

## Keep Off the Grass: The Economics of Prohibition and U.S. Drug Policy

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### ABSTRACT

*In 1906, the United States instituted its first drug laws. Over time, drug prohibition and criminalization have continued, becoming what is known today as the “War on Drugs.” This Article examines the political economy of the War on Drugs with particular emphasis on the unintended consequences of drug prohibition. This Article analyzes the effects of prohibition on violence, drug potency, and cartelization in the drug market. In addition, it examines how the drug policies of the U.S. government have led to a progressive militarization of domestic police forces, fostered an erosion of civil liberties, and contributed to the weakening of private property. The Article concludes that drug prohibition works against many of the*

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<sup>‡</sup> Professor of Economics and Philosophy, George Mason University; Ph.D., Economics, George Mason University.

\* F.A. Harper Professor of Economics, George Mason University; Ph.D., Economics, George Mason University.

<sup>†</sup> Mercatus Ph.D. Fellow and Ph.D. student at George Mason University.

*stated goals of its advocates and offers an alternative to present drug policy.*

#### INTRODUCTION

On October 9, 2012, police executed a “no-knock” warrant on the home of Mr. and Mrs. Fasching in Billings, Montana.<sup>1</sup> While conducting their mission, police dropped a flash grenade into the bedroom of the Fasching’s twelve-year-old daughter.<sup>2</sup> The ensuing blast left the girl with first- and second-degree burns on over fifty percent of her body.<sup>3</sup> A few months earlier, in May 2011, police in Pima County, Arizona, stormed a series of homes, equipped with full SWAT gear and an armored personnel carrier.<sup>4</sup> Police entered the home of a twenty-six-year-old former Marine, Jose Guerena, who, after telling his wife and four-year-old son to hide in a closet, armed himself and prepared to face who he thought were intruders.<sup>5</sup> Reports later confirmed that Guerena had not fired his weapon nor turned off the safety when officers opened fire, striking the young father twenty-three times in less than seven seconds, killing him.<sup>6</sup> In both of these cases, police entered the homes to execute raids searching for drugs or drug-related activity. No drugs of any kind, or any evidence of drug-related exploits, were found in either residence. In both instances, however, innocent civilians had their property and person violated by the violent actions of police.

These two cases are far from isolated incidents. Between 1985 and 2011, police executed more than 375 botched raids in search of drugs or drug-related activity in which innocent civilians, police officers, and non-violent offenders were killed, innocent suspects had their property trespassed, sickly individuals or medical professionals were wrongfully raided, or excessive force was used.<sup>7</sup> Like the two opening cases, each of these raids was conducted as part of the

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<sup>1</sup> Mike Riggs, *12-Year-Old Girl Has Second Degree Burns from SWAT Flash Grenade Detonated During Wrong-Door Raid*, REASON: HIT & RUN BLOG (Oct. 12, 2012, 1:06 PM), <http://reason.com/blog/2012/10/12/12-year-old-girl-has-second-degree-burns>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Radley Balko, *Jose Guerena Killed: Arizona Cops Shoot Former Marine in Botched Pot Raid*, HUFF POST: POL. (May 25, 2011, 6:42 PM), [http://www.huffingtonpost.com/2011/05/25/jose-guerena-arizona-\\_n\\_867020.html?](http://www.huffingtonpost.com/2011/05/25/jose-guerena-arizona-_n_867020.html?)

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Botched Paramilitary Police Raids*, CATO INST., <http://www.cato.org/raidmap/index.php?type=1#> (last visited Mar. 2, 2013).

broader “War on Drugs.” Since President Richard Nixon first declared drugs to be a serious threat to the United States in the early 1970s, state and local authorities, as well as the U.S. government, have increasingly expanded their efforts to combat illicit drugs. In 1980, a total of 580,900 people were arrested on drug-related charges.<sup>8</sup> By 2011, the number of drug arrests exceeded 1.5 million, and more than twenty-five percent of the U.S. prison population was incarcerated as a result of drug offenses.<sup>9</sup> During its inaugural year in 1973, the Drug Enforcement Administration (DEA) employed 2,898 people and had an annual budget of \$74.9 million.<sup>10</sup> By 2011, the DEA employed nearly 10,000 people with a budget of over \$2 billion.<sup>11</sup> Annually, the War on Drugs costs U.S. taxpayers over \$51 billion.<sup>12</sup>

The U.S. government’s goals for the War on Drugs are wide reaching. For instance, the *National Drug Control Strategy Goals* for 2012 called for a reduction in “illicit drug consumption” and an “improve[ment] [of] the public health and public safety of the American people.”<sup>13</sup> Former U.S. Attorney General Richard Thornburg presented the following as the objectives of U.S. drug policy:

[We] must face up to the daunting challenge of facing down drug abusers and drug traffickers. . . . [O]ur responsibility is to disrupt, dismantle, and destroy drug trafficking enterprises. This ambitious agenda reaches across the full spectrum of drug activity. We intend to disrupt the drug marketplace by displacing sellers and users alike. . . . [W]e intend to destroy the very infrastructure of these criminal conglomerates. . . . [T]he United States [has been] one of the first nations to . . . enhance law enforcement efforts worldwide. . . . [T]here will be no safe havens.<sup>14</sup>

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<sup>8</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 165148, DRUGS AND CRIME FACTS 59, <http://bjs.ojp.usdoj.gov/content/pub/pdf/dcf.pdf> (last visited Mar. 2, 2013) [hereinafter DRUG AND CRIME FACTS].

<sup>9</sup> *Drug War Statistics*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/drug-war-statistics> (last visited Mar. 2, 2013).

<sup>10</sup> *DEA Staffing and Appropriations: FY 1972-2011 (All Sources)*, DRUG ENFORCEMENT ADMIN.: STAFFING AND BUDGET, <http://www.justice.gov/dea/about/history/staffing.shtml> (last visited Mar. 2, 2013).

<sup>11</sup> *Id.*

<sup>12</sup> *Drug War Statistics*, *supra* note 9.

<sup>13</sup> EXEC. OFFICE OF THE PRESIDENT OF THE U.S., NATIONAL DRUG CONTROL STRATEGY 3 (2012), available at [http://www.whitehouse.gov/sites/default/files/ondcp/2012\\_ndcs.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/2012_ndcs.pdf).

<sup>14</sup> Dick Thornburg, U.S. Attorney Gen., Goals in the War on Drugs 3–4, 8, 10 (Apr. 30, 1990), available at <http://www.justice.gov/ag/aghistorical/thornburgh/1990/04-30-90.pdf>.

As this quote indicates, many negative consequences are attributed to the drug trade. Some argue that in addition to destroying people's health, drugs decrease societal wealth and employment, promote crime, corrupt law enforcement, and spread disease.<sup>15</sup> But has the federal government's War on Drugs curtailed these negative outcomes? Have the past and present policies worked to "disrupt, dismantle, and destroy"<sup>16</sup> the purveyors of illicit substances? This Article argues that the U.S. government has not only failed in its efforts to stop drug use among American citizens, but that the prohibition of drugs has in fact worked *against* many of the strategic goals summarized above. As the opening examples and recent statistics regarding expenditure and arrests illustrate, the War on Drugs has immensely impacted the lives of many individuals in a variety of capacities.<sup>17</sup> Through the policies of prohibition and the War on Drugs, the U.S. government has produced several negative unintended consequences. These include increasing the amount of drug-related crime and violence (both domestically and internationally), inducing the spread of deadly diseases, and increasing the likelihood of overdose for persons who consume illicit drugs. Moreover, the War on Drugs has led to mass spending on incarceration and drug interdiction activities, criminalized a large part of the American populace, and negatively impacted employment prospects for millions of individuals. Prohibition policies have *encouraged* cartelization in the drug industry both domestically and abroad. Finally, the War on Drugs has adversely impacted American citizens by eroding civil liberties and changing the overall structure of state and local law enforcement.

Part I offers a brief history of prohibition in the United States in order to examine how the scope and scale of the War on Drugs has changed over time. Part II provides an overview of the economics of prohibition and explains the mechanisms through which drug policies

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<sup>15</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-111, LAW ENFORCEMENT: INFORMATION ON DRUG-RELATED POLICE CORRUPTION (May 1998), *available at* <http://www.gao.gov/archive/1998/gg98111.pdf>; NAT'L COAL. FOR THE HOMELESS, SUBSTANCE ABUSE AND HOMELESSNESS 1-2 (July 2009), *available at* <http://www.nationalhomeless.org/factsheets/addiction.pdf>; *Drugs and Crime Facts*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/content/duc/duc.cfm> (last visited Mar. 2, 2013) [hereinafter *Drug and Crime Facts*]; *Drug Facts: HIV/AIDS and Drug Abuse: Intertwined Epidemics*, NAT'L INST. ON DRUG ABUSE (May 2012), <http://www.drugabuse.gov/publications/drug-facts/hiv-aids-drug-abuse-intertwined-epidemics>.

<sup>16</sup> Thornburg, *supra* note 14, at 4.

<sup>17</sup> See *Drug War Statistics*, *supra* note 9.

impact individuals, the drug industry, and other areas of the economy. Part III examines how the War on Drugs has impacted law enforcement throughout the United States. Specifically, this Part examines how policies regarding drugs have led to the increasing militarization of domestic police forces and how this has perpetuated the erosion of civil liberties over time. Part IV describes the political mechanisms of drug policy and discusses the challenges faced by those wishing to enact substantial policy reforms. The Article concludes by stating that drug prohibition works against many of its advocates' goals and offers an alternative to present drug policy.

## I

### A BRIEF HISTORY OF PROHIBITION

Throughout the 1700s and until the early 1900s, the U.S. government did not institute criminal penalties against the manufacture, sale, possession, or use of today's illegal drugs.<sup>18</sup> In 1906, Congress began to regulate the sale and use of some substances via the Pure Food and Drug Act.<sup>19</sup> The Act required substances containing ingredients like cocaine, morphine, heroin, alcohol, and cannabis to be labeled with information regarding content and dosage.<sup>20</sup>

In the following decades, federal policies moved away from regulation toward criminalization and prohibition. In 1914, the Harrison Narcotics Act was passed by Congress to regulate and tax the market for opiates by requiring "registration of, with collectors of internal revenue, and . . . a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations."<sup>21</sup> Although it did not appear to criminalize drugs, the Act contained a clause that required physicians to only proscribe

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<sup>18</sup> See Eric. E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 391–95 (1995).

<sup>19</sup> Pure Food and Drug Act of 1906, Pub. L. No. 59-381, 34 Stat. 768, *replaced by* Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (codified in scattered sections of 21 U.S.C.).

<sup>20</sup> David F. Musto, *The History of Legislative Control Over Opium, Cocaine, and Their Derivatives*, SHAFFER LIBRARY OF DRUG POL'Y, <http://www.druglibrary.org/schaffer/history/ophs.htm> (last visited Mar. 23, 2012).

<sup>21</sup> Harrison Narcotics Act of 1914, Pub. L. No. 63-223, ch. 1, 38 Stat. 785, *replaced by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. 2, 84 Stat. 1236 (1970).

narcotics “in the course of his professional practice.”<sup>22</sup> This part of the Harrison Act was interpreted as banning doctors from prescribing narcotics to addicts. The effects of the Act occurred almost immediately. For example, the *New York Medical Journal* reported less than six months after the bill was passed,

[T]he immediate effects of the Harrison antinarcotic law were seen in the flocking of drug habitués to hospitals and sanatoriums. Sporadic crimes of violence were reported too, due usually to desperate efforts by addicts to obtain drugs. . . . The really serious results of this legislation, however, will only appear gradually and will not always be recognized as such. These will be the failures of promising careers, the disrupting of happy families, the commission of crimes which will never be traced to their real cause, and the influx into hospitals for the mentally disordered of many who would otherwise live socially competent lives.<sup>23</sup>

By 1938, over 25,000 physicians were arraigned on narcotics charges as a result of the Harrison Act, and 3,000 served time in prison.<sup>24</sup>

Between 1920 and 1933, the United States placed a constitutional ban on the sale of alcohol. In addition to ushering in the well-known era of moonshine, rum-runners, and speakeasies, the Eighteenth Amendment also led to significant increases in arrests. Arrests for drunkenness and disorderly conduct increased forty-one percent.<sup>25</sup> Drunk driving arrests increased by eighty-one percent.<sup>26</sup> The number of federal convicts increased by 561 percent and total federal expenditures on penal institutions increased by 1,000 percent.<sup>27</sup>

In the years following prohibition, marijuana use became more widespread. As a result, Congress passed the Marihuana Tax Act of 1937.<sup>28</sup> The legislation levied a tax of approximately \$1.00 per year on anyone who dealt commercially with marijuana, hemp, or cannabis.<sup>29</sup> Violation of the Act could result in five years imprisonment and a fine of \$2,000.<sup>30</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Mental Sequelae of the Harrison Law*, N.Y. MED. J., May 15, 1915, at 1014, 1014.

<sup>24</sup> LAWRENCE KOLB, DRUG ADDICTION: A MEDICAL PROBLEM 146 (1962).

<sup>25</sup> William A. Meredith, *Organized Crime and Prohibition*, U. OF ALBANY (Apr. 29, 2005), [http://www.albany.edu/~wm731882/organized\\_crime1\\_final.html](http://www.albany.edu/~wm731882/organized_crime1_final.html).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Marihuana Tax Act of 1937, Pub. L. No. 75-238, ch. 553, 50 Stat. 551, *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1292 (1970).

<sup>29</sup> *Id.* ch. 553, § 2(a)(2).

<sup>30</sup> *Id.* ch. 553, § 12.

In 1951, Congress passed the Boggs Act, the first law requiring mandatory minimum sentencing for drug offenses.<sup>31</sup> Five years later, the Narcotics Control Act increased the penalties and allowed for the death penalty in cases in which heroin was sold to individuals under the age of eighteen.<sup>32</sup>

In the early 1970s, President Nixon declared drugs to be “public enemy number one.”<sup>33</sup> During his presidency, concerns over the “drug problem” in the United States grew once again. In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act (CDAPC).<sup>34</sup> CDAPC brought many separate federal mandates under a single law and established a schedule of controlled substances.<sup>35</sup> In 1972, the House voted unanimously to authorize a “\$1 billion, three-year federal attack on drug abuse.”<sup>36</sup> The DEA was created the following year to enforce all federal drug laws and coordinate broader drug interdiction activities.<sup>37</sup> Under the direction of the DEA, the War on Drugs expanded internationally and led to more drug arrests than ever before.

By 1980, there were approximately 376,000 drug related arrests a year.<sup>38</sup> By the end of the decade, that number climbed to almost one million annually.<sup>39</sup> President Ronald Reagan declared a “War on Drugs” in 1982, leading to a further tightening of drug laws, more arrests, and harsher sentencing. That same year, the U.S. Supreme Court upheld a ruling imposing a forty-year prison sentence on a Virginia man convicted of possession of nine ounces of marijuana (about \$200 worth), reversing the ruling of two lower courts, which

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<sup>31</sup> Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767, *amended by* Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567.

<sup>32</sup> Narcotics Control Act of 1956, Pub. L. No. 84-728, § 107, 70 Stat. 567 (1956).

<sup>33</sup> Telephone Remarks to Students and Educators Attending a Drug Education Seminar in Monroe, Louisiana, 321 PUB. PAPERS 1019 (Oct. 4, 1971), *available at* <http://www.presidency.ucsb.edu/ws/?pid=3179>.

<sup>34</sup> Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

<sup>35</sup> *Id.*

<sup>36</sup> THOMAS SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS, AND PUSHERS 223 (rev. ed. 2003) (citing *\$1 Billion Voted for Drug Fight*, SYRACUSE HERALD-J. Mar. 16, 1972, at 32.).

<sup>37</sup> *Drug Enforcement Administration History: 1970–1975*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/about/history.shtml> (last visited Mar. 4, 2013).

<sup>38</sup> HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 5 (Mar. 2009), *available at* <http://www.hrw.org/reports/2009/03/02/decades-disparity-0>.

<sup>39</sup> *Id.*

found the sentence violated the Eighth Amendment's ban on cruel and unusual punishment.<sup>40</sup> In another case, a twenty-one-year-old man in Arizona was sentenced to a two-year prison term for sniffing paint under the pretense that "intoxicating sniffers can grow violent."<sup>41</sup> In 1988, working under her "Just Say No" campaign, First Lady Nancy Reagan provided a clear window into the federal government's stance on illegal drugs, "[A]ny user of illicit drugs is an 'accomplice to murder' . . . 'There is no middle ground. We must be as adamant about the casual user as we are about the addict.'"<sup>42</sup>

Throughout the 1990s and the first decade of the new millennium, the DEA and the U.S. government expanded the scope of anti-drug operations once again, looking to curtail the use of substances like crack cocaine, methamphetamine, and the steady increase in prescription drug abuse. By the end of 2012, the DEA operated 226 domestic offices in twenty-one distinct divisions throughout the United States and collaborated with over 300 state and local agencies.<sup>43</sup> The global footprint of the DEA also expanded as its international operations grew to include eighty-six foreign agencies in sixty-seven different countries.<sup>44</sup> The list of banned substances also continued to grow. By the end of 2012, more than 150 substances would be considered a Schedule I controlled substance,<sup>45</sup> and a first-time offense for trafficking such a substance might include a twenty-year prison sentence, as well as a \$1 million fine.<sup>46</sup> Further, if "death or serious bodily injury occurs," an individual could face life imprisonment as well as a fine of \$5 million.<sup>47</sup> Penalties for simple possession also tightened. Possession of any amount of marijuana, for example, might carry a federal penalty of up to one year in jail and a

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<sup>40</sup> *Hutto v. Davis*, 454 U.S. 370, 371, 374–75 (1982); see also *Supreme Court Roundup: 40-Year Term Held 'Legislative Prerogative.'* N.Y. TIMES, Jan. 12, 1982, at B15, available at <http://www.nytimes.com/1982/01/12/us/supreme-court-roundup-40-year-drug-term-held-legislative-prerogative.html?>

<sup>41</sup> Szasz, *supra* note 36, at 229 (citing E. Hume, *Sniffing Paint Gets Man 2-Year Jail Term*, ITHACA J., Feb. 11, 1982, at 29).

<sup>42</sup> Steven V. Roberts, *Mrs. Reagan Assails Drug Users*, N.Y. TIMES, Mar. 1 1988, at A16, available at <http://www.nytimes.com/1988/03/01/us/mrs-reagan-assails-drug-users.html> (comments by First Lady Nancy Reagan).

<sup>43</sup> DRUG ENFORCEMENT ADMIN., DEA FACT SHEET 1 (Dec. 2012), available at <http://www.justice.gov/dea/resource-center/statistics.shtml>.

<sup>44</sup> *Id.*

<sup>45</sup> 21 C.F.R. § 1308.11 (2012).

<sup>46</sup> *Federal Trafficking Penalties*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/druginfo/ftp3.shtm> (last visited Mar. 4, 2013).

<sup>47</sup> *Id.*

\$1,000 fine on the first offense.<sup>48</sup> Moreover, distributing or cultivating marijuana in relatively small amounts (fifty to ninety-nine kilograms) might result in a twenty-year prison sentence and a \$1,000,000 fine.<sup>49</sup>

Given the expansion of drug enforcement activities and the increase in penalties for drug-related crime, the elections in November 2012 raised questions regarding prohibition laws in the United States, particularly as they relate to marijuana. Although Washington state and Colorado voted to legalize the drug, it is unclear how these new measures will be received by federal authorities. Since the federal government does not recognize any use of marijuana as legal, federal drug penalties may still be enforced even in states with more lenient drug laws. Exactly how the disconnect between state and federal laws will play out in practice is thus presently uncertain.

## II

### THE UNINTENDED CONSEQUENCES OF PROHIBITION

We begin with the assumption, as stated by proponents of prohibition, that the policies of the federal government are intended to reduce the use of drugs and drug abuse, disrupt the drug supply chain, reduce violence and drug-related crime, and dismantle the mechanisms through which drugs reach users. The question that naturally follows is whether the means employed are suitable to achieve these ends. Economic analysis can provide insight into this question by tracing the chain of consequences associated with policies of drug prohibition.

Proponents of prohibition argue that by banning certain substances, they can reduce both the supply and demand for drugs and significantly shrink or eliminate the drug market. What proponents fail to realize, however, is that making drugs illegal does not eliminate the market for drugs, but instead forces the buying and selling of drugs into an underground “black market.” Prohibition essentially acts as a “tax” on sellers in the drug market.<sup>50</sup> Vendors must incorporate the potential fines, prison time, and costs of evading capture into their business plans.<sup>51</sup> This extra “tax” has the effect of

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<sup>48</sup> *Federal Penalties*, NORML, <http://norml.org/laws/item/federal-penalties-2> (last visited Mar. 18, 2013).

<sup>49</sup> *Federal Trafficking Penalties*, *supra* note 46.

<sup>50</sup> Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, J. ECON. PERSP., Fall 1995, at 175, 176.

<sup>51</sup> *Id.*

driving lower-cost sellers out of the market. The end result is fewer suppliers and higher drug prices.<sup>52</sup> Although the decrease in supply and increase in price may at first appear to support the goals of prohibition, the higher prices and changes in the market structure generate several unintended consequences which work directly against stated policy goals.

The first unintended consequence of prohibition is that individuals are more likely to consume poisonous substances and overdose with the increase in drug prices. As the price of a given drug rises, it creates additional profit opportunities for those willing to enter the drug trade. Since the drug market is illegal, and therefore, conducted underground, quality control is reduced compared to “above ground” markets. Drug users have few means available to determine which drugs are “pure” and have no recourse should they purchase a substance of inferior quality. Further, the underground market allows for less information sharing about products and vendors because transactions take place secretly to avoid authorities. Consequently, more poor-quality drug products enter the market, which leads to a greater potential for poisoning and overdose.

The greater prevalence of poor-quality drugs is not the sole mechanism through which overdoses increase. The illegality of drug use generates unintended “potency effects,” which affect both the supply and demand sides of the drug market. On the supply side, prohibition results in drug dealers carrying and selling more potent drugs. Because drug laws increase the risk of selling low potency drugs, suppliers tend to substitute toward higher potency drugs. For example, under prohibition, suppliers prefer to transport cocaine, as compared to marijuana, because cocaine is more potent and therefore more valuable per unit.

On the demand side, drug prices are driven up by prohibition, which causes drug users to seek “more bang for their buck.” That is, since the *overall* cost of obtaining drugs is higher, more potent drugs are *relatively* cheaper than “weak” drugs. Because drug users must act illegally to obtain drugs, they seek to maximize the satisfaction or “high” from each dollar spent. This dynamic manifests itself in

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<sup>52</sup> See Jeffrey A. Miron, *The Effect of Drug Prohibition on Drug Prices: Evidence from the Markets for Cocaine and Heroin*, 2003 NAT'L BUREAU ECON. RESEARCH WORKING PAPER NO. 9689, at 178, available at [http://www.nber.org/papers/w9689.pdf?new\\_window=1](http://www.nber.org/papers/w9689.pdf?new_window=1); MARK THORNTON, CATO INSTITUTE POLICY ANALYSIS NO. 157: ALCOHOL PROHIBITION WAS A FAILURE (July 1991), available at <http://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure>.

several ways. Drug users may switch from lower potency to higher potency within a given drug (for example, from marijuana with lower levels of THC to marijuana with higher levels of THC). Alternatively, drug users may switch from substances like marijuana to “harder” drugs like cocaine and heroin. Finally, drug users may employ more intense methods of drug use, such as injection.

Taking both sides of the market together, prohibition leads to a greater use of more potent substances, which increases the likelihood of overdose and drug-related death. Indeed, these effects may be seen in the rate of unintended overdose deaths in the United States. In 1971, two years before the creation of the DEA and the year President Nixon declared drugs to be a public menace, just over one death per 100,000 deaths was due to an overdose.<sup>53</sup> By the year 2007, over 27,500 people died as a result of a drug overdose, which translates to almost ten per 100,000 deaths.<sup>54</sup> Between 1990 and 2007 alone, overdose rates increased five-fold.<sup>55</sup> The most common sources of overdose deaths are higher potency drugs—mainly cocaine, heroin, and opioid painkillers.<sup>56</sup>

The second unintended consequence of prohibition is adverse health effects through increased disease transmission. As noted, prohibition causes the relative price of drugs to change, pushing users toward “harder” drugs and more intense methods of ingestion, like injection. At the same time, prohibition reduces the availability of items used in conjunction with drugs—like needles. Lack of clean needles leads drug users to either re-use or share needles with other drug users, which increases the likelihood of disease transmission. Therefore, drug users face a higher risk of contracting diseases like hepatitis and HIV/AIDS. In 2000, approximately 60 percent of new Hepatitis C infections and 17 percent of new Hepatitis B infections occurred in intravenous drug users.<sup>57</sup> The prevalence of disease among drug users has not gone unnoticed by those within the health community and federal drug agencies. As the number of drug users infected with these diseases has increased, it has led to increases in

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<sup>53</sup> CTR. FOR DISEASE CONTROL, UNINTENTIONAL DRUG POISONING IN THE UNITED STATES 1 (2010), *available at* <http://www.cdc.gov/homeandrecreationalsafety/pdf/poison-issue-brief.pdf>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> NAT'L ALLIANCE OF STATE & TERRITORIAL AIDS DIRS., VIRAL HEPATITIS & INJECTION DRUG USERS 7 (2006), *available at* [http://www.nastad.org/Docs/Public/Publication/2006213\\_NASTAD\\_IDUStandAlone.pdf](http://www.nastad.org/Docs/Public/Publication/2006213_NASTAD_IDUStandAlone.pdf).

health care costs associated with treatment. In 2010, 23.8 percent of all emergency department visits were attributed to the use of illicit drugs.<sup>58</sup> Approximately 6.9 percent of all hospital admittances in 2004 were a result of illegal drug use.<sup>59</sup>

The adverse health effects of drug prohibition have led many to advocate that needles be made available to drug users despite the illegality of drugs.<sup>60</sup> In 1998, the federal government banned the use of government funds for needle exchange programs.<sup>61</sup> As a result, private charities and state and local agencies have incurred the cost of such programs. By 2007, 185 needle exchange programs were operating in 36 states.<sup>62</sup> Thus, prohibition not only increases health care costs directly by creating conditions that promote the spread of disease, but also creates expenses for charities and organizations. Since federal funds are unavailable, state and private agencies have incurred the cost and diverted scarce resources to programs aimed at subsidizing the market for needles by making clean needles more readily available to drug users.

The third unintended consequence of prohibition is an increase in drug-related violence. Those who offer prohibition as a solution to the “drug problem” contend that *drug use* leads to violence by drug users and that, by making drugs illegal, violence will decrease. This view fails to recognize that because drugs are illegal, those involved in the underground market cannot use formal legal channels to resolve disputes or to seek protection for their business dealings. Instead, drug sellers and buyers must resolve their own problems, which fosters increased instances of violence in place of more peaceful means of resolving disputes.

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<sup>58</sup> DRUG ABUSE WARNING NETWORK, THE DAWN REPORT: HIGHLIGHTS OF THE 2010 DRUG ABUSE WARNING NETWORK (DAWN) FINDINGS ON DRUG-RELATED EMERGENCY DEPARTMENT VISITS 2 (July 2, 2012), <http://www.samhsa.gov/data/2k12/DAWN096/SR096EDHighlights2010.htm>.

<sup>59</sup> S. Binks et al., *Prevalence and Healthcare Burden of Illegal Drug Use Among Emergency Department Patients*, 22 EMERGENCY MED. J. 872, 872 (2005).

<sup>60</sup> The American Medical Association, American Nurses Association, American Public Health Association, American Bar Association, and others endorse needle exchange programs to address these health issues.

<sup>61</sup> Alan Franciscus, *Needle Exchange—A Matter of Public Health: So Why is the Government Playing Politics with this Ticking Time Bomb?*, HCV ADVOCATE, [http://www.hcvadvocate.org/hepatitis/About\\_Hepatitis\\_pdf/1.1\\_Hepatitis\\_C/needle\\_exchange.pdf](http://www.hcvadvocate.org/hepatitis/About_Hepatitis_pdf/1.1_Hepatitis_C/needle_exchange.pdf) (last visited Mar. 9, 2013).

<sup>62</sup> Ctr. for Disease Control, *Syringe Exchange Programs—United States, 2005*, MMWR WEEKLY, Nov. 9, 2007, at 1164, 1164, available at <http://www.cdc.gov/MMWR/preview/mmwrhtml/mm5644a4.htm>.

Further, under prohibition, individuals in the drug trade are automatically criminals. Because those involved in the market are, by definition, already committing a crime, prohibition lowers the relative cost of committing subsequent criminal actions (like assaulting a drug dealer following a bad sale) relative to a situation where drugs are bought and sold on a legal market.

Moreover, prohibition may unwittingly encourage violence, as those involved in the illegal drug market can rely on violence to gain power. Likewise, those harmed may turn to violence in the absence of legitimate dispute resolution options.

Statistics indicate that it is the *prohibition* of drugs that leads to more crime, *not* the drug use itself.<sup>63</sup> One study of homicides in New York City found that only 7.5 percent of the murders committed in 1988 resulted from the mental and physical impact of drug use.<sup>64</sup> However, 39 percent of all homicides, and 74.3 percent of drug-related homicides were related to the “exigencies of the illicit market system.”<sup>65</sup> These crimes occurred mostly between drug dealers, or between dealers and users over territorial disputes, as a result of dealer robberies, or as a result of drug-related debts.<sup>66</sup> Further, a 2004 survey of prisoners found that 16.6 percent of all state inmates and 18.4 percent of individuals in federal custody admitted to committing their crimes specifically to obtain drugs.<sup>67</sup>

A fourth unintended consequence of drug prohibition is cartelization in the drug industry. Although prohibition is intended to “disrupt and dismantle” such enterprises, it has the opposite effect in practice. As prohibition increases the benefits and lowers the cost of committing violent acts, and as high production costs keep smaller sellers from entering the drug trade, cartels are more likely to appear in the drug market. In a legalized drug market, new entrants could penetrate the market, forcing a cartel to incur incredibly high costs in order to maintain its monopoly. This would mean that, over time, the monopoly would likely be eroded. Under prohibition, however, a cartel may use violence to drive out smaller competitors and more

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<sup>63</sup> See generally Andrew J. Resignato, *Violent Crime: A Function of Drug Use or Drug Enforcement?*, 32 APPLIED ECON. 681 (2000).

<sup>64</sup> Paul J. Goldstein et al., *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 113, 116–17 (Craig Reinerman & Harry G. Levine eds., 1997).

<sup>65</sup> *Id.* at 118.

<sup>66</sup> *Id.* at 116.

<sup>67</sup> *Drugs and Crime Facts*, *supra* note 15.

easily maintain its monopoly. These effects are self-enforcing. The cartelization of the market further increases drug prices, which increases the benefits of using violence to maintain control of the market. This in turn further increases the likelihood of a violent cartel.<sup>68</sup>

Examples of cartelization in the drug market are numerous. Similar to how the American Mafia vastly expanded its operations during alcohol prohibition, the prohibition of opium in 1919 led to the development of powerful and violent Chinese gangs.<sup>69</sup> Colombian economist Eduardo Sarmiento Palacio has found that the U.S. War on Drugs has led to the rise of Colombian drug cartels. He found that as production of a drug is eliminated in one geographic area, like the United States, supply conditions are such that production will quickly move elsewhere, like Colombia.<sup>70</sup> Another example of cartelization can be seen in Mexico where drug cartels earn nearly \$30 billion annually trafficking cocaine, heroin, and other drugs into the United States.<sup>71</sup> These cartels have also been responsible for numerous kidnappings, extortion, human trafficking, and more than 60,000 deaths since 2006 alone.<sup>72</sup>

In addition to the claims that prohibition decreases violence, cartelization, and disease, prohibition supporters also argue that prohibition decreases societal wealth because people who are on drugs are assumed to be less productive.<sup>73</sup> But this view fails to consider the fifth unintended consequence of prohibition—how the policies of prohibition and criminalization impact education and employment. For one, the higher prices of drugs, resulting from the War on Drugs, provides an incentive for some students to drop out of school in order to potentially profit from the lucrative drug trade. This

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<sup>68</sup> Miron & Zwiebel, *supra* note 50, at 178–79.

<sup>69</sup> Stergios Skaperdas, *The Political Economy of Organized Crime: Providing Protection When the State Does Not*, 2 *ECON. GOVERNANCE* 173, 176–77 (2001).

<sup>70</sup> See generally Eduardo Sarmiento, *Economica del Narcotráfico*, in *NARCOTRAFICO EN COLOMBIA: DIMENSIONES POLÍTICAS, ECONÓMICAS, JURÍDICAS E INTERNACIONALES* 47, 47–75 (2d ed., Carlos Gustavo Arrieta eds., 1991) (Colom.).

<sup>71</sup> Ioan Grillo, *Hit Mexico's Cartels with Legalization*, *N.Y. TIMES* (Nov. 1, 2012), [http://www.nytimes.com/2012/11/02/opinion/hit-mexicos-cartels-with-legalization.html?\\_r=0](http://www.nytimes.com/2012/11/02/opinion/hit-mexicos-cartels-with-legalization.html?_r=0).

<sup>72</sup> *Id.*

<sup>73</sup> See *Drug Use and Crime*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=352> (last updated Aug. 10, 2009).

temptation is especially prevalent in inner-city neighborhoods where poverty is more likely to be an issue.<sup>74</sup>

The War on Drugs affects educational opportunities in other ways as well. A single conviction for drug possession, for example, renders students automatically ineligible for federal student aid, including grants, loans, and work-study. The period of ineligibility varies depending on the type of offense and number of offenses, but individuals with multiple offenses who fail to complete a rehabilitation program may become permanently ineligible.<sup>75</sup> It is estimated that approximately 20,000 students each year are ineligible for Pell Grants due to drug offenses.<sup>76</sup> An additional 30,000 to 40,000 students are denied student loans.<sup>77</sup>

Penalties for a drug conviction, however, do not end at the educational level. If convicted of a felony drug charge (which in some states requires only 0.75 ounces of marijuana), an individual may lose his ability to hold employment in a federal office, enlist in the armed forces, obtain a federal license (import, customs, etc.), or acquire a passport.<sup>78</sup> Moreover, many job applications require background checks and disclosure of felony convictions, which may prohibit individuals convicted of drug offenses from obtaining employment in the private sector. The implication is straightforward: prohibition directly impacts employment by prohibiting individuals with drug convictions from obtaining certain types of work. Moreover, prohibition retards the development of human capital by excluding those convicted of drug crimes from certain types of educational assistance. Therefore, while prohibition may increase productivity by preventing some drug use, this gain is undermined by the loss in productivity from lost education and employment opportunities.

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<sup>74</sup> Gary S. Becker & Kevin M. Murphy, *Have We Lost the War on Drugs?*, WALL ST. J. (Jan. 4, 2013, 8:39 PM), <http://online.wsj.com/article/SB10001424127887324374004578217682305605070.html>.

<sup>75</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-238, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS 51–52 (Sept. 2005), *available at* <http://www.gao.gov/new.items/d05238.pdf>.

<sup>76</sup> Doug Lederman, *Drug Law Denies Aid to Thousands*, INSIDE HIGHER ED. (Sept. 28, 2005), <http://www.insidehighered.com/news/2005/09/28/drug>.

<sup>77</sup> *Id.*

<sup>78</sup> KING CNTY. BAR ASS'N, FACT SHEET: IMPACT OF DRUG CONVICTIONS ON INDIVIDUAL LIVES 1–2, *available at* <http://www.kcba.org/druglaw/pdf/drugconviction.pdf> (last visited Mar. 10, 2013).

A sixth unintended consequence of the War on Drugs is an increase in the corruption of public officials and civil servants. The high prices of drugs, and the associated high profits for drug traffickers and dealers who avoid capture and punishment, incentivizes these individuals to bribe the array of public actors—police, military, elected officials, judges—involved in combating the illegal drug trade.<sup>79</sup> Given the violence prevalent in the illegal drug market, those who refuse bribes are often threatened with violence against themselves and their families. In Mexico, “[e]nforcing current [drug] laws to prosecute criminals is difficult because members of the cartels have infiltrated and corrupted the law enforcement organizations that are supposed to prosecute them, such as the Office of the Attorney General.”<sup>80</sup> In the United States, a recent investigation by the Associated Press found that “U.S. law officers who work the border are being charged with criminal corruption in numbers not seen before, as drug and immigrant smugglers use money and sometimes sex to buy protection, and internal investigators crack down.”<sup>81</sup> As these examples illustrate, by artificially raising the price, and therefore profitability, of illegal drugs, prohibition provides a stronger incentive for corruption by those involved in enforcing laws.

These six categories of negative unintended consequences demonstrate that prohibition works against many of the stated policy objectives. In addition, there are further consequences of the War on Drugs and drug prohibition that are unrelated to the drug market itself. While it is expected that drug prohibition impacts drug crime and the producers, suppliers, and consumers of drugs, it is not immediately obvious how the War on Drugs and the prohibition of illegal substances impacts the lives of the general public. This subject will be discussed in the next Part.

### III

#### DOMESTIC POLICE MILITARIZATION AND THE WAR ON DRUGS

In 1915, the first narcotics agents were issued three things along with their badge—a Thompson submachine gun and two hand

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<sup>79</sup> Becker & Murphy, *supra* note 74.

<sup>80</sup> Arturo Zamora Jimenez, *Criminal Justice and the Law in Mexico*, 40 CRIME LAW & SOC. CHANGE 33, 33 (2003).

<sup>81</sup> Martha Mendoza & Christopher Sherman, *AP Investigation: Border Police Being Busted More*, SAN DIEGO UNION-TRIB. (Aug. 9, 2009), <http://www.utsandiego.com/news/2009/aug/09/us-drug-war-border-corruption-080909/>.

grenades.<sup>82</sup> Modern tools of the trade include Kevlar vests and helmets, riot shields, automatic weapons, and tactical and intelligence training.<sup>83</sup> The first drug laws were enforced by an existing agency—the Prohibition Unit of the Bureau of Internal Revenue.<sup>84</sup> Today, the DEA, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Federal Bureau of Prisons, Central Intelligence Agency, Center for Disease Control, U.S. Coast Guard, Customs and Border Protection, Immigration and Customs Enforcement, Department of Health and Human Services, Department of Homeland Security, Federal Bureau of Investigation (FBI), National Drug Intelligence Center, Office of National Drug Control Policy, Office of Juvenile Justice and Delinquency, the Substance Abuse and Mental Health Services Administration, and others work to fight the War on Drugs.

But the enhanced weaponry and tactical and intelligence training of the War on Drugs has not remained solely in the realm of the federal government. The botched drug raids in Montana and Arizona discussed in the Introduction, for example, were not conducted by teams of DEA, ATF, or federal immigration forces, but by local police departments.<sup>85</sup> What these cases and the progression of drug enforcement weapons from “Tommy guns” to assault rifles demonstrate is a broader trend of domestic police militarization—police forces have acquired more military-like characteristics over time.

The United States has historically worked to create rules that delineate the functions of local police from those of the military. State and local law enforcement, for example, are to uphold *domestic* laws that protect the rights of citizens. Their goal is not to eliminate criminals physically, but to maintain public order and “keep the peace.” They are to “serve and protect” the rights of victims and criminals alike. They are trained to use violence only as matter of last resort. Military forces, however, are trained to engage in combat with the goal of destroying an *external* enemy deemed to be a threat to the

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<sup>82</sup> Drug Enforcement Admin. Museum & Visitors Center, Exhibit, *Illegal Drugs in America: A Modern History* (last visited by Article’s authors 2012) [hereinafter Exhibit, *Illegal Drugs in America*]. For additional information regarding the Exhibit, see *Illegal Drugs in America: A Modern History*, Drug Enforcement Admin. Museum & Visitors Ctr., <http://www.deamuseum.org/ida/index.html> (last visited Mar. 10, 2013).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Riggs, *supra* note 1; Balko, *supra* note 4.

rights of U.S. citizens.<sup>86</sup> Despite historical efforts to make laws that enforce this distinction, U.S. drug policies have led to a progressive breakdown of this distinction.<sup>87</sup> That is, domestic law enforcement has taken on the characteristics of the armed forces by engaging in military-like training, acquiring military weapons, and utilizing military tactics in everyday operations.<sup>88</sup> While historical instances of police militarization tended to be specific and geographically concentrated, the War on Drugs allowed for militarization on a national scale.<sup>89</sup> This continued militarization has contributed to an erosion of the rule of law, mass criminalization, and a deterioration of civil liberties. The War on Drugs has differed greatly from other conflicts in U.S. history. In prior conflicts, the “enemy combatants” were external to the United States. In the War on Drugs, however, enemies have consisted not only of South American drug cartels, Chinese opium growers, and Mexican marijuana farmers, but also of American citizens.

Militarization was accelerated through a series of legislation in the 1980s, such as the Military Cooperation with Civilian Law Enforcement Officials Act (MCCLEOA), whereby the federal government was allowed *enhanced ability* to combat the drug problem.<sup>90</sup> The MCCLEOA allowed the Department of Defense (DOD) to share information with local police, participate in local counter-drug operations, and transfer equipment and other materials to domestic law enforcement as long as the local agencies were enforcing drug, immigration, or customs laws.<sup>91</sup> In the first three years following the MCCLEOA’s passage, the DOD granted nearly 10,000 requests for weapons and assistance from state and local law

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<sup>86</sup> U.S. DEP’T OF THE ARMY FM 7-10, DEPARTMENT OF THE ARMY FIELD MANUAL: RIFLE COMPANY, INFANTRY AND AIRBORNE BATTLE GROUPS 3–4 (1962), *available at* <http://www.survivalebooks.com/free%20manuals/1962%20US%20Army%20Vietnam%20War%20Rifle%20Company%20Infantry%20&%20Airborne%20Battle%20Groups%20326p.pdf>.

<sup>87</sup> Abigail R. Hall & Christopher J. Coyne, *The Militarization of U.S. Domestic Policing*, 18 THE INDEP. REV. (forthcoming 2013).

<sup>88</sup> A full history of the distinction between state, local, and military functions is beyond the scope of this work. For an overview of the history of police militarization, see *id.*

<sup>89</sup> *Id.*

<sup>90</sup> Military Support for Civilian Law Enforcement Agencies Act, Pub. L. No. 97-86, 95 Stat. 1114 (1981) (codified as amended at 10 U.S.C. §§ 371–82).

<sup>91</sup> *Id.*

enforcement.<sup>92</sup> Program 1033 was passed in 1997 and allowed the DOD to transfer excess military equipment to state and local law enforcement, including body armor, aircraft, armored vehicles, weapons, riot gear, watercraft, and surveillance equipment.<sup>93</sup> Although many departments are eligible, preference is given to state and local agencies focused on counter-drug and counter-terrorism activities.<sup>94</sup> In 2010 and 2011, new records were set with \$212 and \$500 million in equipment transfers through the program, respectively.<sup>95</sup>

The breakdown of the distinction between local and military forces may also be seen in programs offered by agencies like the DEA and the FBI. Having expanded from a single multi-bureau task force in 1970, the DEA now works with over 300 state and local agencies to enforce drug laws.<sup>96</sup> In addition to providing specialized training for local law enforcement, in 2009 the DEA managed more than 380 task forces nationwide that work to coordinate information and promote resource sharing among state and federal agencies.<sup>97</sup> Similarly, the FBI expanded its Joint Terrorism Task Forces (JTTFs) with the purpose of sharing intelligence, training, and other knowledge across agencies. As of 2012, there are more than 100 JTTFs across the United States, which include over 4,400 personnel from over 600 local agencies and fifty federal agencies.<sup>98</sup>

The War on Drugs has also led to massive seizures of personal property. Through use of the Asset Forfeiture Program, the DEA has, by “[w]orking with other local, state, national, and international law enforcement agencies . . . seized record[] amounts of cash, assets, and

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<sup>92</sup> PETER REUTER ET AL., RAND CORP., *SEALING THE BORDERS: THE EFFECTS OF INCREASED MILITARY PARTICIPATION IN DRUG INTERDICTION* 54 (Jan. 1998), available at <http://www.rand.org/content/dam/rand/pubs/reports/2007/R3594.pdf>.

<sup>93</sup> *Department of Defense Excess Property Program (DoD 1033)*, Missouri Dep’t of Pub. Safety, <http://www.dps.mo.gov/dir/programs/cjle/dod.asp> (last visited Mar. 9, 2013).

<sup>94</sup> *Id.*

<sup>95</sup> Madison Ruppert, *The Pentagon’s 1033 Program: Giving Free Military Equipment to Police Departments Around the U.S.*, ACTIVIST POST (Dec. 6, 2011), <http://www.activistpost.com/2011/12/pentagons-1033-program-giving-free.html>.

<sup>96</sup> See *DEA Programs: State and Local Task Forces*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/ops/taskforces.shtml> (last visited Mar. 9, 2013).

<sup>97</sup> *Id.*

<sup>98</sup> *Protecting America from Terrorist Attack: Our Joint Terrorism Task Forces*, FED. BUREAU OF INVESTIGATION: TERRORISM, [http://www.fbi.gov/about-us/investigate/terrorism/terrorism\\_jttfs](http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jttfs) (last visited Mar. 9, 2013).

other drug-related proceeds.”<sup>99</sup> The program allows the government to seize assets that “represent the proceeds of, or were used to facilitate federal crimes.”<sup>100</sup> Between 1989 and 2009, an estimated \$10.9 billion dollars in assets were seized by authorities at an average growth rate of 20 percent per year.<sup>101</sup> These assets include real estate, vehicles, commercial businesses, cash, financial instruments, jewelry, art, watercraft, and aircraft.<sup>102</sup> State and local police have benefitted immensely from the confiscation and sale of private property, receiving more than \$561 million in 2011 alone to “supplement funding for law enforcement initiatives.”<sup>103</sup>

The implications for this type of program are straightforward. If a state or local police force depends on the proceeds from asset seizures to supplement its budget, then it has clear incentives to “seek out” offenses in which it would be able to seize assets. This not only leads to increased use of military tactics, but also increases the likelihood of police corruption. For example, agents have greater incentive to engage in unauthorized or unethical activities (like intense interrogation activities or planting evidence) in order to confiscate materials and enhance their budget. These incentives may be observed in the statements of one Utah mayor following a vote by the city council that authorized the combination of police bonuses with seized assets: “Why not give our guys a reason to be more aggressive? . . . If the city gets a house through a drug forfeiture, and we . . . sell it for \$50,000, then . . . the guy who made the bust is going to get a nice bonus check.”<sup>104</sup> This creates the perverse incentives to seize first and ask questions later.<sup>105</sup>

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<sup>99</sup> *DEA Programs: Asset Forfeiture*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/ops/af.shtml> (last visited Mar. 9, 2013).

<sup>100</sup> *Asset Forfeiture Program: Overview of the Asset Forfeiture Program*, U.S. DEP’T OF JUST., <http://www.justice.gov/jmd/afp/> (last updated Jan. 2013).

<sup>101</sup> Mary Jane Borden, *Forfeiture Facts from Drug War Facts*, DRUG WAR FACTS, <http://drugwarfacts.org/cms/files/Forfeiture-Facts-from-Drug-War-Facts.pdf> (last visited Mar. 18, 2013).

<sup>102</sup> *Asset Forfeiture Program*, U.S. MARSHALLS SERV., <http://www.usmarshals.gov/assets/index.html> (last visited Mar. 9, 2013).

<sup>103</sup> *Id.*

<sup>104</sup> *Helper OKs Giving Officers ‘Bonuses’ for Drug Busts*, Desert News (Jan. 31, 1995, 12:00 AM), <http://www.deseretnews.com/article/401745/HELPER-OKS-GIVING-OFFICERS-BONUSES-FOR-DRUG-BUSTS.html?pg=all> (internal quotation marks omitted).

<sup>105</sup> See Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 337 (1992); SCOTT EHLERS, DRUG POLICY FOUND., POLICY BRIEFING: ASSET FORFEITURE 8–11 (1999), available at [http://www.drugpolicy.org/docUploads/Asset\\_Forfeiture\\_Briefing.pdf](http://www.drugpolicy.org/docUploads/Asset_Forfeiture_Briefing.pdf).

IV  
THE PERPETUATION OF UNINTENDED CONSEQUENCES AND  
MILITARIZATION

To understand the growth and perpetuation of the War on Drugs and the unintended consequences it generates, it is necessary to understand the political economy underlying the support for these policies.<sup>106</sup> Doing so provides insight into the dynamics discussed in previous Parts, as well as why changes to existing drug policies would likely face fierce opposition.

To appreciate the continuation of drug prohibition policies one must first understand the innate predispositions of government bureaucracies, as this is the most common organizational structure of those engaging in drug enforcement. Unlike firms that operate in a market setting, bureaucracies do not function under signals of profit and loss. Instead of measuring effectiveness based on profits earned, bureaucratic agencies base success on the size of their discretionary budgets and the number of subordinates under their command.<sup>107</sup> This results in competition, not over profit in private markets, but over the distribution of a given pool of government resources. The potential for securing additional funds creates an incentive for government bureaus to engage in lobbying efforts to secure as much of the available budget as possible.

One result of this tendency is “mission creep”—that is, bureaus look to expand their portfolio of activities to increase the size of their budgets and the number of personnel they employ.<sup>108</sup> By expanding the size and scope of their activities, bureaucrats look to signal to other parts of the government and the public that they are engaged in providing crucial services.<sup>109</sup> This expansion is then used to justify requests for additional funding and more employees.<sup>110</sup> This tendency is particularly important to this analysis, as there is an inherent tendency for drug enforcement agencies, police, and the military to expand the range of their activities in order to increase their budgets and employees.

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<sup>106</sup> “Political economy” refers to the application of the economic way of thinking to the political realm and the interactions by those in the polity and those in the economy.

<sup>107</sup> WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38 (1971) [hereinafter NISKANEN, BUREAUCRACY]; William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 618 (1975).

<sup>108</sup> NISKANEN, BUREAUCRACY, *supra* note 107, at 111.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

These incentives have resulted in a relationship between the police, military, and federal forces whereby each benefits from repeated interactions with the others. Moreover, these incentives, as well as the repeated interaction between agencies, work to perpetuate current drug policies. Federal agencies involved in drug interdiction activities, looking to increase their power, budgets, and personnel, have incentive to expand and exert influence over the military and domestic police.<sup>111</sup> Similarly, the military has incentives to exert its influence over federal agencies and local police. By providing weapons, training, and other resources for the War on Drugs, the military effectively augments its powers by exerting influence over other agencies. Domestic law enforcement agencies benefit as well. By extending operations and focusing on enforcing federal drug policies, they may acquire additional funds and staff. Once domestic police forces acquire additional funding, tactical training, and weaponry, they face an incentive to use this training and equipment to justify the spending while seeking further increases. The result of this process is the aforementioned blurring of the police-military dichotomy as police increasingly acquire military characteristics. Moreover, this provides a clear avenue for the expansion of anti-drug activities as each agency looks to increase its activities.

In addition to the economics of bureaucracy, the perpetuation of the War on Drugs may also be attributed to special interest groups that work to influence government for the benefit of their members. Special interest groups, like bureaus, compete for funds. This results in an intense political competition as these groups finance campaigns, work to influence public opinion, and lobby Congress. They attempt not only to preserve the status quo, but also look to expand government spending and influence resource allocations in a way that will benefit their members. Due to these underlying objectives, this means that even when ineffective or counterproductive policies are enacted, there is little pressure for special interest groups to reform or remove said policies.

Among the groups supporting continuation of drug prohibition, perhaps the most influential have been police and prison guard unions. Police departments throughout the United States have become increasingly dependent on federal funding for drug interdiction efforts. One program, Community Oriented Policing Services, allocated about \$10 billion to more than 12,000 agencies in less than a

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<sup>111</sup> See Hall & Coyne, *supra* note 87.

decade.<sup>112</sup> These funds, and the potential for enhanced profits, prompted these groups to push for expanded drug laws. If the drug laws were to be relaxed, it would mean smaller budgets for police forces. In 2008, for example, the National Fraternal Order of Police (FOP) lobbied Congress to increase the penalties for offenses involving particular types of narcotics, to create a registry and public database for persons convicted of certain drug offenses, and to establish increased penalties and mandatory sentences for individuals involved in “large drug trafficking organization[s].”<sup>113</sup> The FOP also lobbied for stiffer penalties against individuals who “threat[en] . . . violence against law enforcement officers” and increased regulation on products used to manufacture drugs.<sup>114</sup> Each of these policies, if passed, would expand the resources available to police in order to enforce the more stringent laws.

Private prisons, like police and prison guard unions, have a strong interest in not just sustaining the status quo, but in increasing the number of individuals incarcerated. One way of working toward this outcome is to lobby governments to pass more stringent drug laws. This ensures an ongoing stream of criminals to incarcerate. Private prisons derive most of their income from government contracts; therefore, their profits are directly tied to the number of individuals incarcerated.<sup>115</sup> Revenue for the two largest private prison businesses total nearly \$3 billion annually.<sup>116</sup> In 1990, private prisons contained an average of 7,771 inmates at a given time.<sup>117</sup> By the end of 2009, that number had soared to 129,336—an increase of 1,664 percent.<sup>118</sup>

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<sup>112</sup> Peter Eisler & Kevin Johnson, *10 Years and \$10B Later, COPS Drawing Scrutiny*, USA TODAY (Apr. 11, 2005), [http://www.usatoday.com/news/washington/2005-04-10-cops-cover\\_x.htm](http://www.usatoday.com/news/washington/2005-04-10-cops-cover_x.htm).

<sup>113</sup> James O. Pasco, Jr., Nat’l Fraternal Order of Police, Lobbying Report: Lobbying Disclosure Act of 1995 (Section 5) 14 (2008), available at <http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=AA305517-7F6A-4A0F-8B1B-61D3BFC92289>.

<sup>114</sup> *See id.*

<sup>115</sup> *See* W.W., *The Perverse Incentives of Private Prisons*, ECONOMIST (Aug. 24, 2010, 10:01 PM), [http://www.economist.com/blogs/democracyinamerica/2010/08/private\\_prisons](http://www.economist.com/blogs/democracyinamerica/2010/08/private_prisons).

<sup>116</sup> Justin Loiseau, *Why Private Prisons Will Lock Up Your Returns*, MOTLEY FOOL (June 28, 2012), <http://www.fool.com/investing/general/2012/06/28/why-private-prisons-will-lock-up-your-returns.aspx>.

<sup>117</sup> AM. CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 12 (2011), available at [http://www.aclu.org/files/assets/banking\\_onbondage\\_20111102.pdf](http://www.aclu.org/files/assets/banking_onbondage_20111102.pdf).

<sup>118</sup> *Id.*

Taken together, these insights from political economy indicate that once set in motion, prohibition policies—whether effective or not—will tend to be self-enforcing and self-extending over time. The ever-growing War on Drugs illustrates this dynamic. Problems emerge when these policies generate negative unintended consequences or when they are altogether ineffective. Ideally, changes to policies and rules would be made quickly in response to unintended consequences. However, political institutions are inclined to adapt slowly given the inherent tendencies of bureaucracy and the nature of vested interests. This means that policies that fail to achieve the desired end will continue to persist even though they are a net cost, the burden of which falls on ordinary citizens.

### CONCLUSION

The state has several mechanisms it can use to decrease the use of a substance. It can increase taxes, use the legal system to remove manufacturers from the market, or it can altogether prohibit the substance. For the past 100 years, the U.S. government has attempted to use prohibition as a means to decrease drug use and curtail drug-related violence. Despite these efforts, however, there are good reasons to conclude that prohibition and the War on Drugs have failed to achieve the goals stated by proponents of prohibition. The United States has the largest prison population of any country,<sup>119</sup> high levels of violent crime, and more drug addicts than other developed countries.<sup>120</sup> In 1900, just before the United States passed its first prohibitive piece of legislation, one in every 200 Americans was addicted to some kind of drug.<sup>121</sup> By the year 1992, that number increased to one in every 100.<sup>122</sup>

The analysis presented in this Article reveals two main implications. First, proponents of drug prohibition must appreciate and address the full range of their policy's consequences. The Article has discussed how prohibition is not only costly in a direct pecuniary sense, but that policies regarding illicit drugs have led to more drug-related violence, increased cartelization in the drug industry, and driven individuals to seek more potent substances and intense

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<sup>119</sup> W.W., *supra* note 115.

<sup>120</sup> Jennifer Warner, *U.S. Leads the World in Illegal Drug Use*, CBS NEWS (July 1, 2008, 9:30 AM), available at [http://www.cbsnews.com/2100-500368\\_162-4222322.html](http://www.cbsnews.com/2100-500368_162-4222322.html).

<sup>121</sup> Exhibit, *Illegal Drugs in America*, *supra* note 82.

<sup>122</sup> *Id.*

methods of drug use. This has led to an increased chance of overdose and has worked to spread infection and deadly disease. It follows that, if the ends sought by government are decreased drug abuse, less drug violence, and an elimination of dangerous drug operations, then current policies have failed to meet the desired goals.

Second, the analysis in Part IV demonstrates why drug policies are unlikely to change radically in the near future. Given the bureaucratic nature of government agencies and the work of special interest groups, there is no foreseeable end to the War on Drugs. Further, there is no clear mechanism through which the War on Drugs could be easily undone given the array of actors involved who benefit from the perpetuation of prohibition. In this regard, perhaps the best options are to continually express the negative unintended consequences of prohibition and to demand that proponents appreciate and address the full costs of the policies they advocate.

These implications raise the question—what is the proper policy regarding drugs? Given the stated goals of politicians and drug crusaders that drug policy should reduce drug-related violence, drug abuse, and dangerous cartels, one could argue that decriminalization and legalization would better achieve these outcomes than prohibition. If drugs were to be legalized, the market for illicit substances would no longer be forced to operate underground. Bringing drugs into the open market would have significant effects. First, it would allow a greater quantity of drugs to come to market, which would reduce the cost. While prohibition drives up the cost of drugs and induces drug users to seek more potent drugs and methods of use, a decrease in cost and easier access would likely decrease the potency of many drugs and foster a decrease in methods like injection. Consider that under alcohol prohibition people drank more vodka and moonshine because they were of relatively high potency.<sup>123</sup> After prohibition, more people drank mass-produced, less potent beer and wine.<sup>124</sup>

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<sup>123</sup> Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, in *CONFRONTING DRUG POLICY: ILLEGAL DRUGS IN A FREE SOCIETY* 160, 166 (Ronald Bayer & Gerald M. Oppenheimer eds., 1993) [hereinafter *From Prohibition to Regulation*]; Harry G. Levine & Craig Reinerman, *The Transition from Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, in *HOW TO LEGALIZE DRUGS* 259, 264 (Jefferson M. Fish ed., 1998) [hereinafter *The Transition from Prohibition to Regulation*].

<sup>124</sup> *From Prohibition to Regulation*, *supra* note 123, at 166; *The Transition from Prohibition to Regulation*, *supra* note 123, at 264.

Second, the legalization of drugs would allow for disputes within the drug industry to be resolved through the traditional legal channels instead of resorting to violence. Disagreements regarding price, quality, and contracts would no longer have to be settled violently as contracts could be enforced in a court of law. By legalizing drugs, the U.S. government would effectively *increase* the cost of engaging in drug-related violence. Since prohibition decreases the relative cost of committing another crime in conjunction with a drug-related offense, it follows that legalization would have the opposite effect. One may anticipate that a free market for drugs would mean less drug-related crime, not more. Alcohol prohibition gave rise to Al Capone. The end of prohibition gave rise to the liquor store and liquor aisle in the supermarket. Ending prohibition would not only reduce drug-related violence in the United States, but in Mexico as well. Third, decriminalization would reduce the rapidly growing U.S. prison population and save significant monetary resources associated with trying and housing prisoners charged with and convicted of drug-related crimes. Fourth, decriminalization would lower the cost of medical treatment and counseling for those suffering from drug addiction and who seek help. Finally, legalizing drug use would also provide an incentive for entrepreneurs to develop alternatives to dealing with drug addiction.<sup>125</sup>

Opponents of legalization may argue that such a policy would mean more drug use and more drug addicts. This question is empirical, as we cannot know *ex ante* how many users would exist as a result of legalization. It seems telling, however, that the number of addicts in the United States has increased since drug prohibition, not decreased. In 1900, one in every 200 Americans was addicted to some sort of drug.<sup>126</sup> By 1992, it was one in every 100.<sup>127</sup> During alcohol prohibition, arrests for drunk and disorderly conduct increased by forty-one percent.<sup>128</sup> Arrests for drunk driving increased eighty-one percent.<sup>129</sup> Major crimes including murder, assault, and burglary also saw sharp increases during prohibition.<sup>130</sup> However, these rates

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<sup>125</sup> Becker & Murphy, *supra* note 74.

<sup>126</sup> Exhibit, *Illegal Drugs in America*, *supra* note 82.

<sup>127</sup> *Id.*

<sup>128</sup> JAMES H. TIMBERLAKE, *PROHIBITION AND THE PROGRESSIVE MOVEMENT: 1900–1920*, at 60 (1963).

<sup>129</sup> *Id.* at 60.

<sup>130</sup> See JAMES OSTROWSKI, CATO INST., CATO INSTITUTE POLICY ANALYSIS NO. 121: *THINKING ABOUT DRUG LEGALIZATION 1* (1989).

returned to pre-prohibition levels following the repeal of prohibition in 1933.<sup>131</sup> Consider that Portugal decriminalized drug use in 2001 (drug trafficking remains illegal) with some success.<sup>132</sup> For example, a study of the Portugal experience found that since decriminalization, imprisonment due to drug-related charges has fallen, clinic visits related to drug addiction have increased as individuals seek assistance in stopping drug use, deaths related to opiates have fallen, and the use of drugs by the young has increased only moderately.<sup>133</sup> Cases such as Portugal, as well as the decriminalization of marijuana in several U.S. states, can serve as “event studies” to consider the effects of removing the barrier to a legal drug market. Even with these unknowns, one thing is certain—ignoring the insights from economics regarding drug prohibition will not annul these insights, but prohibition will continue to waste resources and impose significant costs, both economic and non-economic, on innocent people around the world.

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<sup>131</sup> *Id.*

<sup>132</sup> See generally GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (2009); see also Becker & Murphy, *supra* note 74.

<sup>133</sup> Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn From the Portuguese Decriminalization of Illegal Drugs?*, 50 BRIT. J. CRIMINOLOGY 999, 1017 (2010).

