

A New Direction? Yes. Legalization?
No. Drawing on Evidence to
Determine Where to Go in Drug
Policy

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INTRODUCTION

It has been almost a hundred years since President Taft discussed the “special necessity” for federal anti-drug legislation. In many ways, he was echoing prominent voices of the time, including this representative of the American Medical Association:

There are few if any subjects regarding which legislation is in a more chaotic condition than the laws designed to minimize the drug-habit evil. . . . In many of the states anti-narcotic laws are so comprehensive that practically every retail druggist would be subject to fine or imprisonment were an attempt made to enforce the legislation ostensibly in force, while in other states the laws are so burdened with exceptions and provisos as practically to nullify every effort to control the traffic in narcotic drugs.¹

The United States spends about \$13 billion a year in health, criminal justice, and other costs to reduce drug use and its consequences. About eight percent of Americans are regular illicit drug users, compared to twenty-seven percent of tobacco smokers and fifty-two percent of alcohol consumers. But we are left with an illegal drug market that generates about \$15 to \$30 billion in illicit revenues, destructive violence both at home and abroad, and an underground criminal syndicate that gains new recruits every year.

Methods to control drug use and judge policy effectiveness remain highly polarized. Beliefs about the success of U.S. policy to control the use and harms of illicit drugs, however, are highly polarized. Many laud current anti-drug policy, noting that steady declines of drug use have been achieved since the 1980s, according to data from

¹ DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 96 (3d ed. 1999) (quoting Martin I. Wilbert from a 1912 compilation of state laws on habit-forming drugs).

school and household surveys.² These declines were preceded by government spending on programs aimed at reducing drug supply and demand.³ Conversely, others have cited the harms of drug policies themselves as a perverse effect of increased government intervention.⁴ Harms resulting from escalated rates of imprisonment, the reduction of civil liberties, and the nexus between infectious diseases and injection drug use have led to increasing calls for a radical restructuring of American drug policy.⁵

The reality is that our ability as scientists to predict how policy changes will affect drug markets, drug use, and related problems is quite limited.⁶ Furthermore, most policy alternatives generate incommensurable outcomes (e.g., more dependence but less crime), and judging whether those trade-offs are favorable or not in the aggregate inevitably involves value judgments, not just dispassionate science.⁷

In essence, honest drug policy analysis forces us to draw on limited evidence and decide what matters more. Since the recent discourse in the United States has shifted considerably toward legalizing drugs, this Article will examine some key premises of support for legalization. Readers can decide for themselves if the data is convincing enough to resist such a policy change or not. My take is that while the current drug control system is not perfect, it is much

² A sixty-six percent reduction in secondary school reported drug use and a fifty percent reduction in reported prevalence in the adult population from 1979 to 1993. OFFICE OF APPLIED STUDIES, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE ADVANCE REPORT #18 (1997), SAMSHA, *available at* <http://www.samhsa.gov/data/nhsda/ar18t014.htm#A1> (last updated June 16, 2008) (using data in *Figure 4. Past Month Illicit Drug Use by Age: 1979–1995*).

³ See James A. Inciardi, *American Drug Policy: The Continuing Debate*, in THE DRUG LEGALIZATION DEBATE 4–5 (James A. Inciardi ed., 2d ed. 1999); Herbert D. Kleber & James A. Inciardi, *Clinical and Societal Implications of Drug Legalization*, in SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK 855, 860 (Joyce H. Lowinson et al. eds, 3d ed. 1997); WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 180–85 (1996).

⁴ See Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, in 245 SCIENCE 939, 940 (1989); Kurt L. Schmoke, *Decriminalizing Drugs: It Just Might Work—And Nothing Else Does*, WASH. POST, May 15, 1988, at B1.

⁵ See Nadelmann, *supra* note 4, at 943–46; Schmoke, *supra* note 4, at B1.

⁶ See Letter from Jonathan Caulkins & Kevin A. Sabet, to Editor, *The Lancet* (May 8, 2009) (on file with author), *available at* <http://www.ibhinc.org/pdfs/CaulkinsSabet.pdf>.

⁷ See ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES AND PLACES 319–25 (2001).

more desirable than legalization, which needlessly puts our public health and safety at risk.⁸

I

LEGALIZATION WOULD INCREASE DRUG USE, AND THUS HARM

In 2010, when a team of five RAND researchers analyzed California's 2010 effort to legalize marijuana, they concluded that the pre-tax price of the drug could plummet (as much as eighty percent) and therefore marijuana consumption could increase.⁹ This was based on a scenario where the federal government did not intervene and indoor home-production would be allowed. That sharp drop in price complicates any attempts to predict the actual revenues that will result from marijuana taxes. Furthermore, the fall in price will hinder efforts to collect those revenues as a black market springs up to take advantage of the gap between the taxed price of pot and the real production cost of pot.¹⁰

This corroborated everything economics has taught us about how price correlates with use (and why Big Tobacco and the Liquor Lobby fight price hikes aggressively). There is strong evidence to indicate that rates of drug use are inversely proportional to the price of drugs. For example, Americans who came of age in the 1980s were significantly more likely to initiate marijuana use than those in the 1990s, when price increased. The case is the same for adults and marijuana use; fewer people use marijuana when the price is higher.¹¹

Why would the price of drugs fall so dramatically? Drugs are inherently not expensive; both cocaine and heroin are agricultural products that require minimal and inexpensive chemical processing to produce the street form of the drugs, and marijuana is strictly agricultural.¹² But producing, manufacturing, distributing, and purchasing illegal drugs are inherently risky, and so people have to be paid for that risk. One of the principle purposes of prohibition is to

⁸ An important caveat is that even though I may think legalization is undesirable, we should recognize that the effect of marijuana legalization would be very different than cocaine or methamphetamine legalization.

⁹ BEAU KILMER ET AL., RAND CORP., ALTERED STATE? ASSESSING HOW MARIJUANA LEGALIZATION IN CALIFORNIA COULD INFLUENCE MARIJUANA CONSUMPTION AND PUBLIC BUDGETS 2 (2010).

¹⁰ *See id.* at 15.

¹¹ WILLIAM RHODES ET AL., ILLICIT DRUGS: PRICE ELASTICITY OF DEMAND AND SUPPLY 43–45 (2001).

¹² *See id.* at vi.

increase the price of a drug that would otherwise be cheap. This makes them less attractive to users who, as just discussed, are sensitive to price. Drugs are expensive because of the risk producers and traffickers take to get their product to market, and because lower-level dealers are also trying to make a profit, further raising the price. In addition, cocaine and heroin are not produced in the United States, therefore increasing the price because of the necessary trafficking.¹³

II PUBLIC BUDGETS WILL SUFFER, NOT GAIN, FROM DRUG LEGALIZATION AND TAXATION

Many legalization advocates urge the government to “tax the hell out of” drugs,¹⁴ in order to pay for the assumed increased use and addiction costs. That way, new users will be deterred from starting because the price would be out of reach. The most vulnerable (i.e. the poor) would benefit from high costs, too, since one might think that those with less disposable income can afford expensive drugs.

Ironically, however, this scenario actually exacerbates some of the worst qualities of prohibition. High-cost drugs would ensure that an already well-established black market would remain largely in tact. If a person can buy cocaine for ten dollars an ounce from a dealer or go to a government-sponsored “drug store” for ten times that much, he or she would opt for the former scenario. Especially if drugs were still illegal for minors (no one has seriously proposed legalizing marijuana or cocaine for minors), a black market would still have reasons to linger. This is precisely what occurred in Canada when it imposed steep taxes on cigarettes.¹⁵ In fact, today there is a thriving black market for the highly taxed cigarettes in certain parts of the United States as criminals smuggle packs of cigarettes from lower-taxed states to those with higher taxes. For example, New York has the highest tax on cigarettes in the country (\$4.35 per pack, with an additional \$1.50 in New York City).¹⁶ As a result, it has the highest

¹³ See *id.* at 19, 22.

¹⁴ Andy Ivens, ‘Legalize It, Control It and Tax the Livin’ Hell Out of It,’ THE PROVINCE, Nov. 11, 2007, available at <http://www.canada.com/theprovince/news/story.html?id=cdf9aed6-718c-4991-8328-2475bfda76e6> (quoting former Vancouver, BC mayor Larry Campbell).

¹⁵ See Phil Gunby, *Canada Reduces Cigarette Tax to Fight Smuggling*, 271 J. AM. MED. ASS’N 647 (1994).

¹⁶ Joseph Henchman & Scott Drenkard, *Fiscal Fact: Cigarette Taxes and Cigarette Smuggling by State*, TAX FOUND., Jan. 10, 2013, at 1.

smuggling rates in the United States: 60.9% of cigarettes were smuggled into New York in 2011.¹⁷ After Massachusetts, Florida, and Utah raised their cigarette taxes, smuggling significantly increased.¹⁸ California Board of Equalization officials have recently estimated that cigarette excise tax revenue evasion was \$182 million in fiscal year 2005–06.¹⁹ Around fifteen percent of all cigarettes sold in that state have somehow avoided the excise taxes in place on each pack to raise revenues for the state budget.²⁰ This is lower than evasion rates in other countries, according to the Chief Economist for the California Board of Equalization.²¹ For example, about twenty-two percent of the United Kingdom’s domestic cigarette market now consists of smuggled cigarettes.²² In Canada, smuggled cigarettes represented about thirty-three percent of all domestic cigarette consumption at their peak.²³

In the United States, illegal drugs cost \$193 billion per year in lost social costs.²⁴ That number would no doubt increase under legalization and then have to be distributed to the new number of total drug users. Experience with taxing alcohol and tobacco shows that any attempt to pay for lost costs through taxes would be futile. Indeed the social costs of legalization (e.g., increased health costs, accidents, productivity losses) outweigh any possible tax that could be levied against the drug. Drugs that are already legal in the United States are a good example of what would happen if we thought we could reap the financial benefits of illegal drugs: For every one dollar of revenue they produce, they each cost the United States ten dollars in lost social costs.²⁵

¹⁷ *Id.*

¹⁸ *See id.* at 2–3.

¹⁹ REVENUE ESTIMATE: CIGARETTE AND TOBACCO PRODUCTS TAX EVASION, CAL. BD. OF EQUALIZATION 1 (2007), *available at* <http://www.boe.ca.gov/pdf/cig-evasion-07.pdf>.

²⁰ Joe Fitz, Chief Economist, Cal. Bd. of Equalization, PowerPoint presentation titled “California Cigarette Excise Tax Revenue Loss Estimate” at the Federation of Tax Administrators Revenue Estimating and Tax Research Conference (Sept. 17, 2007), *available at* http://www.taxadmin.org/fta/meet/07rev_est/papers/fitz.pdf.

²¹ *See id.*

²² *Id.*

²³ *Id.*

²⁴ NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE, THE ECONOMIC IMPACT OF ILLICIT DRUG USE ON AMERICAN SOCIETY ix (2011).

²⁵ *See* OFFICE OF NAT’L DRUG CONTROL POLICY, MARIJUANA LEGALIZATION FACT SHEET 2 (2011), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/marijuana_legalization_fact_sheet_3-3-11.pdf (discussing revenue from tobacco and alcohol offset by social costs of those substances); *see also generally* HENRICK

III LEGALIZATION OF DRUGS WOULD NOT GET RID OF THE UNDERGROUND MARKET

One way to doom the black market for drugs is to beat the market down: Make drugs so cheap that the black market will eventually wither away in the face of legal competition. This would be a good economic model—if we were not concerned about the effects of drugs themselves. Certainly, drugs are dangerous because they rob people of making rational decisions. Cheap drugs would put a joint of marijuana well within the reach of a child’s daily allowance. Additionally, it would dissuade users from stopping (thus giving them a greater chance to become addicted) because of the cheap price. The American tobacco experience shows us that the price of drugs greatly influences a person’s decision to use. It is generally agreed that for every ten percent increase in cigarette price, overall smoking rates decline three to five percent and the number of children smoking is reduced by six to seven percent.²⁶ Price increases are even more effective in reducing tobacco use rates among males, Hispanics, African Americans, and low-income smokers.²⁷

As the RAND research team scrutinized this argument, they discovered that marijuana exports are an important but not dominant source of revenue for Mexican drug cartels. RAND estimated that “15-26 percent is a more credible range of the share of drug export revenues attributable to marijuana” at that time.²⁸ That works out to around \$1.5 billion in cartel revenues coming from moving marijuana across the U.S. border for sale to wholesalers. By contrast, cocaine, heroin, and methamphetamine trafficking into the United States brought the cartels over \$4 billion a year in revenues (combined total,

J.HARWOOD, U.S. DEP’T HEALTH & HUMAN SERVS., *UPDATING ESTIMATES OF THE ECONOMIC COSTS OF ALCOHOL ABUSE IN THE UNITED STATES* (2000); CAMPAIGN FOR TOBACCO FREE KIDS, *TOLL OF TOBACCO IN THE UNITED STATES OF AMERICA* (2013), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf>.

²⁶ CAMPAIGN FOR TOBACCO FREE KIDS, *RAISING CIGARETTE TAXES REDUCES SMOKING, ESPECIALLY AMONG KIDS (AND THE CIGARETTE COMPANIES KNOW IT)* 1 (2012), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0146.pdf>.

²⁷ *Id.*

²⁸ BEAU KILMER ET AL., RAND CORP., *REDUCING DRUG TRAFFICKING REVENUES AND VIOLENCE IN MEXICO: WOULD LEGALIZING MARIJUANA IN CALIFORNIA HELP?* 3 (2010).

not per drug).²⁹ Consistent with this finding, the Mexican Institute of Competitiveness (IMCO), found that Mexican drug cartels could see their revenue drop between twenty and thirty-three percent. The lead author wrote later that he thought “that could be reasonably termed both significant and substantial . . . [however] . . . marijuana legalization would transform the Mexican drug trafficking organizations (in interesting and, as of yet, unpredictable ways), but it would certainly not eliminate them (not by itself, in any case).”³⁰

Where do the cartels derive most of their income if not from marijuana trafficking? They traffic cocaine, heroin, and methamphetamine into the United States. They smuggle migrants across the border and when migrants refuse to cooperate in cartel activities, they are often murdered, sometimes in mass killings, dozens at a time. These crime syndicates profit from extortion and kidnapping. They traffic in weapons and ammunition. In short, like the Mafia during alcohol Prohibition, the Mexican cartels have “diversified their portfolio” and spread their tentacles into a wide range of vices, and these activities have further escalated levels of violence as the various cartels compete to control turf.³¹

IV

LEGALIZATION WOULD NOT DRAMATICALLY REDUCE THE NUMBER OF PEOPLE IN PRISON OR JAIL—AND MAY INCREASE CRIMINAL JUSTICE INVOLVEMENT

Critics of U.S. drug policy often claim that legalization would free up much needed prison space and police time.³² It is certainly true that the U.S. prison population has grown enormously over the past three decades. At the end of 2008, one in every 100 adults in this country was in the custody of a state or federal prison or local

²⁹ See ALEJANDRO HOPE & EDUARDO CLARK, IMCO, IF OUR NEIGHBORS LEGALIZE: SOME CLARIFICATIONS ABOUT THE IMCO FINDINGS 2 (2012), available at <http://imco.org.mx/images/clarification.pdf>.

³⁰ Comment of Alejandro Hope, Mark Kleiman, *Polarization, Denial, and the Cannabis Debate*, SAME FACTS (Dec. 8, 2012), <http://www.samefacts.com/2012/12/drug-policy/polarization-denial-and-the-cannabis-debate/>.

³¹ Kevin A. Sabet, REEFER SANITY: SEVEN URBAN MYTHS ABOUT AMERICA’S MOST POPULAR ILLEGAL DRUG (forthcoming 2013).

³² See generally Nadelmann, *supra* note 4, at 943; Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097 (2013).

jail.³³ But are we really throwing people in prison for lighting up a joint? Simply put: no.

A. State and Federal Prisons

The U.S. prison population is falling.³⁴ What do drugs have to do with it? To understand who comprises America's incarcerated population, we must first examine state prisons, which house the majority of the country's prison population.

Bureau of Justice Statistics state that the largest prison system in the United States, the state system, had 1,410,901 prisoners in 2009.³⁵ Eighteen percent of state prisoners were there for drug offenses in 2008.³⁶ According to the most recent survey of inmates in state and federal correctional facilities, about three-quarters of state prisoners in for a drug conviction are there for drug trafficking, not for petty drug offenses.³⁷ Drug offenders made up six percent of state prison inmates, and only one tenth of one percent (0.1%) of all state prisoners were sentenced for possession of marijuana with no prior record. In federal prisons, which hold thirteen percent of the total prison population, about half of the inmates were incarcerated for drug offenses. Most of these prisoners, 99.8%, were incarcerated not for possessing marijuana—or any other drug—they were sentenced on more serious drug trafficking charges or other offenses.³⁸ Even when not differentiating between the most serious drug crimes, like large-scale trafficking, and lesser offenses, like marijuana possession, the data show that drug offenders account for only a small fraction of

³³ PEW CTR. ON THE STATES, PRISON COUNT 2010, at 1 (2010) [hereinafter PEW PRISON COUNT], available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Pew_Prison_Count_2010.pdf.

³⁴ *U.S. Prison Count Continues to Drop*, PEW CHARITABLE TRUSTS (Mar. 8, 2013), <http://www.pewstates.org/news-room/press-releases/us-prison-count-continues-to-drop-85899457496>.

³⁵ PEW PRISON COUNT, *supra* note 33, at 1.

³⁶ See HEATHER C. WEST ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, at 7 (2010), available at <http://bjs.gov/content/pub/pdf/p09.pdf> (providing statistics that 251,400 of 1,365,400 prisoners were sentenced for drug offenses).

³⁷ See U.S. DEP'T OF JUSTICE, SURVEY OF INMATES IN STATE AND FEDERAL CORRECTIONAL FACILITIES, 1997, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/2598> (last visited Apr. 16, 2013).

³⁸ See Jonathan P. Caulkins & Eric L. Sevigny, *How Many People Does the U.S. Imprison for Drug Use, and Who Are They?*, 32 CONTEMP. DRUG PROBLEMS 405, 425 (2005) (“[T]he number of marijuana users in prison for their use is perhaps 800-2,300 individuals or on the order of 0.1%-0.2% of all prison inmates.”).

the overall prison population. In their column one year ago, Marc Mauer and David Cole revealed that as of the mid-90s, drug offenses no longer drove prison growth.³⁹

The largest growth in state inmates between 1995 and 2001 was among violent offenders.⁴⁰ They accounted for sixty-three percent of the growth; drug offenders accounted for only fifteen percent of the growth.⁴¹

Additionally, even federal prisons are not overwhelmingly filled with drug offenders. In the federal system, there were 208,118 people in prison in 2009.⁴² Of this number, 45.7% were there for drug offences—this is down from sixty percent in 1995 and fifty-five percent in 2001.⁴³

B. Local Jails

In July of 2004, the Bureau of Justice Statistics released, for the first time in six years, a profile of local jail inmates, covering the year 2002.⁴⁴ It revealed the number of inmates held for drug law violations rose by about 40,000 from 1996 to 2002, although the number of drug violations was still just under the number of violations for public order and violent offenses.⁴⁵ They each hovered around twenty-five percent of all offenders (public order violations rose by 30,000; violent offenses rose by 24,000).⁴⁶ And of the drug offenders in jails, they were about equally distributed for possession and trafficking (10.8% and 12.1%, respectively).⁴⁷ A 40,000 rise in the number of drug violators, however, is no small number. This resulted because there was a steep increase in those six years in the time served for

³⁹ Marc Mauer & David Cole, *Five Myths about Americans in Prison*, WASH. POST (June 17, 2011), http://www.washingtonpost.com/opinions/five-myths-about-incarceration/2011/06/13/AGfIWvYH_story.html.

⁴⁰ See PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2002, at 10 (2003), available at <http://bjs.gov/content/pub/pdf/p02.pdf>.

⁴¹ *Id.*

⁴² WEST ET AL., *supra* note 36, at 2.

⁴³ See *id.* at 2, 33 (reporting 95,205 federal inmates imprisoned for drug offenses in 2009); HARRISON & BECK, *supra* note 40, at 11 (reporting 52,782 out of 88, 658 federal inmates imprisoned for drug offenses in 1995, and 78,501 out of 142,766 federal inmates imprisoned for drug offenses in 2001).

⁴⁴ DORIS J. JAMES, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES, 2002, at 1 (2004).

⁴⁵ See *id.* at 4, 10.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 3.

drug traffickers—not possessors—from twenty-nine to fifty months.⁴⁸ In fact, the average time drug possession inmates expected to serve in jail was six months, for traffickers it was sixteen months.⁴⁹

It appears, then, that the state and federal anti-drug effort does not target users or addicts, but rather large-scale traffickers and others involved with impacting the supply of drugs. Ironically, Daniel Polsby, who favors marijuana legalization, sums it up best when he writes: “Despite well-publicized declarations to the contrary, there is very little worthwhile evidence that the current prison population of drug offenders contains any appreciable fraction of temperamentally inert flower children, ensnared by happenstance in the war on drugs.”⁵⁰

C. Arrests

Of course, prison time is not the only indicator of entry into the criminal justice system. Arrests are unpleasant, especially if you are detained in a local jail, and they count against someone when getting a job or accessing social benefits. The total number of arrests for drug offenses in 2010 hovered at approximately 1.6 million.⁵¹ Of course, the term “arrest” itself could mean very different things, including a citation (ticket) or summons—the former is often invoked for simple marijuana possession. Arrest, per se, is an arbitrary term with different applications throughout the country. Additionally, if one person is arrested for multiple violations simultaneously, only the “most serious” offense is reported to the FBI⁵²—causing significant undercount or overcount (whichever you prefer) for actual drug arrests. In other words, someone pulled over for reckless driving would only be cited for drug possession if drugs were found during the traffic stop. So drug arrests are often incidental to other crimes.⁵³

⁴⁸ *Id.* at 5.

⁴⁹ *Id.*

⁵⁰ Daniel D. Polsby, *Ending the War on Drugs and Children*, 31 VAL. U. L. REV. 537, 542–43 (1997).

⁵¹ FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009: ARRESTS 1 (2010), available at <http://www2.fbi.gov/ucr/cius2009/documents/arrestmain.pdf>.

⁵² See *Crime in the United States 2011: Persons Arrested*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested> (last visited Apr. 15, 2013).

⁵³ See PETER REUTER ET AL., ASSESSING THE CRACK-DOWN ON MARIJUANA IN MARYLAND 2 (2001), available at http://www.drugpolicy.org/docUploads/md_mj_crack_down.pdf.

Finally, looking at our legal drugs is again useful. A fact most people do not know is that alcohol, not crack or heroin, or even marijuana, is responsible for over 2.2 million arrests every year.⁵⁴ That is 700,000 *more* arrests than for all illegal drugs combined.⁵⁵ The reason for this is because alcohol is used so much more than our illegal drugs and people are being arrested for violating liquor laws, driving while intoxicated, and public drunkenness (the 2.2 million number does not include violent crimes that involve alcohol use). If drugs were legal and more people used, we would have more people driving high, manufacturing drugs in their own homes to avoid government regulations, using underage, and violating all sorts of new regulations.

V

NEITHER THE NETHERLANDS NOR PORTUGAL OFFERS THE UNITED STATES MODELS FOR DRUG POLICY⁵⁶

For decades, American tourists and other visitors knew the Dutch city of Amsterdam as the “San Francisco of Europe,” a designation that harkened back to the 1960s “Summer of Love” in San Francisco and reflected Amsterdam’s permissive attitudes toward marijuana. The Dutch city emerged as a magnet for foreign drug tourists seeking legal highs in coffee shops licensed to sell marijuana.

This Dutch experiment lasted for almost forty years, from 1976 when the possession and sale of up to thirty grams of marijuana was decriminalized⁵⁷ to 2011 when awareness of a new reality about pot began to dawn on Dutch policymakers and public health authorities. This new awareness emerged because selective breeding has made Dutch marijuana so powerful in its effects that psychiatric problems are cropping up in growing numbers of users.⁵⁸ So in October 2011, Holland reclassified strong cannabis (THC of about fifteen percent or higher) as a “hard” drug, putting it in the same category as cocaine,

⁵⁴ See *Crime in the United States 2011: Table 29*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29> (last visited Apr. 15, 2013) (reporting 1,215,077 arrests for diving under the influence, 500,648 arrests for liquor law violations, and 534,218 arrests for drunkenness).

⁵⁵ See *id.*

⁵⁶ SABET, *supra* note 31.

⁵⁷ Robert J. MacCoun, *What Can We Learn from the Dutch Cannabis Coffeeshop System?*, 106 ADDICTION 1899, 1899 (2011).

⁵⁸ See Selena Chavis, *Cannabis Use Linked to Increased Risk for Mental Health Issues*, PSYCHCENTRAL (Oct. 12, 2010), <http://psychcentral.com/news/2010/10/08/cannabis-use-increases-risk-for-mental-health-issues-2/19425.html>.

and proposed a law banning foreign tourists from the nation's 700 marijuana coffee shops.⁵⁹

Legalization proponents on this side of the Atlantic have been holding the Dutch experience up for years as a model of rational marijuana policy. Indeed, the Dutch case presents an instructive model for us—but not for the reasons the pro-marijuana movement would have us believe. The about-face in Dutch attitudes and policies provides a cautionary tale for us in the United States as various states consider relaxing their drug laws.

But before examining the Dutch experience in more detail, let's first look at a more recent European experiment, which is also at the heart of this urban myth—the case of Portugal.

A. Is Portugal a Model? If So, of What?

No single country in the last decade has had its drug policy held up on the pro-legalization soapbox more than Portugal. That's because in 2001 the nation passed a law formally decriminalizing all drugs, including marijuana, heroin, and cocaine. When the law was first announced, it sounded extreme on its face and was widely characterized as legalization. Drug legalization advocates cheered.

But just a little bit of digging shows that the Portuguese experience has been vastly exaggerated, twisted, and misused in two principal ways. First, Portugal's policy was decidedly not a form of legalization. Second, the outcomes of the new Portuguese approach are mixed.

1. Decriminalization or Something Else?

Since 2001, drug users in Portugal have been sent to “dissuasion panels” of social workers, attorneys, and psychiatrists, called “Commissions for the Dissuasion of Drug Addiction” (Comissões para a Dissuasão da Toxicodependência–CDT). Members of the CDT team assess drug users and refer them to brief health interventions or treatment, if necessary. The policy is in fact similar to the way many European countries have long treated people caught for low-level drug possession. One might even argue that the Portuguese approach is similar to the U.S. drug court or diversion system. One thing is for

⁵⁹ See Stephanie Darrall, *Dutch Government Bans Coffee-Shops from Selling 'Skunk,'* MAIL ONLINE (Oct. 8, 2011), <http://www.dailymail.co.uk/news/article-2046768/Dutch-government-bans-coffee-shops-selling-skunk.html>.

sure: in no way does the law resemble legalization, or even many reformers' vision of true decriminalization under which users would be slapped with a small (usually uncollected) fine and left alone.

In fact, prior to 2001, Portugal had rarely imprisoned drug users at all. But because of relatively high rates of HIV and other drug-related problems, authorities felt compelled to try a new policy that amped up treatment and intervention strategies and formally ended any possibility of jail time. In a 2011 profile of the country and its drug law experiment, *The New Yorker* magazine observed: "Portuguese leaders, flailing about and desperate for change, took an unlikely gamble: they passed a law that made Portugal the first country to fully decriminalize drug use."⁶⁰

Under the new law, drug possession in small amounts became an administrative offense rather than a criminal one. People who are caught using drugs in a public place and/or possessing a small amount of any drug (up to ten days' worth of personal use) are referred to CDTs. A CDT consists of a three-member administrative panel, which decides if the referred individual gets an intervention, treatment, a fine, or nothing at all. A person *selling* any drug, however, can still be arrested for trafficking, even if the amount in his or her possession is less than ten days' worth.

Portugal's policy is a far cry from legalization, which implies the retail sale, commercial distribution, and production of drugs. But that did **not** stop the spin. Misleading headlines and blog posts abounded: "Ten Years Of Legalization Has Cut Portugal's Drug Abuse Rate In Half," "What Pot Legalization Looks Like: Portugal shows the best way to keep kids away from pot is to make it legal for everyone else," and "What Happened After Portugal Made All Drugs Legal?" are just a few examples.⁶¹

To legalization advocates, the details did not matter. They presented Portugal as a new frontier in legalization and argued that the United States would do well to follow.

⁶⁰ Michael Specter, *Getting A Fix: Portugal Decriminalized Drugs a Decade Ago. What have we learned?*, THE NEW YORKER, Oct. 17, 2011, at 36.

⁶¹ Trish Regan, *What Pot Legalization Looks Like*, HUFFINGTON POST (Apr. 20, 2011, 1:38 PM), http://www.huffingtonpost.com/trish-regan/what-pot-legalization-look_b_851550.html; Jacob Sloan, *Ten Years of Legalization Has Cut Portugal's Drug Abuse Rate in Half*, DISINFORMATION (July 20, 2010), <http://www.disinfo.com/2012/07/ten-years-of-legalization-has-cut-portugals-drug-abuse-rate-in-half/>; *What Happened After Portugal Made All Drugs Legal?* HUFFINGTON POST, http://www.huffingtonpost.com/2011/07/13/portugal-legal-drugs_n_897207.html (last updated Sept. 12, 2011).

2. *What Has Been the Outcome of Portugal's Policy?*

The first analysis on Portugal was done in 2009 by the Cato Institute, a libertarian U.S. think tank which has been on record for years favoring the legalization of all drugs.⁶² The Cato report, released in 2009, concluded that drug use had not increased under decriminalization, that drug-related deaths and HIV rates had fallen, and that generally, things were much better in that country because of the new policy.⁶³ Immediately after the Cato report was released and its author went on a world tour promoting his findings, pro-drug lobby groups and legalization advocates touted Portugal as *the* model of drug policy for the United States. They propped up Portugal as an example of radical revolution in the decades-long drug wars. For example, headlines read “Portugal Drug Decriminalization: A Resounding Success,” “Drug Decriminalization Policy Pays Off,” and “5 Years After: Portugal’s Drug Decriminalization Policy Shows Positive Results.”⁶⁴

In 2011, *The New Yorker* was much more careful in its review of the law’s effects: “[T]here is much to debate about the Portuguese approach to drug addiction. Does it help people to quit, or does it transform them into more docile drug addicts, wards of an indulgent state, with little genuine incentive to alter their behavior?”⁶⁵ So what is the straight truth about Portugal and its drug policy? In short, some use and harm levels went up, others went down. And it is questionable whether the policy that Portugal enacted is working as intended.

Depending on which years, age groups, or outcomes one examines, the statistics on the impact of drug use change dramatically. The significance of Portugal’s experience and the impact of that country’s drug policy have been overstated in several ways. The European

⁶² GLENN GREENWALD, CATO INST., *DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES* (2009).

⁶³ *See id.* at 16–18, 27–28.

⁶⁴ Glenn Greenwald, *Drug Decriminalization Policy Pays Off*, POLITICO (Oct. 14, 2010, 4:46 AM), <http://www.politico.com/news/stories/1010/43544.html>; Tom Chivers, *Portugal Drug Decriminalisation ‘A Resounding Success’: Will Britain Respond? No.*, THE TELEGRAPH, <http://blogs.telegraph.co.uk/culture/tomchivers/100047485/portugal-drug-decriminalisation-a-resounding-success-will-britain-respond-no/> (last updated Sept. 28, 2010); Brian Vastag, *5 Years After: Portugal’s Drug Decriminalization Policy Shows Positive Results*, SCIENTIFIC AMERICAN (Apr. 7, 2009), <http://www.scientificamerican.com/article.cfm?id=portugal-drug-decriminalization>.

⁶⁵ Specter, *supra* note 60, at 36.

Monitoring Centre for Drugs and Drug Addiction (EMCDDA), long considered the authority on drug statistics in Europe, compiled statistics showing an increase in lifetime prevalence rates for the use of cannabis, cocaine, amphetamines, ecstasy, and LSD between 2001 and 2011.⁶⁶ Those figures are for the general population of Portugal, ages fifteen to sixty-four years of age.⁶⁷ The European School Survey Project on Alcohol and Other Drugs (ESPAD) survey of fifteen- and sixteen-year-olds shows an overall increase in the prevalence of marijuana use between 1999 to 2011, although there was an initial dip in use rates.⁶⁸ Past-month prevalence for marijuana use in that age group went from five percent in 1999 to eight percent in 2003 to six percent in 2007 and finally up nine percent in 2011.⁶⁹ EMCDDA concluded, “the most recent ESPAD study corroborates the findings of the [UN World Health Organization] study, showing increasing consumption of illicit substances [in Portugal] since 2006.”⁷⁰

Data on the number of drug-related deaths is mixed. Some sources point to an increase in deaths from 280 in 2001 to 314 in 2007.⁷¹ Others point to different numbers. For example, data from the General Mortality Registry of the Statistics National Institute shows that twenty-six cases of drug-related deaths occurred in 2010.⁷² That represents fewer deaths than the twenty-seven cases reported in 2009 and 2002 but is higher than the number of drug-related deaths reported in each of the years between 2003 and 2008.⁷³ Clearly, it is a mixed picture. As Stanford University’s Dr. Keith Humphreys notes of the EMCDDA’s data, “Portugal decriminalized all drugs in 2001, and these factually accurate data can be used to prove that Portugal’s policy has been a complete success or a complete failure, assuming the analyst has no intellectual integrity.”⁷⁴

⁶⁶ *Country Overview: Portugal*, EUROPEAN MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, <http://www.emcdda.europa.eu/publications/country-overviews/pt#drd> (last updated Oct. 19, 2012) [hereinafter *Portugal Overview*].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Comment of Nigel Keegan, *Drug Decriminalization in Portugal*, *BMJ* (Oct. 5, 2010), <http://www.bmj.com/content/341/bmj.c4554?tab=responses>.

⁷² *Portugal Overview*, *supra* note 66.

⁷³ *Id.*

⁷⁴ Keith Humphreys, *Scientific Proof that Drug Decriminalization in Portugal Saved Lives and Killed People*, SAME FACTS (Oct. 18, 2010), <http://www.samefacts.com/2010/10/drug-policy/scientific-proof-that-drug-decriminalization-in-portugal-saved-lives-and-killed-people/>.

With this evidence in hand, the EMCDDA concluded that under Portugal's drug law, "[t]he country still has high levels of problem drug use and HIV infection, and does not show specific developments in its drug situation that would clearly distinguish it from other European countries that have a different policy."⁷⁵ The new policy, then, appeared to be neither novel nor a magic bullet.

It is also highly debatable whether Portugal's law has encouraged people with drug problems to seek treatment. As *The New Yorker* article pointed out, treatment facilities "became far more accessible just as the new law was passed."⁷⁶ Any positive treatment trends and other claimed benefits seen since 2001 may simply be due to increases in treatment capacity and reach. We do not really know.

Indeed, it appears that Portugal's policy is not really a true decriminalization or legalization strategy. It is more of a treatment-or-"dissuasion"-focused approach similar to those of Portugal's European neighbors.

While the Portuguese experience with drug policy reform extends beyond marijuana, the fact that pro-legalization advocates point to it as a successful model for North American pot legalization makes it highly relevant to this context. Close examination has demonstrated that drug legalization advocates in the United States are not strengthening their case by highlighting the Portuguese drug law model.

B. Holland's Dramatic About-Face

A onetime poster child for legalization, Holland has experienced a dramatic about-face in its policies. The Dutch policy began in 1976, not as legalization, but as a non-enforcement policy on marijuana sale and use. The country has made it a practice to look the other way when marijuana is sold in coffee shops. When passing the 1976 law, Parliament removed penalties for the possession of thirty grams of marijuana or hashish, an amount that was thought to constitute the average pot user's consumption over three months.⁷⁷

⁷⁵ EUROPEAN MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, DRUG POLICY PROFILES: PORTUGAL 24 (2011).

⁷⁶ Specter, *supra* note 60, at 44.

⁷⁷ Larry Collins, *Holland's Half-Baked Drug Experiment*, FOREIGN AFFAIRS, May/June 1999, at 83.

In addition to this decriminalization of possession in small amounts, Dutch lawmakers authorized the sale of marijuana and hashish in special coffee shops licensed by the government. These shops could not sell more than thirty grams to any customer.⁷⁸ The import, export, production, or sale of cannabis remained illegal outside of the coffee shops.⁷⁹

From 1976 to the early 1980s, there was little change in Dutch marijuana use levels. Then, when coffee shops started figuring out how much they could profit from the policy by attracting foreigners and advertising their products, the business climate changed. There was a tourism boom, and with the rise in advertising, coffee shops became a favorite destination for foreign tourists and Dutch residents alike. From the mid-1980s to the mid-1990s, the number of coffee shops selling pot quintupled.⁸⁰

In 1996, local communities throughout Holland were given the authority to decide whether coffee shops should be allowed within their jurisdictions.⁸¹ Since then, three quarters of the nearly 500 local communities in Holland have refused to allow coffee shops to operate within their borders at all.⁸² As a result, Amsterdam became home to one-third of all coffee shops in the country despite having only five percent of the country's population.⁸³

But the black market sale of marijuana did not go away in areas with a high concentration of coffee shops legally selling pot. There are several reasons for this and all relate to the unfailing opportunism of black market sellers in exploiting the inevitable gaps left open in any regime of legal marijuana. For example, black market dealers take advantage of coffee shops not being open twenty-four hours a day to offer round-the-clock service. Black market sellers also target minors too young to legally enter coffee shops. Additionally, while there are limits on the amount of pot a coffee shop visitor can purchase, there is no limit on how much a customer can buy from a black market dealer in a single transaction.⁸⁴ All of these factors

⁷⁸ See MacCoun, *supra* note 57, at 1899.

⁷⁹ Collins, *supra* note 77, at 83.

⁸⁰ See MACCOUN & REUTER, *supra* note 7, at 241, 250.

⁸¹ Dirk Korf, *Chapter 9: An Open Front Door: The Coffee Shop Phenomenon in the Netherlands*, in A EMCDDA, *A CANNABIS READER: GLOBAL ISSUES AND LOCAL EXPERIENCES* 137, 142 (2008).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *id.* at 150.

combined create an enforcement problem for Holland's criminal justice system.

Predictably, as pot use was normalized by coffee shops, an increase in marijuana use among Holland's young people occurred. Rates of youth marijuana use more than doubled from the mid-1980s to the mid-1990s. An analysis by a pair of researchers who are sympathetic to marijuana legalization and decriminalization found that the percentage of eighteen- to twenty-year-olds reporting marijuana use went from fifteen percent in 1984 to forty-four percent in 1996, an increase of 300% for that age group.⁸⁵ The Dutch always had lower rates of youth marijuana use than the United States, but since the mid-1990s, Dutch rates have caught up to their American counterparts.

Marijuana potency has also risen dramatically over the last decade or so. The European Monitoring Centre for Drugs and Drug Addiction has posted statistics showing that THC concentrations in marijuana sold in coffee shops more than doubled between 1999 and 2004, from an average of 8.6% in 1999 to more than 20% in 2004.⁸⁶ As potency levels escalated, users began developing a tolerance for the drug, requiring increasingly higher levels of THC to get the same high—a vicious cycle that accelerates the development of dependency. Dutch citizens now are more likely to be admitted to treatment centers for marijuana use than citizens of any other European country.⁸⁷

Holland holds yet another distinction that the pro-pot movement might wish would go away. *Foreign Affairs*, published by the United States-based Council on Foreign Relations, did an analysis of Holland's drug experiment and described how that country's lenient laws and status as "the drugs capital of western Europe" had turned it into "a magnet for . . . criminal types."⁸⁸ And we are not just talking about marijuana trafficking. Law enforcement authorities in both France and Britain estimated that eighty percent of the heroin used or seized in those countries passed through or was temporarily warehoused in Holland.⁸⁹ Dutch traffickers manufactured most of the

⁸⁵ MACCOUN & REUTER, *supra* note 7, at 257.

⁸⁶ Korf, *supra* note 81, at 151.

⁸⁷ See Table TDI-3: *New Clients Entering Treatment by Primary Drug, 1997 to 2007: Part (iv) New Cannabis Clients by Country and Year of Treatment*, EUROPEAN MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, <http://www.emcdda.europa.eu/stats09/tditab3d> (last visited Apr. 15, 2013).

⁸⁸ Collins, *supra* note 77, at 83–84.

⁸⁹ *Id.* at 83.

amphetamines and ecstasy pills consumed in Europe.⁹⁰ According to a British customs official, “Holland has become *the* place for drug traffickers to work . . . it’s an environment which is relatively trouble-free from a criminal’s point of view.”⁹¹ To their credit, Dutch law enforcement have begun to fund enforcement operations and intelligence at a much higher rate now than in the past.⁹²

Dutch officials did not predict these effects of marijuana legalization. Nor did they predict the sharp increase in use rates, the higher rates of dependency, the significant increase in treatment admission rates, or all the other social and public health problems that have emerged in Holland over the years.

Observing these effects, however, did eventually drive Dutch lawmakers to reverse their policy. In response to these growing problems, Dutch officials initiated a turnaround, scaling back lenient marijuana laws in late 2011, banning tourists from going to the coffee shops selling pot, closing many of the shops, and reclassifying high-THC marijuana as a hard drug alongside heroin.⁹³ As a *Daily Mail* commentator observed in 2011, Dutch physicians and lawmakers had begun to recognize that pot “is very dangerous psychiatrically. Its frequent use leads to an increased incidence of hospitalisation for psychotic breakdown.”⁹⁴

Not surprisingly, coffee-shop owners have come together as the Cannabis Retailers’ Association to take legal action against these changes. They argue, among other things, that these legal changes discriminate against foreigners who would no longer be able to consume pot in their coffee shops. In April 2012, a judge in Holland upheld the new law. Appeals could drag the legal process out for years to come since the cannabis retailers have vowed to take this issue to the European Court of Human Rights.⁹⁵

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See, e.g., *Higher Sentences for Drugs and Drink-Related Crime*, DUTCH NEWS (Mar. 25, 2011), http://www.dutchnews.nl/news/archives/2011/03/higher_sentences_for_drugs_and.php.

⁹³ *Dutch to Classify Super Strong Marijuana Alongside Heroin*, DUTCH NEWS (Nov. 20, 2012), http://www.dutchnews.nl/news/archives/2012/11/dutch_to_classify_super_strong.php.

⁹⁴ Robert LeFever, *Even the Dutch Think Skunk Drives You Mad*, DAILY MAIL (Oct. 11, 2011, 9:10 AM), <http://www.dailymail.co.uk/debate/article-2047750/The-grass-greener-Holland.html>.

⁹⁵ See *Netherlands Judge Backs Cafe Cannabis Ban*, BBC NEWS (Apr. 27, 2012), <http://www.bbc.co.uk/news/world-europe-17865151>.

Certainly, we can learn from Portugal about its public health oriented approach using administrative sanctions and Holland's warnings about the commercialization of marijuana. But neither Holland nor Portugal represents a successful model of legalization. As argued here, Portugal's policy can hardly be called a legalization regime. And, in any case, the outcomes of Portuguese drug reform are far from resoundingly positive. The Dutch experience, on the other hand, offers a clear warning of the many harms that marijuana legalization can inflict. In the United States, a country obsessed with commercialization in the name of the First Amendment, legalization is sure to be an even riskier proposition.

VI

AMERICAN-STYLE LEGALIZATION WOULD MEAN PROMOTION, ADVERTISING, AND A DENIAL OF HARMS: ALCOHOL AND TOBACCO ARE A CASE IN POINT

According to internal documents the government forced Big Tobacco to release during its historic court settlement, Big Tobacco is ready to pounce on the golden opportunity of marijuana legalization:

The use of marijuana . . . has important implications for the tobacco industry in terms of an alternative product line . . . [We] have the land to grow it, the machines to roll it and package it, the distribution to market it. In fact, some firms have registered trademarks, which are taken directly from marijuana street jargon. These trade names are used currently on little-known legal products, but could be switched if and when marijuana is legalized. Estimates indicate that the market in legalized marijuana might be as high as \$10 billion annually.⁹⁶

It is no wonder that the parent company of Phillip Morris, Altria, recently bought the domain names "AltriaCannabis.com" and "AltriaMarijuana.com."⁹⁷ If this sounds frightening, it should: Big Tobacco tried for decades to conceal the harms of the drug tobacco and millions of lives were lost as a result. We are naïve to think that this wouldn't happen with marijuana.

⁹⁶ Michael S. Rosenwald, *The Year is 2020: What's Happening with Marijuana?*, WASH. POST (2010 Oct. 31, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102205573_2.html?sid=ST2010102805974 (quoting a report prepared by consultants for Brown & Williamson).

⁹⁷ See Andrew Allemann, *Altria gearing up to sell marijuana?*, DOMAIN NAME WIRE (Dec. 28, 2009), <http://domainnamewire.com/2009/12/28/altria-gearing-up-to-smell-marijuana/>.

When the “Winston Man,” model Dave Goerlitz, finished with a photo session for R. J. Reynolds one day, he asked the executives present if he could take home some props—a few cartons of cigarettes. He was surprised when the executives replied that they did not smoke. “Are you kidding?” one of the executives said. “*We reserve that ‘right’ for the young, the poor, the black and the stupid.*”⁹⁸ Goerlitz, who was severely disabled in a stroke due to his tobacco use, now counsels kids on why smoking is dangerous.

The Liquor Lobby is not much better. We know that even though today’s alcohol taxes are, adjusting for inflation, *one-fifth of those during the Korean War*—yes one-fifth—the lobby opposes any such increase.⁹⁹ Of course, it also relies on the heaviest drinkers for their profits, meaning that it has major incentives to encourage, not discourage, drinking among kids and adults alike. The industry also targets the poor, documented by the fact that liquor store outlets are far more prevalent in poorer neighborhoods of color than in white, upper-class areas.¹⁰⁰

Alcohol and tobacco are industries we should hardly hang our marijuana hat on. But as the examples of legal, addictive substances, they provide a cautious tale of legalization, American-style.

VII

PROHIBITION OR LEGALIZATION ARE NOT THE ONLY TWO POLICY CHOICES FOR MARIJUANA

Though it is hard to hear over the shouting matches that characterize today’s drug policy debate, enforcement-heavy prohibition and lax legalization are thankfully not the only two choices we have for dealing with drugs. Hundreds of localities have implemented drug courts that combine treatment with regular testing as opposed to just prison alone. Probation programs that change behavior among drug users by enforcing modest rules have proven to be successful. But we can certainly do more. Increased education about today’s marijuana harms need to be amplified. Screenings for early marijuana abuse need to be more widespread within our health

⁹⁸ 135 CONG. REC. S9,971 (daily ed. Aug. 3, 1989) (statement of Dave Goerlitz), available at <http://legacy.library.ucsf.edu/action/document/page?tid=lpm40c00&page=1>.

⁹⁹ See Mark A.R. Kleiman et al., *Rethinking the War on Drugs*, WALL STREET JOURNAL (Apr. 22, 2012, 9:09 AM), <http://online.wsj.com/article/SB10001424052702303425504577353754196169014.html>.

¹⁰⁰ See Rhonda Jones-Webb et al., *Alcohol and Malt Liquor Availability and Promotion and Homicide in Inner Cities*, 43 SUBSTANCE USE & MISUSE 159, 170 (2008).

care system. Localities are also realizing that we cannot just arrest our way out of our marijuana use and saddle users with lifelong records that inhibit their ability to get their life together. Sadly, however, the black-and-white thinking that plagues this issue betrays the fact that there are better ways than legalization or prohibition to deal with this complex health problem.

VIII

CAN DRUG USERS BE *FORCED* TO STOP USING DRUGS?

The issue of coercion and abstinence is relevant in the drug policy discussion today because a growing number of drug courts and treatment and sanctions programs have emerged both in the United States and in Europe. These mechanisms use different tools of coercion—a jail sentence, usually—to lure drug users to change their behavior. Noncompliance (positive drug tests) results in proceeding with the charges as if the user had not entered into the drug court. Drug courts have been positively shown to reduce crime, as opposed to offenders who receive probation alone.¹⁰¹

At first read, the idea seems paradoxical: if addiction is beyond the addict's control, since we classify it as a disease, then how can addicts just "change" their status from drug using to nondrug using? Not all drug users, though, are addicts. Many people can have trouble with drugs and not necessarily be addicted. These people may not necessarily need treatment to stop using drugs. Some, still, may be dependent or addicted, and require a more comprehensive treatment regimen. For both of these groups of drug users, coercion has shown to work remarkably well to stop drug use.

A. Drug Courts

The National Association of Drug Court Professionals defines a drug court as "a special court that is given the responsibility to handle cases involving drug-using offenders through comprehensive supervision, drug testing, treatment services and immediate sanctions and incentives."¹⁰² Drug courts offer nonviolent drug users the

¹⁰¹ See ELIZABETH PIPER DESCHENES ET AL., NAT'L INST. OF JUSTICE, AN EXPERIMENTAL EVALUATION OF DRUG TESTING AND TREATMENT INTERVENTIONS FOR PROBATIONERS IN MARICOPA COUNTY, ARIZONA iv (1996).

¹⁰² National Association of Drug Court Professionals: Information on Drug Courts, HOPENET, <http://www.hopenetworks.org/addiction/DrugCourtInformation.htm> (last visited Apr. 15, 2013).

chance to forgo formal criminal sanctions if they agree to enter into and complete a procedure of heavily monitored drug treatment and routine drug testing. A General Accounting Office (GAO) report from the U.S. government discovered that the average retention rate of drug court participants was a whopping seventy-one percent.¹⁰³ The GAO report found that the longer the participation in the drug court, the more likely the outcome would be successful.¹⁰⁴ Other studies looking at drug courts in Baltimore, Las Cruces, Portland, and various places in Florida have shown very promising results.¹⁰⁵

The first drug court emerged in the late 1980s in the Miami-Dade area of Florida as judges witnessed a new wave of cocaine use and the revolving door into the criminal justice system many drug users were participating in.¹⁰⁶ As of September 2005, there were about 1,500 working drug courts and another 550 in the planning stages in the United States.¹⁰⁷

Drug courts are an excellent alternative to traditional sentencing, yet, like all policy interventions, they do suffer from some limitations. First—and this may explain at least some of the success surrounding drug courts—the nature of drug courts could lead these programs to focus on the less-serious offenders, though many drug courts now take serious offenders. Second, another limitation is that drug courts can suffer from a lack of judges and other necessary stakeholder investment. Third, since drug court participation is voluntary, many

¹⁰³ U.S. GEN. ACCOUNTING OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS 11 (1997).

¹⁰⁴ See *id.* at 117.

¹⁰⁵ See generally MICHAEL W. FINIGAN, MULTNOMAH CNTY. DEP'T OF CMTY. CORR., AN OUTCOME PROGRAM EVALUATION OF THE MULTNOMAH COUNTY S.T.O.P. DRUG DIVERSION PROGRAM (1998); JOHN S. GOLDKAMP & DORIS WEILAND, NAT'L INST. OF JUSTICE, ASSESSING THE IMPACT OF DADE COUNTY'S FELONY DRUG COURT (1993); W. Clinton Terry III, *Chapter 4: Broward County's Dedicated Drug Treatment Court: From Post-Adjudication to Diversion*, in THE EARLY DRUG COURTS: CASE STUDIES IN INNOVATION (W. Clinton Terry III ed., 1999); James F. Breckenridge et al., *Drunk Drivers, DWI "Drug Court" Treatment, and Recidivism: Who Fails?*, 2 JUSTICE RES. & POL'Y 87 (2000); Denise C. Gottfredson & M. Lyn Exum, *The Baltimore City Drug Court: One-Year Results from a Randomized Study*, 39 J. RES. CRIME AND DELINQUENCY 337 (2002); Denise C. Gottfredson et al., *Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial*, 2 CRIMINOLOGY & PUB. POL'Y 171 (2002).

¹⁰⁶ See History: Justice Professionals Pursue a Vision, NAT'L ASS'N OF DRUG COURT PROF'LS, <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Apr. 15, 2013).

¹⁰⁷ See BJA DRUG COURT CLEARINGHOUSE PROJECT, SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY (2007), available at http://spa.american.edu/justice/publications/us_drugcourts.pdf.

offenders skip out on this opportunity and take their chances with the legal system. Finally, drug courts require treatment capacity, which has proven (unacceptably) frustratingly difficult to expand for a variety of reasons (including cost, political will, public support, and resource capacity). These limitations should in no way imply that drug courts are not an innovative, successful, and positive drug policy intervention. They, like other similar interventions, can always benefit from improvement.

B. Coerced Abstinence

Traditional sentencing does not have a brilliant track record in healing drug users and stopping them from committing criminal behavior. Coerced abstinence acts as an alternative to both traditional sentencing and drug courts. It combines treatment and sanctions through conducting swift, certain, non-severe sanctions for drug violations, while offering formal treatment for those who need it or want it. Using drug testing as the centerpiece of the program, coerced abstinence promises to reduce recidivism among probationers and reduce the time offenders spend behind bars—two important micro harms of drug policy.

Opponents of coerced abstinence, or “treatment and sanctions” as it is sometimes called, reflect that the premise of such a program ignores the fact that drug addiction is a disease, a wholly medical condition that takes away the capacity of its victims to make any kind of rational choice. In many cases, that is right: addiction changes brain chemistry and alters one state of mind so much sometimes that the person becomes unrecognizable and commits crimes they would otherwise not have done. However, there are some people who change their behavior in the face of swift and certain penalties: a partner leaving them, an employer firing them, or a landlord evicting them, for example. Why not try the same kind of approach with drug users, especially heavy users, most of whom commit crimes and cause disturbances in the community?

A coerced abstinence program may look like this:¹⁰⁸

- (1) Probationers and parolees are screened for cocaine, heroin, or methamphetamine use, employing a combination of records review and chemical tests.

¹⁰⁸ See generally FRIENDS OF HOPE, <http://www.hopehawaii.net> (last visited Apr. 15, 2013).

- (2) Those identified as users, either at the beginning of their terms or by random testing thereafter, are subject to twice-weekly drug tests. They may choose any two days of the week and times of day for their tests, as long as the two chosen times are separated by at least seventy-two hours. That means that there is effectively no “safe window” for undetected use.
- (3) Every positive test results in a brief (say, two-day) period of incarceration.
- (4) The sanction is applied immediately, and no official has the authority to waive or modify it. The offender is entitled to a hearing only on the question of whether the test result is accurate; the penalty itself is fixed.
- (5) Missed tests count as positive and a warrant is immediately issued.
- (6) After a period of no missed or positive tests, or alternatively achievement of some score on a point system, offenders are eligible for less frequent testing. Continued good conduct leads to removal to inactive status, with only random testing.

Its proponents argue that coerced abstinence programs are favorable from a policy perspective because they are much cheaper than traditional treatment and may act as a wise “first-tier response” for drug users otherwise channeled into an over-run treatment system.¹⁰⁹

Since many drug offenders do not meet the criteria for dependence or abuse programs (one figure has it at forty percent),¹¹⁰ this program has many attractive qualities. It opens up treatment slots for those who actually need it, and enforces the bargain by which freedom was offered as an alternative to prison or jail time. If an offender tests positive for drug use in this regime, a swift, short sentence is imposed. Ideally, drug testing would occur at least twice a week.

CONCLUSION

Drug use is a pleasurable activity for many people. Most have neither crashed a car nor dropped out of school after using drugs. Many have found that smoking a joint is as enticing and enjoyable as casually sipping on a glass of wine. For the majority of users, using drugs just once or twice has not resulted in great harm. But this is no

¹⁰⁹ See MARK A. R. KLEIMAN ET AL., CAL. POLICY RESEARCH CTR., OPPORTUNITIES AND BARRIERS IN PROBATION REFORM: A CASE STUDY OF DRUG TESTING AND SANCTIONS vii (2002).

¹¹⁰ *Id.*

reason to legalize drugs. The minority of users who cause great harm to society as a whole should be our focus.

A report from the National Research Council explained the situation concisely in the title of an exhaustive review of evidence-based drug policy *Informing America's Policy On Illegal Drugs: What We Don't Know Keeps Hurting Us*.¹¹¹ Thus, there is a pressing need to conduct thorough evaluations of policy interventions, and to implement proven interventions such as community-based prevention, increased intervention and treatment, drug courts, and testing and sanctions programs. Bringing these programs to scale should be our priority before any wholesale policy change, especially one as risky and potentially devastating as legalization.

¹¹¹ CHARLES F. MANSKI ET AL., NAT'L RESEARCH COUNCIL, *INFORMING AMERICA'S POLICY ON ILLEGAL DRUGS: WHAT WE DON'T KNOW KEEPS HURTING US* (2001); *see also* Charles F. Manski, *Drug Control Policy in an Uncertain World*, 91 OR. L. REV. 101 (2013) (discussing the report and experiences with statistical studies).

