

## Drug Legalization

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### The Regulation of Psychoactive Drugs

Throughout the world, psychoactive drugs such as heroin, cocaine, amphetamines, LSD, and marijuana are regulated by statutes. As a logical matter, the form that such regulations could take varies widely. At one extreme is the complete prohibition on the production, distribution and use of all psychoactive substances guarded by aggressive enforcement action and harsh penalties. At the other extreme is complete legalization that makes the drugs freely available to everyone like any other commodity with nothing more than a slightly elevated tax to mark their status as potentially hazardous substances.

As a practical matter, the regulatory policies of most developed countries are concentrated in a relatively small range. The reason is at least partly the effect of the International Convention on Psychotropic Substances which commits its \_\_\_ signatories to establishing regulatory controls over the production, distribution and use of psychotropic drugs. Within the broad requirements of the

Psychotropic Convention, different countries have pursued different policies.

Great Britain has authorized licensed physicians operating in government sponsored clinics to prescribe heroin to addicts as part of the medical treatment of their condition. The United States has prohibited such conduct, preferring the prescription of oral doses of methadone to intravenous doses of heroin as a treatment for heroin addiction.

The Netherlands has retained laws that proscribed the production, distribution, and use of drugs such as heroin, cocaine, and marijuana, but has effectively decriminalized their use by deciding not to enforce them against users. In the United States, about a dozen states have explicitly "decriminalized" the possession of marijuana for one's own use, but laws against the possession of heroin and cocaine as well as distribution and sale continue to be enforced aggressively.

The question raised by those who advocate drug "legalization" is whether the United States would be more effective in combatting drug use and its adverse consequences if its current "prohibitionist" regime were relaxed in some way. While legalization advocates do not always describe the regime they are proposing, one can

distinguish generally between proposals to "legalize" drug distribution and sale on the one hand, and to "decriminalize" the possession of drugs on the other. "Legalization" calls for legitimating the sale and distribution of the drugs as well as their possession. "Decriminalization" implies authorizing only personal possession, not sale.

One can also distinguish among legalization and decriminalization proposals on the basis of what particular drugs are being authorized for wider distribution and use. One can distinguish, for example, between proposals to "decriminalize" the possession of marijuana on the one hand, and proposals to "legalize" the distribution and sale of heroin and cocaine on the other. While the "decriminalization" of marijuana possession and use is often considered part of the general discussion of drug legalization, in this discussion I will concentrate more on proposals to legalize the distribution and sale of drugs such as heroin and cocaine (with or without medical supervision), since it is these proposals that are now attracting the greatest attention.

#### Two Different Kinds of Arguments

The debate about whether legalizing drugs is a good idea or not occurs at two different levels. At one level,

the argument is philosophical one about the proper limits of state authority in a free society. The argument is that the state should not regulate private conduct that poses little harm to others. At another level, the argument is a practical one about the likely effects of legalizing drugs on different objectives of drug policy. The argument is that if drugs were legalized, many of the current adverse consequences of drug use such as the crimes associated with black markets or the ill health associated with impure drugs would be substantially improved. While, as we will see, the different arguments are often commingled, it is important to learn to discuss them separately, for each makes a different kind of appeal.

### The Philosophical Argument

The philosophical discussion begins with a principle articulated by John Stuart Mill that has become a basic tenet of the philosophy of the liberal state: government in a free society should not seek to legislate personal morality; it should regulate only that conduct that is directly harmful to others. To insure the greatest degree of personal liberty, each citizen should be free to choose their own road to Hell. By this philosophical standard, advocates of legalization argue it is wrong to prohibit drug use because, in a world in which drug use was permitted, the only people who would be adversely affected are the users

themselves. As a matter of principle, they ought to be allowed to use drugs if they so desired.

Note that this philosophical principle rests at least partly on a practical idea that it is imprudent as well as wrong to try to legislate against personal conduct. The argument is that such efforts are doomed to failure, and will themselves produce a variety of unintended, adverse consequences. Since the laws themselves will not dissuade people from using drugs, drug use will continue despite its illegality, and that will weaken the credibility of the criminal law. Because there are no victims to complain, law enforcement efforts must rely on the most intrusive investigative methods which threaten important losses in privacy. Because people will still want drugs, a black market will arise to supply them, and that, in turn, will promote violence and corruption. In short, staking the state's credibility on deterring conduct that is desired by individuals is unwise as well as inappropriate.

Those who argue against the legalization of drugs attack the philosophical position in several different ways. First, they argue that drug use would have adverse consequences for others even in a world in which drugs were legal. To some extent, the adverse consequences are created by the fact that we are now all tied together in public and private insurance schemes so that if an individual drug user

were injured in an accident, or was unable to discharge his responsibilities to care for his spouse and children, the rest of the society would end up taking care of the drug user or his family. But even if no insurance schemes tied us together, it is quite possible that many others would be adversely affected by drug users. Other drivers or co-workers might be injured as a consequence of drug intoxication. Spouses and children might be neglected as a result of the financial and psychological demands associated with drug dependency. In short, drug use may not be a victimless crime.

Second, they point out that Mill himself made an exception in his general argument against state regulation of personal conduct to allow the state to prohibit citizens from selling themselves into slavery, and to allow the state to regulate the conduct of people (such as children, or the mentally disabled) whose judgment about their own best interests could not be trusted. In these cases, state regulation was justified because it enhanced and protected the freedom of individuals rather than reduced it. It also established the conditions necessary for individuals in the society to remain free and accountable. Arguably, state regulation of drug use could be justified under these exceptions to the general rule. Addiction could be viewed as a kind of slavery that could properly be the target of state regulation. Drug dependency could also be viewed as

something that reduced the competence of individuals to judge what was in their own interest, and to watch out for the interests of others, and therefore something that would expose drug dependents to special controls analogous to those placed on children and the mentally ill.

Third, they note that not everyone has to agree with Mill's principle anyway. There are older philosophical traditions that view the state as an institution that is allowed -- even expected -- to behave paternalistically towards its citizens, and to promote some kinds of virtues. Compulsory education, laws requiring drivers to wear seat belts, even compulsory participation in the social security program can be seen as examples of the state assuming the responsibility to make people act in their own best interests, or to encourage the kinds of virtues among citizens that will strengthen a democratic society. Arguably, then, it is appropriate for the state to regulate drug use in the interest of .

### The Practical Arguments

Even if those who support the current "prohibition" against drug use can find room in their philosophy of the state to justify controls over drug use, they must still answer the claims of those who advocate legalization that the policy is practically self-defeating as well as

philosophically unsound. The argument made by those who advocate drug legalization is that many of the worst aspects of the drug problem that we now see are not consequences of drug use in itself, but of the policies that are used to regulate drug use. If those policies were changed, the drug problem would look much different and be much improved over our current state.

#### Legalization Advocates: Legalization Reduces Crime

In this view, the crime now associated with drug use, for example, would be substantially reduced if drugs were legalized. The crimes of drug selling and possession that now overwhelm the nation's criminal justice system and stigmatize hundreds of thousands of otherwise law-abiding citizens would immediately disappear. The violent crimes associated with illicit trafficking -- the torture of informants, and the murders of innocent citizens caught in the crossfire between competing drug dealers -- would also be substantially reduced as the profit was taken out of illegal drug dealing by the creation of legal competition. The burglaries and robberies committed by drug users to get money to support their drug habits (and that sometimes erupt into violence) would also be reduced as drugs became available at lower prices.



## Legalization Advocates: Legalization Improves the Health and Welfare of Users

Advocates of legalization also claim that the health and welfare of drug users would be improved. The reasoning is that many of the worst health consequences of drug use -- death by overdose, HIV infection (i.e. AIDS), septicemia (i.e. bacterial infections and blood poisoning) -- are the results of the unsterile and unpredictable doses supplied by illicit markets. Similarly, some of the greatest pressures on the welfare of users comes from the fact that illicit drugs are expensive and unreliably available. The first feature places enormous financial pressures on those least able to respond to them. The second makes it difficult to hold a regular job, and function in normal ways. If sterile and predictable doses were conveniently available to drug users at a reasonable price, some of these adverse consequences might well disappear. This would be particularly true if the drugs were made available in ways that lured drug users into some kind of treatment program designed to discourage them from drug use.

## Prohibition Advocates: Legalization Reduces Crime Less than Advocates Assume

Those opposed to the legalization of drugs take a more jaundiced view of the salutary effects of making drugs

more freely available. With respect to the level of crime committed by users, they acknowledge that legalization would eliminate the crimes of sale and possession of drugs. They would also acknowledge that some of the crimes associated with the black market in drugs would be reduced. But they would also point out that unless drugs were made freely available to all, including teenagers, some residual black market would survive, and some violence might well continue in that market. They would also observe that it is possible that the drug dealers, skilled in organization and violence, would not simply disappear, but would enter different illegal enterprises such as gambling, prostitution, or extortion and engage in violence there.

Similarly, they would argue that there is some possibility that the level of economically motivated crime committed by drug users might diminish. But they would point out that this effect might be smaller than assumed by those who favor legalization because the drug users would still have to have money to buy food and shelter and to take care of their families, and crime might remain the preferred career.

They would also point out that some crimes committed by drug users might, in fact, be stimulated the physiological effects of the drugs rather than the economic pressure they create. Cocaine makes people tense and

irritable. So does heroin when people are in the early stages of withdrawal. Crack, in high doses, produces paranoia. These physiological effects, combined with some frustrating circumstances and the availability of weapons might well trigger some of the crime now committed by drug users, and that might increase in a world where drugs were more widely available.

Prohibition Advocates: Legalization Does Not  
Necessarily Enhance the Health and Welfare of Drug  
Users

The claim that the health and welfare of users would be improved by making drugs freely available to users also seems far too optimistic to those who oppose drug legalization. While it is theoretically true that drug users would have a greater opportunity to keep themselves healthy if drugs were made more freely available, what actually happens is that when drugs are made freely available to users, they do not necessarily adopt safer drug using practices. They still court overdoses by trying to get as high as possible. They still inject themselves carelessly and expose themselves to risks of infection.

Similarly, while making drugs less expensive and more conveniently available could reduce some of the financial and social pressures that now make a user's life

difficult, it is also true that these same measures will encourage drug users to spend more of their time stoned and unable to go to work, or to care for their families. It will also lead to the birth of drug addicted infants. Further, such measures might even undermine what motivations now exist for users to seek treatment, and therefore condemn them to longer periods of drug dependency than would be true if the society continued to discourage drug use.

### The Level of Drug Use

The principal reason that those in favor of prohibition continue to favor prohibition, however, is not because they think that prohibition makes the lives of drug users who use drugs under prohibitionist policies better. They would acknowledge that prohibition policies worsen the behavior and condition of current drug users. Indeed, that is part of the reason why those who favor prohibition also favor treatment programs as devices for improving the health and condition of drug users, and for encouraging them to give up drug use.

Instead, the reason that they support prohibition policies is the belief that if drugs were freely available, many more people would use them than is now true, and that drugs would be sufficiently damaging to those individuals even when the drugs were freely available that the society

would end up worse off than it is now. In effect, it would trade a relatively small number of unhealthy, criminal drug users being supplied by a fairly violent black market for a much larger group of drug users who on average might behave better and be in better shape than the current drug users, but who, in aggregate, would become a much larger social problem than now exists. Indeed, they are particularly concerned that many of the bad health and social consequences of drug use would accumulate among the nation's poor, minority citizens. While they cannot be sure that the growth in the drug problem would be large, they are reluctant to undertake the experiment.

Advocates of legalization, for their part, are much less worried about a growth in the number of users, and trust that the adverse consequences of drug use will be so much less in a world in which drugs were legalized, that any increase in the number of users would be offset by improvements in their health and welfare, and reductions in criminal activity. They believe that relatively few additional people would be tempted to use drugs in a world in which they were freely available. Indeed, they often argue that if the profit could be taken out of the illegal market, drug use might actually go down since there would be no economic incentive to develop the market.

To these points, those in favor of continuing the prohibition against drugs observe that tightening controls over drugs have always been associated with reductions in consumption, and liberalizing with increased consumption. They note, for example, that when the commercial production and distribution of alcohol was prohibited in the United States, alcohol consumption fell by a third to a half -- despite the fact that it was a popular drug, and despite the fact that it remained legal to produce it for personal use. They also note that England has twice controlled increases in heroin use by restricting the availability of heroin to addicts.

In responding to the view that "taking the profit out of illicit drug market" would reduce the incentives for expanding the drug market, advocates of continued prohibition would observe that while legalization reduces the power of the illicit suppliers, it brings into existence a powerful legitimate industry that has its own reasons for wanting to increase the supply of drugs. After all, as the experience with alcohol and lotteries has shown us, it is not only illegal dealers who are greedy; private companies and even the state can become active marketeers of "sin" if there are financial reasons to do so.

The Difficulty of Resolving the Debate

As one can see, the advocates of legalization and continued prohibition of drug use disagree on many things. One might imagine that the disagreements could be resolved through the collection of additional empirical evidence. To a degree, that is true. The debate would be illuminated by the collection of much more accurate information than is now available on the experiences of different countries and different states with changing their drug control policies.

Nonetheless, it is important to understand that at some level the debate can never be resolved. Part of the reason is that it is at least as much a philosophical debate as an empirical one. To resolve it, one must not only develop a view about the proper role of government, but also how one might trade on effect of drug policy off against another -- for example, reduced violence associated with illegal drug trafficking for more cocaine addicted babies.

In addition, however, it is very difficult to know how to interpret the available empirical evidence. Much of the relevant evidence comes from the experience of other countries, other times, or other commodities (such as alcohol). It is never clear to what extent Britain or Holland's experience, even if it can be accurately described, will be the same as the United States. It is not clear what lessons Prohibition has to teach Americans about the best ways to control cocaine use. Moreover, when one is

searching for the effects of drug use on individuals, one is always looking at a result that is powerfully influenced by the individual psychological characteristics of the drug user, his social position, and the effects of current drug policies as well as the drug. Hence, it is always exceedingly difficult to trace out what portion of the observed behavior and condition can be properly attributed to drug use.

The only thing that one can say for sure, then, is that it is uncertain what the effects of legalization would be. It is a gamble. Like all gambles, there is the chance that the benefits would exceed the costs. But there is also the risk that things would get much worse. What is frustrating is not only that the choice remains uncertain, but also that it is hard to know what one could do to improve one's estimate of the odds. In this situation, many would counsel caution -- particularly as the cocaine epidemic which lies behind so much of the nation's current concern about drug use now seems to be reaching its peak and turning down.



Selected References:

James B. Bakalar and Lester Grinspoon, Drug Control in a Free Society (New York, Cambridge University Press, 1984)

John Kaplan, The Hardest Drug: Heroin and Public Policy (Chicago, University of Chicago Press, 1983)

Herbert Packer, The Limits of the Criminal Sanction, (Stanford, Stanford University Press, 1968)

Ethan Nadelmann, "The Case for Legalization", The Public Interest. no. 92 (Summer, 1988) pp. 3-31

Mark H. Moore, "Drugs: Getting a Fix on the Drug Problem" Yale Law and Policy Review, Vol. 8, no. 1 (1990) pp. 8-35

James Q. Wilson, \_\_\_\_\_ Commentary, \_\_\_\_\_  
(February, 1990)

Study Questions:

1. What are the important objectives of drug policy? Should the society be concerned about drug use in itself, or only about the adverse consequences of drug use? What would be the adverse effects of drug use in a world in which drug use was legal?
2. What are the various forms that drug legalization could take? Who would have to take action to legalize drugs in any of the forms that you are considering?
3. What are the estimated benefits of drug legalization? How certain can one be of these benefits?
4. What are the claimed benefits of keeping drugs illegal? What evidence exists to reveal whether these claimed benefits are real?
5. Is drug use a "victimless crime"? How about in a world where drugs were freely available?