Central Intelligence Agency (CIA) and National Security Agency began using spy satellites and communications listening technology as part of the drug war.31 The CIA also designed a special Counter Narcotics Center.32

* The federal government forced drug testing upon public employees and required contractors to establish “drug-free” workplaces.33 Drug testing has also expanded among private companies.34

* Seizures of cocaine rose from 2,000 kilograms in 1981 to

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26 Bandow, supra note 20, at __.


29 Bandow, supra note 20, at __.

30 Id. at __. Interestingly, military leaders became decidedly more sympathetic to getting involved in the drug war just about the time the Berlin Wall opened and the $300 billion military budget began to seem excessive.

31 Id. at __.

32 Id. at __.

33 Id. at __.

34 See Rangel, supra note 18, at 49.
57,000 kilograms in 1988.\textsuperscript{35} Despite this enormous effort, drugs are more readily available than ever before.\textsuperscript{36} The War on Drugs has failed to achieve its primary goal of diminishing the availability and use of drugs.

B. \textit{Prohibition Creates Financial Incentives}

One reason for the failure of the War on Drugs is that it ignores the fact that prohibition sets up tremendous financial incentives for drug dealers to supply the demand.\textsuperscript{37} Prohibition, at least initially, reduces the supply of the prohibited substance and thus raises the price. In addition, a large risk premium is added onto the price.\textsuperscript{38} One has to pay a painter more to paint the Golden Gate Bridge than to paint a house because of the added danger. Similarly, drug dealers demand more money to sell cocaine than to sell alcohol. Those who are willing to accept the risk of arrest or murder will be handsomely — sometimes unbelievably — rewarded.\textsuperscript{39}

Drug dealers, therefore, whatever one may think of them morally, are actually profit-seeking entrepreneurs. Drug researcher James Ostrowski points out that “[t]he public has the false impression that drug enforcers are highly innovative, continually devising new schemes to catch drug dealers. Actually, the reverse is true. The dealers, like successful businessmen, are usually one step ahead of the ‘competition.’”\textsuperscript{40}


\textsuperscript{36} See Rangel, \textit{supra} note 18, at 45.

\textsuperscript{37} See Wisotsky, \textit{Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition}, 1983 WIS. L. REV. 1305, 1319-26 (discussing economics of black market in cocaine).

\textsuperscript{38} Id. at 1322.

\textsuperscript{39} Id. at 1322-23.

\textsuperscript{40} Ostrowski, \textit{supra} note 2, at 34. To illustrate his point, Ostrowski uses British privatization guru Madsen Pirie’s explanation of the advantages of the private sector:

Private firms [read: drug dealers] are constantly seeking new products and practices to give them a competitive edge. They adapt swiftly to changing market conditions, knowing that the failure to do so might lead to bankruptcy.

The rate of innovation in public operations [DEA] is much lower, and public services appear to change very slowly over time.

\textit{Id.} (citing M. Pirie, \textit{Dismantling the State: The Theory and Practice of Privatization} 12-13 (1985)) (brackets in Ostrowski).
New examples of the drug dealers’ entrepreneurial skills appear every day. For example, partly because the Supreme Court upheld surveillance flights over private property to look for marijuana fields, marijuana growers have been moving indoors and underground. The Drug Enforcement Administration seized about 130 indoor marijuana gardens in California in 1989; by November the figure for 1990 was 259. Overseas exporters have also been showing off their entrepreneurial skills. Some have been sending drugs into the United States in the luggage of children traveling alone, on the assumption that authorities will not suspect children and will go easy on them if they are caught. Others have concealed drugs in anchovy cans, bean-sprout washing machines, fuel tanks, and T-shirts. At least one man surgically implanted a pound of cocaine in his thighs. Some smugglers swallow drugs before getting on international flights. Professor Ethan Nadelmann has explained the spread of overseas exporters as the “push-down/pop-up factor”: push down drug production in one country, and it will pop up in another. For example, Nadelmann notes that “Colombian marijuana growers rapidly expanded production following successful eradication efforts in Mexico during the mid-1970s. Today, Mexican growers are rapidly taking advantage of recent Colombian government successes in eradication

42 Richardson, Marijuana Farmers Going Underground, Washington Times, Nov. 30, 1990, at A1, col. 5. In November 1990 law enforcement officials in Southern California and Arizona found five subterranean marijuana farms. Id. One farm found near Lancaster, California, cost about $1 million to build and had the potential to harvest 8,500 plants 4 times a year for an annual profit of $75 million. Id. at A9, col. 1.
45 See, e.g., Diaz, Agents Seized $10 Billion in Drugs, 15% of ’84 Imports, Washington Times, Apr. 8, 1985, at A4, col. 1. To combat the drug swallowers, flight attendants often alert drug-enforcement personnel on the ground that certain arriving passengers have eschewed food and drink throughout a long flight.
ing marijuana."[47]

Prohibition of drugs creates tremendous profit incentives. In turn, the profit incentives induce drug manufacturers and dealers to creatively stay one step ahead of the drug enforcement officials. The profit incentives show the futility of eradication, interdiction, and enforcement and make one question whether prohibition will ever be successful.

II. THE DRUG WAR IS THE HEALTH OF THE STATE

A. Conventional War

"War is the health of the state," wrote Randolph Bourne in 1918, explaining why wars, destructive as they are, are often popular with those who run the state. [48] For war, he explained, automatically sets in motion throughout society those irresistible forces for uniformity, for passionate cooperation with the government in coercing into obedience the minority groups and individuals which lack the larger herd sense. The machinery of government sets and enforces the drastic penalties, the minorities are either intimidated into silence, or brought slowly around by a subtle process of persuasion which may seem to them really to be converting them. . . . The nation in war-time attains a uniformity of feeling, a hierarchy of values culminating at the undisputed apex of the state ideal, which could not possibly be produced through any other agency than war. [49]

[47] Id. Professor Nadelmann also cites the push-down/pop-up factor in the spread of other drugs:

At various points during the past two decades, Turkey, Mexico, Southeast Asia (Burma, Thailand, and Laos), and Southwest Asia (Pakistan, Afghanistan, and Iran) have each served as the principal source of heroin imported into the United States. . . . [But s]o far, the push-down/pop-up factor has played little role in the international cocaine market, for the simple reason that no government has yet pushed down in a significant way. . . . [O]nce eradication efforts do begin, coca growers can be expected to adopt many of the same "guerrilla farming" methods adopted by marijuana and opium growers to camouflage and protect their crops from eradication efforts.

Id.


[49] Id. War has always been, for instance, an ideal reason to raise taxes on an otherwise recalcitrant citizenry. Indeed, Thomas Paine wrote that the British government did not raise taxes to fight wars, it fought wars to raise taxes. T. PAINE, The Rights of Man, in The Thomas Paine Reader 201, 226 (1987).
Advocates of extensive government recognize the truth of Bourne's insight. When the British scholar Michael Foot was leader of the Labor Party, he was asked for an example of the kind of socialism he favored. He replied, "The best example that I've seen of democratic socialism operating in this country was during the second world war. Then we ran Britain highly efficiently, got everybody a job. . . . The conscription of labor was only a very small element of it."50 Here, to mix a metaphor, Foot has put his finger on it: outside of wartime it is very difficult, indeed impossible, to rally millions of free citizens around a common aim.

The American socialist Michael Harrington hailed the efficient planning and social justice also practiced by the American government during World Wars I and II.51 Unlike some more blood-thirsty rulers and court intellectuals, collectivists such as Foot and Harrington do not relish the killing involved in war. But they love war's domestic effects: the centralization and expansion of government power.52

The federal government's expansion of power has not been smooth and steady. The government has acquired most of its new powers under the guise of emergency, especially war.53 After

52 Conservative William F. Buckley, Jr., also noted the connection between war and overweening government. He wrote at the dawn of the Cold War that "we have got to accept Big Government for the duration—for neither an offensive nor a defensive war can be waged . . . except through the instrument of a totalitarian bureaucracy within our shores." Buckley, THE PARTY AND THE DEEP BLUE SEA, 55 COMMONWEAL 391, 392-93 (Jan. 25, 1952).
53 Throughout the history of the United States, the government has used the exigencies of war as an excuse to constrict the constitutional liberties of American citizens. Among the extensions of federal authority conducted under cover of wartime are conscription, standby censorship authority, the Trading with the Enemy Act, ch. 106, 40 Stat. 4-11 (1917), the income tax, tax withholding, wage and price controls, and rent control. See generally R. HIGGS, CRISIS AND LEVIATHAN (1987) (attempting to explain rise of big government). Interestingly, even Prohibition was originally a wartime measure. The Lever Act of 1917, ch. 53, § 15, 40 Stat. 276, granted sweeping powers of economic control to the president. In addition to granting the president the power to require a license of virtually every business involved with food and fuel, to requisition such products as needed for the military, and to fix prices, the act stated that "no foods, fruits, food materials, or seeds shall be used in the production of distilled spirits for beverage purposes. . . . Nor shall there be imported into the United States
the war the government gives up some of its newfound powers, and its spending and taxing recede somewhat, but the government remains larger and more powerful than before the war. Government spending is typically five times as high after a major war as before.\footnote{54} Court decisions upholding powers that would have previously been regarded as unconstitutional remain in effect, sanctioning vast new authority for the government.\footnote{55} Thus has war been the health of the state, if not of the people.

B. Metaphorical War

In the nuclear age war became far more dangerous. Moreover, after Vietnam, Americans for the first time were afraid that they might not win every war. Metaphorical wars, therefore, became the chief means of expanding the power of government. President Lyndon Johnson, for example, started the War on Poverty.\footnote{56} Jimmy Carter dubbed the energy crisis "the Moral Equivalent of War."\footnote{57}

The War on Drugs, the most recent metaphorical war, has served the government's penchant for expansion well. The propaganda for the War on Drugs, like all war propaganda, has created an enemy of such diabolical proportions that Americans are willing to countenance all manner of civil liberties abuses in the name of fighting such a great evil. For example, a Washington Post poll showed that sixty-two percent of Americans polled would be willing to give up "a few of the freedoms we have in this country" to significantly reduce illegal drug use; fifty-two percent said police should be able to search homes of suspected drug dealers without a warrant; eighty-three percent wanted people to report family members who use drugs to the police.\footnote{58} Americans even told pollsters that they would be willing to pay higher taxes to

\footnote{54} J. Hughes, The Governmental Habit 209 (1977).
\footnote{55} R. Higgs, supra note 53, at 147-50, 220-25, 233, 236.
\footnote{57} This phrase harked back to American philosopher William James, who had proposed to conscript American youth into a vast social-work army to "get the childishness knocked out of them" and to serve war's disciplinary function. W. James, The Moral Equivalent of War 10 (1910).
fund the drug war.\textsuperscript{59} Moreover, the United States has installed a “Drug Czar,”\textsuperscript{60} a title it’s hard to imagine James Madison including in the Constitution. Respectable political leaders have proposed, to little public outcry, outrageous ways of dealing with “the drug problem”: arrest all twenty-three million drug users;\textsuperscript{61} strip-search everyone entering the United States from Latin America or Asia;\textsuperscript{62} use the National Guard to occupy the capital city of the free world;\textsuperscript{63} behead drug dealers;\textsuperscript{64} kill those who help “launder” drug money;\textsuperscript{65} shoot all drug users.\textsuperscript{66} A majority of the United States Senate voted to shoot down unidentified airplanes entering the United States.\textsuperscript{67}

In short, the War on Drugs has provided a superb opportunity for the expansion of the powers of the state.\textsuperscript{68} Anyone concerned with this governmental expansion should take to heart Milton Friedman’s words in his open letter to Drug Czar William Bennett:

\textsuperscript{59} Higher taxes to fight the War on Drugs would exemplify the latest ploy of would-be tax-increasers: they tell people that the current level of tax revenue is entirely committed, that no reductions or shifts are possible, and that any new services will require new taxes.

\textsuperscript{60} The official title for the position is “Director, Office of National Drug Control Policy.” See Rangel, supra note 18, at 52; see also Greene, Foreword—Drug Decriminalization: A Chorus in Need of Masterrap’s Voice, 18 Hofstra L. Rev. 457, 459 n.5 (1990).


\textsuperscript{62} United Press Int’l, July 17, 1984 (available on LEXIS, NEXIS library, Wires file) (discussing New York City Mayor Edward Koch’s proposal for mass strip searches at U.S. border).


\textsuperscript{64} Crackmire, New Republic, Sept. 11, 1989, at 7 (quoting The Larry King Show (CNN television broadcast, June 15, 1989)).

\textsuperscript{65} Bandow, supra note 20, at —.

\textsuperscript{66} See Stripling, supra note 10, at K1, col. 4 (quoting Los Angeles Police Chief Daryl Gates).

\textsuperscript{67} See Top of the News, Washington Times, Oct. 6, 1989, at A2, col. 1 (discussing how Senate reversed its position very next day and voted down the proposal).

\textsuperscript{68} For example, a recent law review article finds evidence that the courts are increasingly carving a “drug exception” out of the Bill of Rights. See Wisotsky, Crackdown: The Emerging “Drug Exception” to the Bill of Rights, 38 Hastings L.J. 889 (1987); see also Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L.R. 257 (1984).
Every friend of freedom . . . must be as revolted as I am by the prospect of turning the United States into an armed camp, by the vision of jails filled with casual drug users and of an army of enforcers empowered to invade the liberty of citizens on slight evidence. A country in which shooting down unidentified planes "on suspicion" can be seriously considered as a drug-war tactic is not the kind of United States that either you or I want to hand on to future generations.  

III. INDIVIDUAL RIGHTS

Many of the drug enforcement ideas the prohibitionists suggest trample upon numerous constitutional and natural rights. In any discussion of government policies, it is necessary to examine the effect on natural rights for one simple reason: Individuals have rights that governments may not violate. In the Declaration of Independence, Thomas Jefferson defined these rights as life, liberty, and the pursuit of happiness. I argue that these inviolable rights can actually be classified as one fundamental right: Individuals have the right to live their lives in any way they choose so


70 Individual rights have also been under attack in areas outside drug enforcement. Property rights, for example, are under attack from many fronts. Governments have dramatically increased taxes, thereby reducing people's rights to the fruits of their own labor. Policies such as rent control, zoning, and regulation have further limited what people can do with their own property. In addition, courts have declared that property rights deserve only "minimal scrutiny," which in practice means that virtually any state action that involves a taking of property will be found constitutional. See R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) (examining conflict between original constitutional design and expansion of state power with respect to private property); see also Economic Liberties and the Judiciary (J. Dorn & H. Manne eds. 1987) (addressing whether judiciary will restore its protection of economic liberties or allow majoritarianism to subvert freedom of individuals to determine uses of private property).

long as they do not violate the equal rights of others. To put this idea in the drug context, what right could be more basic, more inherent in human nature, than the right to choose what substances to put in one's own body? Whether it is alcohol, tobacco, laetrile, AZT, saturated fat, or cocaine, this is a decision that the individual should make, not the government. This point seems so obvious to me that it is, to borrow Jefferson's words, self-evident.

The prohibitionists, however, fail to recognize this fundamental freedom. They advance several arguments in an effort to rebut the presumption in favor of liberty. First, they argue, drug users are responsible for the violence of the drug trade and the resulting damage to innocent people. The erstwhile Drug Czar, William Bennett, when asked how his nicotine addiction differed from a drug addiction, responded, "I didn't do any drive-by shootings." Similarly, former First Lady Nancy Reagan said, "The casual user may think when he takes a line of cocaine or smokes a joint in the privacy of his nice condo, listening to his expensive stereo, that he's somehow not bothering anyone. But there is a trail of death and destruction that leads directly to his door. I'm saying that if you're a casual drug user, you are an accomplice to murder."

The comments of both Mr. Bennett and Mrs. Reagan, however, display a remarkable ignorance about the illegal-drug business. Drug use does not cause violence. Alcohol did not cause the violence of the 1920s, Prohibition did. Similarly, drugs do not cause today's soaring murder rates, drug prohibition does. The

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74 Chapman, Nancy Reagan and the Real Villains in the Drug War, Chicago Tribune, Mar. 6, 1988, § 4, at 3, col. 1. The former First Lady posits a remarkable legal theory; it is a relief to note that it was not the Attorney General who propounded it.
75 See Ostrowski, supra note 2, at 13.
76 See, e.g., id. at 1.
chain of events is obvious: drug laws reduce the supply and raise the price of drugs.\textsuperscript{77} The high price causes addicts to commit crimes to pay for a habit that would be easily affordable if obtaining drugs was legal.\textsuperscript{78} The illegality of the business means that business disputes — between customers and suppliers or between rival suppliers — can be settled only through violence, not through the courts. The violence of the business then draws in those who have a propensity — or what economists call a comparative advantage — for violence. When Congress repealed Prohibition, the violence went out of the liquor business.\textsuperscript{79} Similarly, when Congress repeals drug prohibition, the heroin and cocaine trade will cease to be violent. As columnist Stephen Chapman put it, "the real accomplices to murder" are those responsible for the laws that make the drug business violent.\textsuperscript{80}

Another prohibitionist argument against the right to take drugs is that drug use affects others, such as automobile accident victims and crack babies.\textsuperscript{81} With regard to the former, certainly good reasons exist to strictly penalize driving (as well as flying or operating machinery) while under the influence of drugs. It hardly seems appropriate, however, to penalize those who use drugs safely in an attempt to stop the unsafe usage. As for harm to babies, this is a heart-rending problem (though perhaps not as large a problem as is sometimes believed).\textsuperscript{82} Again, however, it seems unnecessary and unfair to ban a recreational drug just because it should not be used during pregnancy. Moreover, drug-affected babies have one point in common with driving under the influence: misuse of legal drugs (alcohol, tobacco, codeine, caffeine) as well as illegal drugs, contribute to both problems. Thus, if society wants to ban cocaine and marijuana because of these drugs' potential for misuse, society should logically also ban alcohol, tobacco, and similar legal drugs.

\textsuperscript{77} See id. at 11.


\textsuperscript{79} See Ostrowski, supra note 2, at 1.

\textsuperscript{80} Chapman, supra note 74.

\textsuperscript{81} See Rangel, supra note 18, at 47.

\textsuperscript{82} See Gieringer, \textit{How Many Crack Babies?}, \textit{Drug Pol'y Letter} (March 1990). Perhaps society's understanding of rights should evolve to the point that pregnant women are held responsible for harm to their babies. \textit{But see Moss, Substance Abuse During Pregnancy}, 13 \textit{Harv. Women's L.J.} 278 (1990) (discussing recent developments showing that women who use drugs during pregnancy are unfairly singled out and punished).
The question of an individual right to use drugs comes down to this: If the government can tell us what we can put into our own bodies, what can it not tell us? What limits on government action are there? We would do well to remember Jefferson's advice: "Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now."\textsuperscript{83}

IV. THE SOLUTION: RE-ESTABLISH INDIVIDUAL RESPONSIBILITY

For the past several decades a flight from individual responsibility has taken place in the United States. Intellectuals, often government funded, have concocted a whole array of explanations as to why nothing that happens to us is our own fault.\textsuperscript{84} These intellectuals tell us that the poor are not responsible for their poverty, the fat are not responsible for their overeating, the alcoholic are not responsible for their drinking.\textsuperscript{85} Any attempt to suggest that people are sometimes responsible for their own failures is denounced as "blaming the victim."\textsuperscript{86}

These nonresponsibility attitudes are particularly common in discussions of alcohol, tobacco, and other drugs.\textsuperscript{87} Development of these attitudes probably began in the 1930s with the formulation of the classic disease theory of alcoholism.\textsuperscript{88} The disease theory holds that alcoholism is a disease that the alcoholic cannot control.\textsuperscript{89} People have found it easy to apply the theory of addiction to tobacco, cocaine, heroin, even marijuana. In each case, according to the theory, people get "hooked" and simply cannot control their use. Author Herbert Fingarette, however, stated that "no leading research authorities accept the classic disease

\textsuperscript{83} T. Jefferson, Notes on Virginia, in The Life and Selected Writings of Thomas Jefferson 187, 275 (1944).
\textsuperscript{84} See, e.g., S. Peele, Diseasing of America: Addiction Treatment Out of Control 4, 115-43 (1988).
\textsuperscript{85} The corollary of this, of course, is that the successful—whether success is measured in terms of wealth, physical well being, the rearing of successful children, or whatever the criteria—are not responsible for their successes.
\textsuperscript{86} This is not to suggest that people are responsible for every misfortune that they suffer. People are obviously not responsible for their genetic endowments (even the careful can have accidents and can take ill), and bad public policies can act to keep people in poverty. The attempt to acknowledge these facts, however, has led society to absolve individuals of far too much responsibility.
\textsuperscript{87} H. Fingarette, Heavy Drinking 2-6 (1988).
\textsuperscript{88} Id.
\textsuperscript{89} Id.
concept [for alcoholism]." Many scientists, though, believe it is appropriate to mislead the public about the nature of alcoholism in order to induce what they see as the right behavior with regard to alcohol.91

In the popular press the addiction theory has spread rapidly. Popular magazines declare everything from sex to shopping to video games an addiction that the addicted person has no power to control. As William Wilbanks said, the phrase "I can't help myself" has become the all-purpose excuse of our time.92

The addiction theory has also gained prominence in discussions of illegal drugs. Both prohibitionists and legalizers tend to be enamored of the classic notion of addiction. Prohibitionists say that because people cannot help themselves with respect to addictive drugs, society must threaten them with criminal sanctions to protect them from their own failings.93 Legalizers offer instead a "medical model": treat drug use as a disease, not a crime.94 The legalizers urge that the billions of dollars currently spent on drug enforcement be transferred to treatment programs so that government can supply "treatment on demand" for drug addicts.95

Despite the popular affection for the addiction theory, numerous commentators denounce the theory. For example, addiction researcher Stanton Peele deplores the effects of telling people that addictive behavior is uncontrollable:

[O]ne of the best antidotes to addiction is to teach children responsibility and respect for others and to insist on ethical standards for everyone — children, adults, addicts. Crosscultural data indicate, for instance, that when an experience is defined as uncontrollable, many people experience such loss of control and use it to justify their transgressions against society. For example,

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90 *Id.* at 3 (emphasis in original); see also S. Peele, THE MEANING OF ADDICTION (1985).


94 See id. at 22, 25.

95 See generally id. at 22-25; see also S. Peele, *supra* note 84, at 116-17. Many legalizers support "treatment on demand" despite a decided lack of evidence that most treatment programs have any significant effect. See, e.g., Jonas, Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs, 18 HOFSTRA L. REV. 751, 790 n. 272 (1990) (discussing 12-point national public health program).
studies find that the “uncontrollable” consequences of alcohol consumption vary from one society to another, depending upon cultural expectations.\textsuperscript{96}

Spreading the disease concept of addiction is not the only way society has undermined the idea of individual responsibility. Some of the other ways have had their greatest impact on America’s poorest citizens. For example, author Charles Murray points out that in the 1960s policymakers and opinion molders were seized with the grand idea that poverty could and should be eliminated in the United States.\textsuperscript{97} One of the policymakers’ first steps was to tell the poor that their poverty was not their own fault.\textsuperscript{98} Seeking to eliminate the “stigma” attached to poverty, the policymakers made welfare easier to get.\textsuperscript{99} They made it more difficult to throw disruptive or uncooperative students out of school,\textsuperscript{100} and they made it more difficult to put criminals in jail.\textsuperscript{101} As a result, America ended up with more people on welfare, fewer students learning in the schools, and more crime.\textsuperscript{102}

By reducing society’s disapproval of people who do not study, do not work, and do not meet their obligations to family and community, the policymakers took away the respectability formerly accorded to those who do study, do work, and do meet their obligations. As Murray wrote, the intelligentsia\textsuperscript{103} and the policymakers began treating the poor “in ways that they would never consider treating people they respected.”\textsuperscript{104}

Recently, Murray has extended his analysis in a penetrating dis-

\textsuperscript{96} See Peele, \textit{supra} note 93, at 25.
\textsuperscript{97} C. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 26-29, 42 (1984) (discussing how shift in poverty policies occurred not because of change in public opinion but because of change in views of intelligentsia).

The workings of the free market economy were responsible for bringing us to the point, for the first time in history, that people could even conceive of eliminating poverty. Unfortunately, however, this key point was ignored in the rush to create social programs designed to root out the remaining pockets of poverty.
\textsuperscript{98} \textit{Id.} at 24-29, 180-82.
\textsuperscript{99} \textit{Id.} at 181-82.
\textsuperscript{100} \textit{Id.} at 172-75.
\textsuperscript{101} \textit{Id.} at 168-70.
\textsuperscript{102} \textit{Id.} at 242, 244, 252-61.
\textsuperscript{103} Murray defined the “intelligentsia” as “people who deal professionally in ideas.” \textit{Id.} at 42.
\textsuperscript{104} \textit{Id.} at 222.
cussion of the drug problem. He cites numerous examples in which the government has taken from people the power to do something about drugs in their own lives. First, in an attempt to prevent school principals from using their power in an arbitrary or racially discriminatory manner, the government has made it very difficult for principals to expel students for disruptive behavior or drug use. Second, legislatures and courts are making it increasingly difficult for employers to dismiss employees: wrongful-discharge suits and federal investigations have replaced the old doctrine of employment at will. Finally, the government has made it more burdensome for landlords to maintain standards in their buildings by taking away the landlords’ power to decide — albeit sometimes arbitrarily — to whom to rent and whom to turn away.

Murray proposes solutions designed to give individuals more control over their own lives: school vouchers to allow parents to choose the schools their children will attend, with the schools free to set their own relaxed or zero-tolerance policies toward drugs; freedom for workers and employers to decide on the conditions of employment with regard to drug use without interference from courts and governments; wide discretion for landlords (and tenant committees in public housing) to screen applicants. Murray’s basic argument is that “legalization [of drugs will] work in a society where people are held responsible for the consequences of their actions.”

The United States requires even more reforms — in addition to drug legalization — to create the kind of society in which people accept responsibility for their actions. Americans must repeal

105 Murray, How to Win the War on Drugs, New Republic, May 21, 1990, at 19, 19-25.
106 Id.
107 Id. at 21.
108 Id. at 24.
109 Id. at 24-25.
110 Id. at 21-25.
111 Id. at 19.
112 One reform that I have proposed elsewhere is the abolition of welfare. See Boaz, Saving the Inner City, in An American Visions 283, 288-91 (1989). With regard to the inner city, where the impact of drug use is worst, Americans must recognize one fact: As long as welfare exists, a significant number of people will take little responsibility for improving their lives and the lives of their children. They will make dependency a permanent way of life. They will continue to impart to their children a sense of hopelessness
the laws that prevent unskilled workers from finding employment so as to make honest, productive work available in the inner city. For example, the minimum-wage law, the Davis-Bacon Act, and licensing laws that regulate who can offer a particular service hamper the ability of employers to hire unskilled workers. By making legitimate employment a more attractive option, Americans can reduce the dependency on government handouts and reduce the attractiveness of crime.

Beyond the inner city, Americans might take other steps to restore traditional notions of individual responsibility. Laws regarding drugs should only punish persons who violate the rights of others; private actions should go unpunished. Thus, laws should strictly punish those who drive while under the influence of alcohol or other drugs. Intoxication, moreover, should not be a legal defense against charges of theft, violence, or other rights violations, nor should a claim of "shopping addiction" excuse people from having to pay their debts. Physicians, intellectuals, and religious leaders should recognize that the denial of responsibility has gone too far, and they should begin to stress the moral value of individual responsibility, the self-respect such responsibility brings, and the utilitarian benefits of living in a society in which all persons are held responsible for the consequences of their actions.

CONCLUSION

Society cannot really make war on drugs, which are just chemical substances. Society can only wage wars against people, in this case people who use and sell drugs. Before America continues a war that has cost many billions of dollars and many thousands of

and resignation about life. Americans must have the courage to recognize the overwhelming failure of welfare and abolish it. Although the abolition of welfare will likely impinge on our sense of compassion, it is a necessary step if we are to have any hope of abolishing the cycle of poverty, despair, and dependency in the inner city. For other discussions on the failure of welfare, see C. MURRAY, supra note 97, at 227-36 (proposing abolition of welfare and replacing with dependence on job market, family members, friends, and locally funded services); R. O'NEIL, THE PRICE OF DEPENDENCY 251, 257, 292-318 (1970) (discussing alternatives to present welfare system).

lives — more than eight thousand lives per year even before the skyrocketing murder rates of the past few years\textsuperscript{114} — Americans should be sure that the benefits exceed the costs. Remarkably, all of the high-ranking officers in the Reagan administration's drug war reported in 1988 that they knew of no studies showing that the benefits of prohibition exceeded the costs.\textsuperscript{115}

There is a good reason for the lack of such a study. Prohibition is futile. We cannot win the War on Drugs. We cannot even keep drugs out of our prisons.\textsuperscript{116} Thus, we could turn the United States into a police state, and we still would not win the War on Drugs. The costs of prohibition, however, are very real: tens of billions of dollars a year, corruption of law enforcement officials, civil liberties abuses, the destruction of inner-city communities, black-market murders, murders incident to street crime by addicts seeking to pay for their habit, and the growing sense that our major cities are places of uncontrollable violence.

Hundreds, perhaps thousands, of years of history teach us that we will never make our society drug-free. In the futile attempt to do so, however, we may well make our society unfree.

\textsuperscript{114} Ostrowski, \textit{supra} note 2, at 15. The breakdown of average annual deaths caused by drug prohibition has been estimated at:

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Murder & 2,350 \\
Drug-related AIDS & 3,500 \\
Poisoned drugs/no quality control & 2,400 \\
Total & 8,250 \\
\hline
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\textit{Id.}

\textsuperscript{115} \textit{Id.} at 2.