

1989

Drug Legalization: The Importance of Asking the Right Question Symposium on Drug Decriminalization

Mark A. Kleinman

University of California, Los Angeles, kleiman@ucla.edu

Aaron J. Saiger

Fordham University School of Law, aaronsaiger@gmail.com

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Food and Drug Law Commons](#)

Recommended Citation

Mark A. Kleinman and Aaron J. Saiger, *Drug Legalization: The Importance of Asking the Right Question Symposium on Drug Decriminalization*, 18 Hofstra L. Rev. 527 (1989-1990)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/328

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

DRUG LEGALIZATION: THE IMPORTANCE OF ASKING THE RIGHT QUESTION

Mark A.R. Kleiman*

Aaron J. Saiger**

I. INTRODUCTION

The drug crisis is regular front-page fare.¹ There is drug-related anarchy abroad,² as the cocaine dealers of Colombia declare war on their government; there is drug-related anarchy of a different sort at home, as neighborhoods are caught in the crossfire among drug dealers.³ In hospital rooms, crack babies gasp for breath;⁴

* Lecturer in Public Policy, John F. Kennedy School of Government, Harvard University; M.P.P. Harvard University, 1977; Ph.D. Harvard University, 1988.

** Consultant on Drug Policy Issues to the RAND Corporation, Santa Monica, California. A.B. Harvard University, 1988.

1. France, *The Drug War: Should We Fight or Switch?*, A.B.A. J., Feb. 1990, at 43; See, e.g., Kerr, *Crack Burdening a Justice System*, N.Y. Times, Nov. 24, 1986, at A1, col. 5; Gross, *Urban Emergency Rooms: A Cocaine Nightmare*, N.Y. Times, Aug. 6, 1989, at A1, col. 1; French, *Crack Filling New York Hospitals with Frustration, Fear and Crime*, N.Y. Times, May 10, 1989, at A1, col. 5; Riding, *In War on Coca, U.S. Weapon is Bogged Down in a Dispute*, N.Y. Times, June 28, 1988, at A1, col. 1; James, *Murders in Queens Rise 25%; Crack is Key Factor*, N.Y. Times, Apr. 20, 1988, at A1, col. 2.

2. See, e.g., Treaster, *Columbians, Weary of the Strain, Are Losing Heart in the Drug War*, N.Y. Times, Oct. 2, 1989, at A1, col. 5.; Brooke, *Drug Traffickers In Columbia Start A Counter Attack*, N.Y. Times, Aug. 25, 1989, at A1, col. 6; Kerr, *Columbia's Cocaine Lords: Conviction in U.S. Poses Little Threat To Power*, N.Y. Times, May 21, 1988, at 5, col. 1; Riding, *Cocaine Billionaires: The Men Who Hold Columbia Hostage*, N.Y. Times, Mar. 8, 1987, § 6 (Magazine), at 27.

3. See, e.g., McKinley, *Gunmen Kill 2 Bystanders in 'Power Play': Queens Incident Termed Dealers' Show of Force*, N.Y. Times, Dec. 27, 1989, at B1, col. 5; Raab, *Brutal Drug Gangs Wage War of Terror in Upper Manhattan*, N.Y. Times, Mar. 15, 1989, at B1, col. 4; Terry, *Bystander, 12, Shot, and Killed in Drug Dispute: Brooklyn Site of Death Known for Crack Use*, N.Y. Times, Jan. 22, 1989, § 1, at 25, col. 1; Madden, *Stunned by 3 Killings in 5 Days, Stamford Cites Growing Drug Crisis*, N.Y. Times, June 8, 1988, at B4, col. 3. Ordinary citizens who speak out against the proliferation of drug trafficking in their neighborhoods are sometimes targets of retribution. See Gross, *Drug Shooting Casualty Inspires a City to Resist*, N.Y. Times, Feb. 10, 1990, at 9, col. 1; cf. *Eulogy for a Drug-War Martyr: Victim's Spouse Pledges Battle*, Newsday, Aug. 11, 1989, at 4, col. 1.

4. See French, *Rise in Babies Hurt by Drugs is Predicted*, N.Y. Times, Oct. 18, 1989,

outside, 12-year-old dealers are shot in the street, beepers at their sides and bankrolls in their pockets.⁵

The Bush Administration has responded to the increasing intensity of the drug problem with heightened rhetoric⁶ and proposals for additional funding.⁷ Congressional Democrats criticize the program as being short of the mark and ask for more.⁸ At the same time, some tired veterans of the drug wars—judges,⁹ prosecutors,¹⁰ proba-

at B1, col. 5; see also Bohlen, *Number of Mothers in Jail Surge with Drug Arrests*, N.Y. Times, Apr. 17, 1989, at A1, col. 4; *Mother Charged in Baby's Death from Cocaine: Illinois Prosecutor Cites Rise in Similar Cases*, N.Y. Times, May 10, 1988, at A18, col. 1.

There has been an increasingly heated controversy surrounding the issue of whether cocaine-using mothers should be criminally liable when their drug use during pregnancy results in the deformity or death of their fetus. See, e.g., Roney, *Imprison Addicts, for the Children's Sake*, N.Y. Times, Dec. 30, 1989, at 24, col. 1 (Letter); Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. Times, July 18, 1989, at A21, col. 2.

5. See *Drug Trade's Army of 'Crack' Gunmen*, Newsday, Mar. 14, 1989, at 4, col. 1 (noting that 130 to 150 young children a month have recently been arrested for dealing drugs); see also Sack, *The Short Life of 'Little Man,' A 14-Year Old Drug Peddler*, N.Y. Times, Nov. 29, 1989, at A1, col. 4; Lewis, *Abroad at Home: Dr. Feelgood Prescribes*, N.Y. Times, Aug. 13, 1989, § 4, at 23, col. 1 (observing that "[o]n a street corner in a poor neighborhood of New York, a 12-year-old boy sits on a milk crate and sells crack. His mother stands by, patting his head. Other boys, as young as 7, 8 and 9, hang out nearby. They have most of the crack to be sold, so the 12-year-old will not be caught with it in his possession."). See generally T. WILLIAMS, *THE COCAINE KIDS* (1989) (portraying the daily lives of eight teenage cocaine dealers in New York City over the course of four years).

6. See OFFICE OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFFICE OF THE PRESIDENT, *NATIONAL DRUG CONTROL STRATEGY* (1989) [hereinafter BENNETT PLAN] (noting that "[crack] . . . is an acid that is fast corroding the hopes and possibilities of an entire generation of disadvantaged young people. They need help. A decent and responsible America must fully mobilize to provide it.").

7. On September 5, 1989, President Bush announced his Administration's new drug plan in a televised speech. The plan, popularly known as the "Bennett Plan", proposes a \$7.9 billion drug-war budget for Fiscal Year 1990, a \$2.2 billion increase over last year's budget. See BENNETT PLAN, *supra* note 6, at 113.

8. See Sirica, *Bush Targets Casual Users, Sets Billions Against Drugs*, Newsday, Sept. 6, 1989, at 5, col. 1 (Sen. Joseph P. Biden (D. Del.) arguing that the Bennett Plan budget increases spending for the war on drugs, in real terms, by only \$716 million); *Money Bush Wants for Drug War is Less than Sought by Congress*, N.Y. Times, Jan. 25, 1989, at A1, col. 4. Congressional Democrat's primarily attacked the Bennett Plan by arguing that the plan failed to devote enough resources to drug education, prevention, and treatment. See, e.g., *Legalization of Illicit Drugs: Impact and Feasibility, Part I: Hearing Before the Select Committee On Narcotics Abuse and Control, House of Representatives*, 100th Cong., 2d Sess. 86-88 (1988) (Statement of Cong. Charles B. Rangel (D. N.Y.) Chairman). The Bennett Plan proposes approximately \$617 million budget for drug prevention and education programs, BENNETT PLAN, *supra* note 6, at 115, whereas a recently released drug plan prepared by Senator Joseph P. Biden proposes \$1.135 billion for drug education in Fiscal year 1990. Berke, *Bennett Doubts Value of Drug Education*, N.Y. Times, Feb. 3, 1990, at 1, col. 2.

9. See, e.g., Speech by Robert Sweet, United States District Court Judge of the Southern District of New York, before the Cosmopolitan Club in New York City (Dec. 12, 1989), reprinted in LEGAL TIMES, Dec. 18-25, 1989, at 20-21.

tion and juvenile officers,¹¹ and even an occasional police officer¹²—say quietly (and for the most part off the record) that drug prohibition has failed and a new course is needed. They are supported by academics, economists,¹³ journalists, physicians,¹⁴ lawyers¹⁵ and a small number of elected officials¹⁶ who have publicly raised the issue of drug legalization.

The term “legalization,” as used in the current debate, covers a wide variety of proposals. While complete legalization would make any psychoactive substance available to any willing buyer, most advocates of legalization would limit legal availability to adults,¹⁷ and

10. See, e.g., Coyle, *Prosecutors Admit: No Victory In Sight*, Nat'l L.J., Aug. 8, 1988, at S2-S3.

11. See, e.g., Smyley, *A Lot Better Than Jail Time*, Newsday, July 5, 1988 (New York City Probation Commissioner Kevin T. Smyley discussing the increased need for reliance on rehabilitation as an alternative to incarceration with respect to drug offenders).

12. See *The Today Show* (NBC television broadcast, Feb. 13, 1990) (video tape on file at Hofstra Law Review) (Ralph Salerno, former Chief of Detectives in the Organized Crime Bureau of the New York City Police Department, criticizing the Bennett Plan on several grounds and advocating legalization).

13. See, e.g., Friedman, *An Open Letter to Bill Bennett*, Wall St. J., Sept. 7, 1989, at A16, col. 2.

14. See, e.g., Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 HOFSTRA L. REV. 751 (1990); Gelman, *City Doc: Drugs Should Be Legal*, Newsday, July 25, 1989, at 19, col. 1 (Dr. Kildaire Clarke, Associate Medical Director of the emergency room at Brooklyn's Kings County Hospital, calling for legalization).

15. See, e.g., King, *A Worthless Crusade*, NEWSWEEK, Jan. 1, 1990, at 4-5 (Editorial). Rufus King, a Washington lawyer who has written extensively on drug-law reform and served on several congressional investigations, observes that “[i]t took the nation only 13 years to recognize that Prohibition had been a disastrous mistake. Isn't it about time, after all these decades of folly and failure, that we open our eyes to the realities of this mistake too? Let's hear it for legalization!” *Id.*

16. The most prominent politician to have publicly endorsed legalization is Baltimore Mayor Kurt Schmoke. See Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501 (1990). In April, 1988, at a meeting of the United States Conference of Mayors, Schmoke proposed that Congressional hearings be held to consider legalization. See Kerr, *The Unspeakable is Debated: Should Drugs Be Legalized?*, N.Y. Times, May 15, 1988, at A1, col. 1 (noting that Schmoke's proposal was supported by Minneapolis Mayor Donald Fraser, Rep. Fortney H. Stark (D. Cal.), and Rep. Stony H. Hoyer (D. Md.)). Legalization advocates maintain that many more public officials share their views, but remain silent because they fear the political repercussions of publicly supporting the legalization movement. See France, *supra* note 1, at 43; Nadelmann, *The Case For Legalization*, 92 PUB. INTEREST 3 (1988); see also Schultz on *Drug Legalization*, Wall St. J., Oct. 27, 1989, at A16, col. 4, col. 5 (former Secretary of State George P. Schultz stating that “we're not really going to get anywhere until we can take the criminality out of the drug business and the incentives for criminality out of it.”).

17. See Schmoke, *supra* note 16, at 525; Friedman, *supra* note 13 (stating that “[d]ecriminalization would not prevent us from treating drugs as we now treat alcohol and tobacco: prohibiting sales of drugs to minors, outlawing the advertising of drugs and similar

apply the new policy to only some of the currently illicit substances.¹⁸ The term "legalization", however, is also used to describe the idea that addicts with established drug habits should have legal access to psychoactive drugs through clinics.¹⁹ Advocates of "decriminalization" would keep distribution illegal, but end the arrests of consumers.²⁰

An undifferentiated debate over "legalization" tends to blur these distinctions.²¹ Nonetheless, since the current debate takes place largely in generic terms, and since some of the arguments apply to a wide range of possible "legalizations," this Article will conform to convention and begin by discussing the generic issues.

II. THE ARGUMENTS

Ethan Nadelmann, a prominent advocate of legalization, asks his readers to compare today's commerce in licit tobacco to the state of the world if the production, sale and possession of tobacco were made illegal.²² As millions of newly criminal nicotine addicts searched for ways to feed their addiction, black-market dealers would take over.²³ Revenue which now flows to the states as cigarette excise taxes would, instead, feed the coffers of criminal organizations.²⁴ A large, expensive and corruptible "Tobacco Enforcement Administration" would need to be created.²⁵ Courts would be clogged with users caught with tobacco, and with dealers caught selling it to them.²⁶ The nation would suddenly confront a daunting, dangerous, and expensive "tobacco problem."

Nadelmann, and other proponents of drug legalization, contend that this allegory of illicit tobacco closely resembles the reality of illicit drugs. Their argument rests on the proposition that the social costs of prohibiting some drugs, and enforcing that prohibition, ex-

measures.").

18. See A. TREBACH, *THE HEROIN SOLUTION* 267-95 (1982).

19. See *id.* at 85-116.

20. See *infra* notes 172-81 and accompanying text (discussing the parameters of decriminalization proponents).

21. See *infra* notes 79-94 and accompanying text.

22. Nadelmann, *supra* note 16, at 12-13.

23. *Id.* at 12.

24. *Id.* at 12-13. (estimating that federal and state governments currently earn almost ten billion dollars per annum in tobacco taxes). These criminal organizations would wage bloody fights over turf and markets, leading to a startling increase in "[t]obacco-related murders." *Id.* at 12.

25. *Id.*

26. *Id.*

ceeds the value of the goals which that prohibition achieves (i.e., the social cost it avoids).²⁷ Such arguments maintain that making psychoactive drugs illegal simply creates a dangerous and menacing black market²⁸ without significantly diminishing the quantity consumed.²⁹ On this view, legalization would make the streets safer, put the black-market dealers out of business, and focus attention on the medical problem of addiction rather than the legal problem of drug dealing.³⁰

In reply, supporters of existing prohibitions contend that the benefits of prohibition justify its costs.³¹ Some of these supporters claim that safer neighborhoods and lower law enforcement budgets would not balance the damage to the public health and well-being that increased consumption of legal drugs would create.³² Others hold that the damage done by prohibition is not as significant as legalization advocates assert.³³

On this level, the argument between advocates and opponents of legalization involves different predictions about the results of alternative policies and different value weightings of those results. For example, legalizers are likely to stress crime reduction,³⁴ whereas

27. See Nadelmann, *supra* note 16, at 11-29 (comparing the costs associated with the war on drugs with the benefits of legalization); Ostrowski, *The Moral and Practical Case For Drug Legalization*, 18 HOFSTRA L. REV. 607, 641-79 (1990); see also France, *supra* note 1, at 46 (quoting Kevin B. Zeese, a criminal-defense attorney and Vice President of the Drug Policy Foundation, who cites many of the social costs associated with drug prohibition).

28. Friedman, *supra* note 13 (noting that "[i]llegality creates obscene profits that finance the murderous tactics of the drug lords; illegality leads to the corruption of law enforcement officials; illegality monopolizes the efforts of honest law forces so that they are starved for resources to fight the simpler crimes of robbery, theft and assault.").

29. See Schmoke, *supra* note 16, at 505 (arguing that "by eliminating access to legitimate sources for drugs, prohibition has virtually ensured the continued profitability of the illicit drug and an ample supply of illicit drugs for the addicts."); Friedman, *supra* note 13, at A16, col. 2 (noting that "the problem is demand, but it is not only demand, it is demand that must operate through repressed and illegal channels.").

30. *Id.*

31. Wilson & DiIulio, *Crackdown: Treating the Symptoms of the Drug Problem*, NEW REPUBLIC, July 10, 1989, at 21-22; Moore, *Actually Prohibition Was a Success*, N.Y. Times, Oct. 6, 1989, at A21, col. 1.

32. See, e.g., Kerr, *supra* note 16, at 1 (stating that "[m]ost politicians and policy makers still regard the abandonment of anti-drug laws as dangerous apostasy . . . [and] say the losses would far outweigh the gains").

33. See Moore, *supra* note 31, at A21, col. 1-2 (noting that violent crime did *not* increase sharply during Prohibition and that organized crime pre-dated Prohibition, and merely became more visible during Prohibition).

34. See Hamill, *The Great American Drug Muddle*, LEAR'S, March 1990, at 156, 156-62.

prohibitionists would emphasize the protection of users' health.³⁵ But both sides can agree that policies are to be judged by their predictable consequences, and that the balance of advantage ought to determine the choice. Drugs ought to be prohibited if, and to the extent that, the benefits of prohibition outweigh its costs.

It is important to note that this debate about the consequences of alternative drug policies is not the only debate about legalization taking place. Legalization is also urged, and deplored, for reasons of principle not directly reducible to results, by those who see themselves as guardians of liberty on the one hand and of virtue (or "traditional values") on the other. This second underlying debate, whose protagonists we will call "libertarians" and "cultural conservatives," is not about likely consequences, but about the fundamental rights of the individual against the state, and about the nature of the good life.³⁶

The first consequentialist debate over policies and their results and the second debate over societal values and moral principles admit distinct sorts of arguments. Assertions about the likely results of any given drug policy are largely irrelevant to positions rooted in abstract notions of what is "good" and "right". Similarly, arguments about the role of the state and what constitutes a good society add little to a practical discussion about how to reduce drug overdose deaths and drug-driven crime.

Both sorts of arguments can contribute to our understanding of what is at stake in formulating and enforcing drug policy. However, in the contention over legalization, the two debates are being waged simultaneously, often in the same forums, and poorly distinguished from one another.

This confusion helps account for the peculiar fury which has attached itself to the legalization question.³⁷ A purely consequential-

35. Kaplan, *Taking Drugs Seriously*, 92 PUB. INTEREST 32, 34 (1988) (noting that "the legalization of [drug use] produces an increase in the behavior, which can produce a public-health problem of enormous magnitude."). *But see* Schmoke, *supra* note 16, at 519 (urging that "[c]omprehensive new drug treatment programs, funded with tax dollars saved from dismantling the massive drug law enforcement bureaucracy, would [] provide a humane response to any increase in the drug using population.").

36. *See generally* J. BAKALAR & L. GRINSPOON, DRUG CONTROL IN A FREE SOCIETY 1-34 (1984) (discussing the relationship between individual liberty and drug control).

37. The vehement and caustic debate on drug policy, and the sharp division between libertarian proponents of legalization and cultural-conservative opponents, has drawn parallels to the embittered debate on Vietnam between the "hawks" and the "doves" that took place over 20 years ago. *See* France, *supra* note 1, at 43 (comparing the Vietnam debate and the drug debate in that "each side believes the issue is of transcendent social significance and

ist debate over legalization—over the plausibility of alternative predictions and the weights to be assigned to competing goals—could be conducted with no more passion than the debate over any other comparably complicated social-policy question. In a debate over principle, however, any assertion that some course of action has an advantage is often taken as being equivalent to an endorsement of that course of action. Whoever asserts that the free legal availability of cocaine would likely increase the number of chronic heavy users is likely to find himself attacked by libertarian proponents of legalization as favoring a police state.³⁸ Whoever asserts that drug prohibitions tend to increase the rate of predatory crime will be accused by cultural-conservative opponents of legalization of indifference to the personal and social degradations of a life spent under the influence.³⁹

Thus, the first step in understanding the legalization question is to disentangle the two debates.⁴⁰ The consequentialist arguments, pro and con, have already been sketched.⁴¹ The debate about liberty and virtue requires some elaboration.

The “libertarian” position holds that the use of mind-altering substances is never a proper subject of public policy and should always be left to individual choice.⁴² It is the right of each adult to make that choice, and it is unjust for the state to interfere.⁴³

Thomas Szasz’s *Ceremonial Chemistry*, the most consistent statement of the libertarian position on drug control, contends that drug use is not rationally distinguishable from dangerous sports and other activities.⁴⁴ Libertarians would consider drug controls illegitimate, even if drugs were much more dangerous than sports; but Szasz offers the stringent control of drugs and not football as evidence that drug laws serve a social function other than protecting

invokes highly charged moral principles in defense of its position.”).

38. Cf. Hamill, *supra* note 34 at 162 (stating that continuing the drug ban “will lead inevitably to the creation of a vast archipelago of drug gulags . . . and more and more young people firing machine guns from the heart of darkness.”).

39. Wilson & DiIulio, *supra* note 31, at 22; see also Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb. 1990, at 21-28.

40. For a parallel analysis of the two debates about AIDS policy, see Kleiman, *AIDS, Vice, and Public Policy*, 51 LAW & CONTEMP. PROBS. 315 (1988).

41. See *supra* notes 20-33 and accompanying text.

42. See generally T. SZASZ, *CEREMONIAL CHEMISTRY* (rev. ed. 1985).

43. See generally R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

44. *Id.*; cf. J. BAKALAR & L. GRINSPOON, *supra* note 36, at 14-16, 27, 30-31, 146-48 (examining the reasons why dangerous drugs are prohibited but dangerous sports, such as mountain climbing, are legal).

citizens from an especially grave threat to their well-being.⁴⁵

Szasz also argues convincingly that drug regulation has many of the procedural consequences generally associated with the enforcement of heresy laws.⁴⁶ The role that drugs and drug-testing play in political campaigns,⁴⁷ praise for those who denounce others (including members of their families) as users and dealers,⁴⁸ the severity of punishment⁴⁹ and factually incorrect anti-drug propaganda⁵⁰—all suggest that we have created for drugs many of the same structures that surrounded heresy-hunting.⁵¹

Szasz defends the libertarian position in terms entirely foreign

45. T. SZASZ, *supra* note 42, at 79; *see infra* note 53; *cf.* Aaron & Musto, *Temperance and Prohibition in America: A Historical Overview*, in ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 163 (M. Moore & D. Gerstein eds. 1981) (noting this phenomenon with respect to alcohol Prohibition) [hereinafter SHADOW OF PROHIBITION].

46. T. SZASZ, *supra* note 42, at 61-74. Szasz compares the Popes' view "that witches were the transcendent malefactors of the society" with politicians who "have similarly convinced people that drug pushers are the transcendent malefactor of our society and that they therefore deserve merciless punishment." *Id.*; *see also* P. MANNING, THE NARCS' GAME: ORGANIZATIONAL AND INFORMATIONAL LIMITS ON DRUG LAW ENFORCEMENT 253 (1980) (arguing that "from a social point of view, [drug enforcement is] a ceremony that celebrates what the powerful segments of society consider appropriate levels and kinds of drug use, proper styles of life and occupations, the correct place to live, and moral commitment.").

47. *See, e.g.*, Saletan, *Jar Wars: From Kissing Babies to Pissing in Bottles*, NEW REPUBLIC, Oct. 2, 1989, at 13-14 (criticizing the fact that "[d]rug testing has become almost a standard part of political campaigns.").

48. *See* Nadelmann, *Drug Prohibition in the United States: Costs, Consequences and Alternatives*, 245 SCI. 943 (1989); *Mailing in the Gossip*, NEWSWEEK, Oct. 16, 1989, at 6 (reporting on a cut-out coupon recently run in Iowa newspaper asking people to write the names of anyone in the neighborhood who they suspect is using or dealing drugs, and to return the coupon to police).

49. *See* Fitzgerald, *Dispatches From the Drug War*, COMMON CAUSE MAG., Jan./Feb. 1990, at 13-19. The recent expansion of federal mandatory sentences for drug offenders, whereby judges can not use discretion in a specific case, has not gone without criticism:

Mandatory minimum sentences, with no possibility of parole, . . . are symbolic of the tendency of Congress and the Bush Administration to seek quick, simple solutions to a complex drug problem. Such sentences are supposed to curb drug use and drug dealing by increasing the certainty of punishment . . . but they will do neither. The outlook instead is for engorged prisons and courts for years to come, and a virtual certainty that resources at the levels needed won't be available to counsel people on drugs and treat addiction.

Id. at 15; *see also* BENNETT PLAN, *supra* note 6, at 7 (arguing that "any significant relaxation of drug enforcement—for whatever reason, however well-intentioned—would promise more use, more crime, and more trouble for desperately needed treatment and education efforts." (emphasis in original)).

50. *See, e.g.*, N. ZINBERG, DRUG, SET, AND SETTING: THE BASIS FOR CONTROLLED INTOXICANT USE 3 (1964) (noting that studies in the 1960's tended to incorrectly equate occasional and moderate use of illicit drugs as abuse).

51. *See* T. SZASZ, *supra* note 46.

to Nadelmann's.⁵² The number of corrupt officials or the size of the judicial backlog caused by drug control are irrelevant; drug control is *prima facie* an illicit activity. Szasz would oppose prohibition as much if the hypothetical "Tobacco Enforcement Administration" were a lean and efficient bureaucratic tiger as he would were it bloated and corrupt.

Similarly, cultural-conservative opponents of drug legalization tend to consider the use of the currently prohibited drugs as a vice which must be forbidden even if it cannot be suppressed, to express social repudiation of that which degrades human life.⁵³ They understand drug use to be very different from dangerous sports, providing only a spurious pleasure which threatens personal autonomy and the capacity for self-control.⁵⁴ Cultural conservatives differ about whether the vice in question is intoxication or addiction, and about which drugs belong on the forbidden list, but tend to cluster around a defense of the legal status quo, with alcohol and tobacco still legal and heroin, cocaine and marijuana still banned.⁵⁵

From the cultural-conservative viewpoint, black market crime and official corruption are unfortunate side effects of a duty which the government is nevertheless obligated to discharge. To use such side-effects as an excuse to avoid drug control would be to sidestep obligations the state owes its citizenry.⁵⁶

This position has a prominent place in the official defense of current drug policy. According to the first National Drug Control

52. See *supra* notes 22-25 and accompanying text.

53. See *infra* note 54-57; Lawn, *The Issue of Legalizing Illicit Drugs*, 18 HOFSTRA L. REV. 703 (1990) (arguing against legalization from the viewpoint that drugs, not drug laws, are the problem); cf. Kaplan, *supra* note 35, at 36 (observing that John Stuart Mill's "simple principle" of letting each person decide for himself cannot be applied to self-harming conduct such as drug use).

54. The cultural conservatives could find support for this assertion in Aldous Huxley's dystopic tale of a *Brave New World*, where the society lived on "soma." The substance first appeared to be a harmless pleasure drug; in fact, it was a sinister opiate that ultimately destroyed individual autonomy and eliminated effective human choice. See generally A. HUXLEY, *BRAVE NEW WORLD* (1946).

55. See, e.g., *Never Trust Anyone Under 40*, POL'Y REV. (Spring 1989).

56. Wilson & Dilulio, *supra* note 31, at 21-22.

There is an obvious moral reason for attempting to discourage drug use: the heavy consumption of certain drugs ravages human character The pleasure or oblivion [drugs] produce leads many users to devote their lives to seeking pleasure or oblivion, and to do so regardless of the cost in ordinary human virtues, such as temperance, duty, and sympathy. The dignity, autonomy, and productivity of users is at best impaired, at worst destroyed.

Id.

Strategy, prepared by the Office of National Drug Control Policy under "Drug Czar" William Bennett: "drug use degrades human character, and a purposeful, self-governing society ignores its people's character at great peril. Drug users make inattentive parents, bad neighbors, poor students, and unreliable employees. . . . [Using drugs is] a hollow, degrading, and deceptive pleasure, . . . and pursuing it is an appallingly self-destructive impulse."⁵⁷

It is from this perspective that the ritual denunciation of legalization in statute and official pronouncement can be seen to make sense. The act of denunciation reaffirms the values perceived to be at stake. The a priori commitment of the government-funded research community to "prove . . . drugs' potential for harm" is also part of this pattern.⁵⁸

The libertarian proponents of legalization and their cultural-conservative opponents do a public service by reminding us of the matters at stake in the drug-policy arena which a casual review of "consequences" might ignore. The libertarians point out the fallibility of majorities, in particular their likely over-eagerness to take their own preferences as the sole measure of the good life. The cultural conservatives make the point that the economists' myth of the rationally maximizing consumer corresponds only imperfectly with the real social world, and that over-indulgence in intoxicants is as old, and as consistent, as intoxicant use itself.⁵⁹ While the libertarians remind us of why drug policy is dangerous, the cultural conservatives remind us of why drug policy is necessary.

But each position, considered in isolation from the other and from the facts, proves too much to be a useful guide to policy. Cultural conservatives have labelled addiction and intoxication as the real enemy. If this is true, why not ban nicotine and alcohol or even chocolate?⁶⁰ Why stop with things taken into the body, while leaving

57. BENNETT PLAN, *supra* note 6, at 7, 9.

58. N. ZINBERG, *supra* note 50, at 199.

59. Schelling, *The Intimate Contest for Self-Command*, 60 PUB. INTEREST 94, 96 (1980) ("How should we conceptualize this rational consumer . . . who in self-disgust grinds his cigarettes down the disposal swearing that this time he means never again to risk orphaning his children with lung cancer and is on the street three hours later looking for a store that's still open to buy cigarettes . . . [?]").

60. See A. WEIL & W. ROSEN, CHOCOLATE TO MORPHINE 9-21 (1983). The definition of "drug" is not as clear as many would have us believe:

Most people would agree heroin is a drug. It is a white powder that produces striking changes in the body and mind in tiny doses. But is sugar a drug? Sugar is also a white powder that strongly affects the body, and some experts say it affects mental function and mood as well. Like heroin it can be addicting. How about Chocolate?

aside entertainments, spectacles and arguments, which, as Plato's Socrates points out, enter directly into the soul?⁶¹ Pornography must obviously go, and graphic violence and mindless cartoons for children; rock concerts come up close behind, along with television-watching generally and spectator sports more specifically.⁶² All can be, and have been, plausibly described as spurious and degrading pleasures and as sources of addiction.⁶³ The problem, then, is to draw a dividing line between those alleged vices which can be left freely available and those for which public control is so strongly required that the (usually heavy) costs of coercive intervention are justified. Answering such line-drawing questions requires that cultural conservatives study closely the facts about the actual harms done by various candidate vices across a variety of devotees and about the effectiveness and the unwanted side-effects of prohibiting those vices.

By the same token, libertarians need to explain why, if twelve-year-olds are allowed to buy Coca-Cola, they should be forbidden to buy cocaine. They also need to decide whether a mother who spends her money on legal crack instead of baby food is exercising her own liberty or impeding the liberty of her child. In answering these questions (and their sequels), they too will be drawn into the consequentialist snare.

In fact, many people of both libertarian and cultural-conservative leanings make concessions to consequences. Some "libertarians" have come to accept John Stuart Mill's willingness to "forego any advantage . . . from the idea of abstract right as a thing independent of utility."⁶⁴ They advocate largely free access to drugs as a practi-

Most people think of it as a food or flavor, but it contains a chemical related to caffeine, is a stimulant, and can also be addicting. Is salt a drug? Many people think they cannot live without it, and it has dramatic effects on the body.

Id. at 9.

61. PLATO: THE COLLECTED DIALOGUES 624-25, 312-13 (E. Hamilton & H. Cairns eds. 1985).

62. See J. BAKALAR & L. GRINSPOON, *supra* note 36, at 24 (noting that Plato believed music and sex ought to be regulated by the government).

63. See T. SZASZ, *supra* note 42, at xiii (stating that in modern society, the term "addiction" refers not to a disease but to a despised kind of deviance."). In recent years, the definition of "addiction" has been expanded far beyond its traditional meaning of physical dependence on a drug. Levine, *America's Addiction to Addictions*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 62. Many experts now view addiction as "any pleasurable behavior that turns out compulsive," ranging from shopping and eating to promiscuity and gambling. *Id.* Levine described a case where a Vietnam veteran accused of drug running even went so far as to claim an uncontrollable addiction to "action". *Id.* at 63. The jury acquitted the veteran after a defense expert testified that the vet was a victim of "action-addict syndrome." See *id.*

64. J.S. MILL, ON LIBERTY 16 (1954).

cal rather than principled option, and their legalization proposals are often accompanied by practical caveats.⁶⁵ Some cultural conservatives, though committed to an anti-drug ethic, allow the factual dimensions of a given drug problem to determine how that ethic should be practiced.

This Article embraces the consequentialist calculus of costs and benefits. It assigns neither peculiar moral status to liberty nor peculiar moral onus to intoxication. Instead, it treats each as a sort of cost, worth considering in determining which sorts of drug policy are likely to have the best results—that is, which policies minimize the total costs of use and prohibition.

This sort of argument requires both analysis and evaluation. It must both identify the probable consequences of a range of possible policies, and suggest which bundles are “better” and which are “worse.”

Neither the analysis nor the evaluation is straightforward. Like other major social problems, the drug problem has costs that resist quantification and even description. Costs range from the obvious and the assignable—lung cancer deaths,⁶⁶ dealer violence⁶⁷—to problems to which drugs may or may not contribute, such as the weakening of the traditional family structure or the undermining of the work ethic.⁶⁸ Comparing these costs is even more difficult. How much liberty is worth sacrificing to prevent how many drug-related deaths? How much drug intoxication would be accepted to empty ten percent of the prison cells?

This Article’s critique of legalization proposals downplays the problem of what weights to assign different kinds of harm. Instead, it emphasizes the analytic side of the problem, identifying the probable consequences of various policies. Thus the close evaluative questions, with important values on both sides, are left unanswered.

The role of analysis is to lay out the selection of outcomes actu-

65. See, e.g., A. TREBACH, *supra* note 18, at 272-73 (1982). Trebach, who advocates inclusion of heroin in the legitimate medical pharmacopeia but believes in continued general prohibition, raises libertarian concerns even as he argues for a severely limited legalization. See generally *id.*

66. See, e.g., M. KLEIMAN, MARIJUANA 8-9 (1989) (discussing the physical effects of smoking marijuana as compared with cigarette smoking); Wu, Tashkin, Djahed & Rose, *Pulmonary Hazards of Smoking Marijuana as Compared with Tobacco*, 318 N. ENG. J. MED. 347, 347 (1988).

67. See sources cited *supra* note 3.

68. See Wilson & DiIulio, *supra* note 31, at 22 (noting that “heroin addict[s] . . . [or] crack smoker[s] . . . are not likely to be healthy people, productive workers, good parents, reliable neighbors, attentive students, or safe drivers.”).

ally available by predicting the consequences of alternative policies. The consequences are not always intuitively obvious; and some of the more desirable outcomes may simply not be available.

III. A CRITIQUE OF THE CASE FOR LEGALIZATION

A central accomplishment of the consequentialist proponents of legalization has been to stress the vital distinction between the costs of drug abuse and the costs of drug control. Drug use is one problem. It makes some users sicker, poorer, more dangerous, and less responsible. On the other hand, state control of drug use creates different problems: crowded prisons, unsafe neighborhoods, wealthy criminal consortia, corrupt officials.⁶⁹ These problems should not be confused; prison overcrowding should not be treated as if it were a pharmacological result of cocaine use.

Equally important, legalization advocates have refused to treat currently legal drugs as conceptually distinct from currently illegal ones. Alcohol and tobacco, like marijuana and heroin, are drugs with significant costs of abuse and costs of control.⁷⁰ Tobacco is an important special case: addictive and health damaging. But the rhetoric of the "war on drugs" attempts to obscure this fact, as if there were chemical categories of "legal" and "illegal" drugs. Reminding us to treat alcohol and tobacco as drugs, in both explanatory and comparative contexts, is therefore an important service.

Current consequentialist arguments for legalization, however, suffer from grave weaknesses. First, they fail to specify crucial details of potential legal regimes.⁷¹ Second, they underestimate the role of prohibition in reducing the extent of drug abuse.⁷² Third, they fail to recognize or acknowledge many of the likely unwanted side effects of legalization.⁷³

Finally, too few legalization advocates have gone beyond discussing the costs of drug control to ask how society might actually

69. See Nadelmann, *supra* note 16.

70. It is estimated that in 1983, "alcohol abuse cost the United States almost \$117 billion Of this amount, nearly \$71 billion is attributed to lost employment and reduced productivity and \$15 billion to health care costs." *Secretary of Health and Hum. Servs., U.S. Dep't of Health and Hum. Servs., Sixth Special Report to the U.S. Congress on Alcohol and Health* 43 (1987) [hereinafter SPECIAL REPORT]; see also Nadelmann, *supra* note 16, at 11-13; Kerr, *supra* note 16, at 24, col. 1 (citing a report by the Triangle Institute of North Carolina that stated that drug abuse cost \$60 billion—almost one-half less than alcohol abuse.).

71. See *infra* notes 84-94 and accompanying text.

72. See *infra* notes 95-105 and accompanying text.

73. See *infra* notes 106-12 and accompanying text.

go about legalizing a particular illicit drug or drugs. It is in asking this question that hidden costs of legalization become apparent.

Therefore, this Article's critique of legalization proceeds in two ways. The remainder of this section is a general discussion of flaws in legalization proposals. The final section analyzes the impact of possible changes in legal status on the American markets for three drugs: alcohol, marijuana, and cocaine.

A. *Defining Legalization*

Legalization, like prohibition, does not name a unique strategy. Perhaps the most prominent inadequacy of current legalization arguments is their failure to specify what is meant by "legalization."

Current drug policy provides an illustration of this diversity. Heroin and marijuana are completely prohibited,⁷⁴ and cocaine can only be used in rigidly specified medical contexts, not including any where the drug's psychoactive properties are exercised.⁷⁵ On the other hand, a wide range of pain-killers, sleep-inducers, stimulants, tranquilizers and sedatives can be obtained with a doctor's prescription.⁷⁶

Alcohol is available for recreational use, but is subject to an array of controls including excise taxation,⁷⁷ limits on drinking ages,⁷⁸ limits on TV and radio advertising,⁷⁹ and retail licensing.⁸⁰ Nicotine is subject to age minimums, warning label requirements,⁸¹ taxation,⁸² and bans on smoking in some public places.⁸³

74. See 21 U.S.C. §§ 812, 841-58 (1988).

75. See *id.* § 812 (1988) (providing that cocaine is a "Schedule II" controlled substance); *id.* § 829(a) (providing that a Schedule II substance may be dispensed directly by a practitioner when determined to be a "prescription drug" under the Federal Food, Drug, and Cosmetic Act); Kaplan, *supra* note 35, at 35 (observing that the United States already permits the prescriptions for medical use of cocaine and THC).

76. In 1970, Congress passed the Controlled Substance Act which provides for a government-regulated system of dispensing drugs. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801-971 (1988)).

77. See 26 U.S.C. § 5001-5056 (1982 & Supp. V 1987).

78. The United States government has, in effect, established a national minimum drinking age of 21 by threatening to withhold federal highway funds from states which fail to comply. See 23 U.S.C. § 158 (1988). Consequently, most states have established a minimum drinking age as a matter of state law. See, e.g., CAL. HEALTH & SAFETY CODE § 1199(e) (West Supp. 1990); CONN. GEN. STAT. ANN. §§ 30-86 (West Supp. 1989); ILL. ANN. STAT. ch. 43, para. 131 (Smith-Hurd 1986); N.Y. ALCO. BEV. CONT. LAW § 65.1 (McKinney 1987).

79. See, e.g., 27 U.S.C. § 205(e) (1982); *infra* note 133.

80. See 27 U.S.C. § 201-11 (1982).

81. 15 U.S.C. § 1333 (1988) (requiring stringent warnings on all cigarette packages about the health dangers of smoking).

82. See 26 U.S.C. §§ 5701-5761 (1982 & Supp. V 1987).

Drug legalization can therefore be thought of as moving drugs along a spectrum of regulated statuses in the direction of increased availability. However, while legalization advocates do not deny that some sort of controls will be required, their proposals rarely address the question of how far on the spectrum a given drug should be moved, or how to accomplish such a movement. Instead, such details are dismissed as easily determined, or postponed as a problem requiring future thought.⁸⁴ But the consequences of legalization depend almost entirely on the details of the remaining regulatory regime. The price and conditions of the availability of a newly legal drug will be more powerful in shaping its consumption than the fact that the drug is "legal." Rules about advertising, place and time of sale, and availability to minors help determine whether important aspects of the drug problem get better or worse. The amount of regulatory apparatus required and the way in which it is organized and enforced will determine how much budget reduction can be realized from dismantling current enforcement efforts.⁸⁵

Moreover, currently illicit drugs, because they are so varied pharmacologically, would not all pose the same range of the problems if they were to be made legally available for non-medical use. They would therefore require different control regimes. These regimes might need to be as diverse as the drugs themselves.

B. *Evaluating the Impact of Prohibition*

Legalization advocates have pointed out that some costs that appear to be the costs of drug abuse are in fact costs of its control.⁸⁶ However, the discovery that prohibition has significant costs appears to have obscured, for these advocates, its possible benefits.⁸⁷ Some

83. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25940-25949.8 (West 1984 & Supp. 1988); FLA. STAT. ANN. §§ 386.201-209 (West 1986); MASS. GEN. LAWS. ANN. ch. 270, § 22 (Supp. 1988); MINN. STAT. ANN. § 144.414 (1988); N.Y. PUB. HEALTH LAW § 1399-o to -q (McKinney Supp. 1988).

84. See Nadelmann, *supra* note 16, at 6-7.

85. See, e.g., *id.* at 46-47 (arguing that if marijuana, cocaine, and heroin were legal, both state and federal governments would collect billions of dollars annually in the form of tax revenues); Ostrowski, *The Moral and Practical Case For Drug Legalization*, 18 HOFSTRA L. REV. 607, 643 (1990) (noting that drug prohibition costs the taxpayer an estimated \$10 billion).

86. See, e.g., Ostrowski, *supra* note 85, at 643 (conducting a cost-benefit analysis and concluding that the most serious problems the public associates with illegal drug use are in reality caused, directly or indirectly, by drug prohibition).

87. As John Kaplan has noted, "[t]here is a considerable temptation to conclude without any . . . examination that our present policy is so costly that free availability just *has* to be better." J. KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 110 (1983) (emphasis

advocates of legalization simply argue that prohibition has no effect on consumption, and, thus, that legalization can shrink the drug problem at a stroke by legislating away a whole category of costs. In short, while illegal drugs have costs of abuse and costs of control, legal ones would have only costs of abuse.⁸⁸ Other, more sophisticated accounts simply minimize prohibition's effects.⁸⁹

However, these assertions fly in the face of research and experience. Black-market cocaine costs nearly twenty times as much as legal, "free market" cocaine,⁹⁰ and it is implausible that a twenty-fold change in a drug's price would have only a trivial effect on volume. It is equally implausible that, even holding the price constant, the convenience and safety of a licit purchase would fail to attract new customers.⁹¹ Prohibition and enforcement make the currently illicit drugs more expensive and less available.⁹² The same effect is apparent from the history of alcohol criminalization: Prohibition clearly decreased consumption, Repeal just as clearly increased it, by substantial amounts.⁹³

The problem legalization advocates face in accounting for the

in original); *see also* Moore, *supra* note 31, at A21, col. 1 (detailing the various benefits of alcohol Prohibition and warning against comparing it to drug prohibition.).

88. Friedman, *supra* note 13, at A14, col. 4; *see also* sources cited *supra* note 86.

89. *See, e.g.*, Falco, *The Bush Drug Plan: Nothing New*, N.Y. Times, Sept. 5, 1989, at A19, col. 3 (criticizing the Bennett Plan's concentration on law enforcement, to which 70% of the new Federal drug budget is allocated, and noting that there has been "overwhelming evidence accumulated during the past eight years of the minimal impact of law enforcement on drug abuse and drug trafficking."); Kerr, *supra* note 16, at 1, col. 1; *infra* note 12 and accompanying text.

90. *See* BENNETT PLAN, *supra* note 6, at 6 (commenting that while a gram of cocaine currently sells for \$60 to \$80, the free market price would be approximately \$3 or \$4); Kaplan, *supra* note 35, at 41 (noting that a gram of cocaine currently sells for \$80-\$100, while it costs less than \$3 per gram to produce).

91. *See* BENNETT PLAN, *supra* note 6, at 6 (arguing that legalization would bring the price of cocaine "well within the lunch money of the average elementary school student."); Kaplan, *supra* note 35, at 42 (arguing that legalizing cocaine is far too risky, because there is no guarantee that a sharp *decrease* in price would not result in a sharp *increase* in use); *id.* at 41 (noting that if the retail price of a gram of cocaine were \$20, the cost of a "hit" would be about forty cents, making it affordable and convenient even for school-age children).

92. *See* Reuter & Kleiman, *Risks and Prices: An Economic Analysis of Drug Enforcement*, in *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 289-310 (M. Tonry & N. Morris eds. 1986).

93. Mortality from cirrhosis of the liver can be used to measure changes in drinking volumes. *See* SHADOW OF PROHIBITION, *supra* note 45, at 62-63 (citing a 1932 study which demonstrated that alcohol related illnesses reached the lowest level ever during prohibition); Kaplan, *supra* note 35, at 34 (discussing the social benefits and cost of alcohol Prohibition in the 1930's); *accord* J. BAKALAR & L. GRINSPOON, *supra* note 36, at 33 *see also* *Legal or Not, Drugs Kill*, N.Y. Times, May 26, 1988, at A34, col. 1 (noting that although Prohibition "failed as a social policy, it was a health triumph.").

effects of prohibition is illustrated by their treatment of alcohol and tobacco. Correctly, they use the heavy load of damage associated with the currently licit drugs to point up the arbitrariness, perhaps irrationality, of the current categorization of drugs into forbidden and permitted.⁹⁴ But unless one thinks that drug policies are made under Murphy's Law, the fact that the licit substances cause more health damage than the currently forbidden ones suggests that prohibition tends, on balance, to protect health. From a public health standpoint, creating a cocaine problem the size of the current alcohol problem or the current tobacco problem would be a major disaster. Yet it is far from clear that legal cocaine would be less attractive, or do less damage to users' health, than alcohol or tobacco. Alcohol and tobacco are indeed instructive, but they make a point quite opposite to the one legalization's advocates intend: they demonstrate that legal availability can carry costs at least as significant as those of prohibition.

C. *Legalization: Theory and Practice*

Some legalization advocates concede that legalization has potential costs, but urge that the risks are worthwhile since the potential benefits are great and the risks containable.⁹⁵ A more lively appreciation of the variety of ways in which legalization might go wrong, and the high potential price of those malfunctions, might reduce the enthusiasm of the legalization camp.

Consider the prohibition of licit drugs to minors. If completely effective, it would ameliorate many of the consumption-related costs of legalization. Some legalization advocates simply assume that this would be the case.⁹⁶ But the actual histories of alcohol and tobacco—both nominally forbidden to minors but widely available to, and used by, adolescents—are far from encouraging on this score.⁹⁷

94. See, e.g., Nadelmann, *supra* note 48, at 941 (arguing that alcohol is the drug which is most "strongly associated with violent behavior."); King, *supra* note 15, at 4-5 (noting that licit substances such as alcohol and tobacco cause greater problems than illegal substances).

95. Nadelmann, *supra* note 48, at 946.

96. See Friedman, *supra* note 13, at A16, col. 4 (arguing that prohibition cannot *per se* be enforced whereas decriminalizing drugs, with the same restrictive measures now imposed on alcohol and tobacco, would be a workable and enforceable policy).

97. Thirty-one percent of children ages 12-17 report having used alcohol at least once in the past month; 11.6% report having had at least five drinks at one sitting during this time. NAT'L INST. ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: MAIN FINDINGS 1985 at 80, 84 (Office of Health & Human Services Publication No. (ADM) 88-1586, 1988). 42% of male high school seniors report having five drinks in the past month. NAT'L INST. ON DRUG ABUSE, DRUG USE DRINKING, AND SMOKING: NATIONAL SURVEY RESULTS

The oft-heard plea for legalization "experiments" is similarly remote from the world of practice.⁹⁸ Re-prohibiting a legal drug would be a much costlier business than continuing to prohibit an illegal one.⁹⁹ The increase in costs would be directly proportional to the increase in market size brought about by legalization.¹⁰⁰ In the circumstance where reversal would be most called for—an explosion in consumption—enforcement costs would be greatest and the probability of a failed re-prohibition highest. As Humpty-Dumpty demonstrated, not all processes are reversible. While irreversibility is not itself an argument for the status quo, it is an argument for caution.

The following case studies consider the details of pricing, availability and advertising as well as legal status. The costs of repealing prohibition are treated as seriously as those of imposing and enforcing it. The intention of this Article is not to provide specific policy recommendations, but to suggest the sort of detailed description and analysis that a serious legalization debate would require. While this approach attempts to be constructive, the conclusions are pessimistic.

IV. POSSIBLE LEGALIZATIONS: THREE CASE STUDIES

Much of the popular and scholarly debate on both sides of the legalization question, like much of the drug policy literature in general, treats the nation's drug problem as if it were due to some singular, indivisible "drug" and treatable by an equally uniform response. Each drug, however, has its own consumption problem, harming users and others in different ways and in different degrees. In addi-

FROM HIGH SCHOOL, COLLEGE, AND YOUNG ADULT POPULATIONS 1972-1988 (1989) [hereinafter YOUTH SURVEY].

98. See, e.g., Koshland, *The War? The Problem? Experiment? on Drugs*, 245 SCI. 1309 (1989) (hypothesizing that "we might institute tough laws for 5 years and then try legalization for another 5 years, collect the data on the two outcomes, and base a final policy on the results").

99. See L. ENGELMANN, *INTEMPERANCE: THE LOST WAR AGAINST LIQUOR* xi-xiv (1983) (discussing how the eighteenth amendment's prohibition of alcohol was actually a declaration of war, taking its toll on federal, state, and local enforcement, and an alarming number of innocent bystanders as well); Kaplan, *supra* note 35, at 33-34 (noting that the cost of prohibition on the criminal justice system, the feeding of organized crime, official corruption and civil liberty violations).

100. Nadelmann, who compares black markets in currently illegal drugs to a hypothetical black market in illegal tobacco, *see supra* text accompanying notes 22-23, fails to note that a newly-created tobacco black market would begin with an established consumer base in the tens of millions; current users of heroin, by contrast, number only in the hundreds of thousands.

tion, each has its own market structure and demand patterns.¹⁰¹

This Section examines the legalization question as it applies to three very different drugs: alcohol, marijuana, and cocaine. Each case study emphasizes one issue raised by the legalization debate. The discussion of alcohol emphasizes the value of prohibition as well as its costs, and the difficulty of creating and maintaining an appropriate non-prohibitory regulatory regime.¹⁰² The analysis of marijuana focuses on the importance of adequately defining what is meant by "legalization."¹⁰³ The discussion of cocaine stresses the difficulty of setting tax rates for newly legalized drugs and the ubiquity of unanticipated consequences.¹⁰⁴

A. *Legal Alcohol: The Need for a More Grudging Toleration*

Drugs that are currently legal provide a convenient set of models for the legalization debate. Examining licit drug control allows us to consider real-life, working, regulatory regimes, rather than the artists' sketches now passing as legalization proposals. Alcohol provides a superb example of legalization gone awry. Regulations governing alcohol, the nation's premier recreational psychoactive, are fantastically permissive, measured against either the rules for other drugs or benefit-cost criteria.

Alcohol is a very dangerous drug. Had Congress failed to specifically exempt it from the provisions of the Controlled Substances Act,¹⁰⁵ it could be placed along with marijuana and heroin in Schedule I, as a psychoactive drug with no accepted medical use and great potential for harm.¹⁰⁶ Indeed, as a product unsafe in its intended use,

101. Of particular importance are a drug's price elasticity of demand—sensitivity of consumption to price—and relations of complementarity or substitutability with other drugs. See Reuter & Kleiman, *supra* note 92, at 289-96.

102. See *infra* notes 116-54 and accompanying text.

103. See *infra* notes 155-88 and accompanying text.

104. See *infra* notes 167-88 and accompanying text.

105. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801-971 (1988)).

106. 15 U.S.C. § 812 (b)(1) (1988). The Controlled Substances Act establishes five schedules of substances; the rules and regulations promulgated under the Act vary depending on the schedule in which a drug is placed. In order to fall within Schedule I, the following findings with respect to a drug or other substance are required:

(A)The drug or other substance has a high potential for abuse.

(B)The drug or other substance has no currently accepted medical use in treatment in the United States.

(C)There is a lack of accepted safety for use of the drug or other substance under medical supervision.

it could perhaps be vulnerable to challenge under the Consumer Product Safety Act.¹⁰⁷

When compared with other drugs, casual or experimental alcohol users are at significant risk of progressing to heavy, chronic use or to alcoholic bingeing.¹⁰⁸ An estimated eighteen million Americans, out of 140 million total current drinkers, have significant drinking problems.¹⁰⁹ Many of these "problem" drinkers find that their alcohol use is no longer fully under their deliberate control, and some of them are the victims of a physical dependency that makes them actively ill if they do not get a daily ration of their drug—they are alcohol addicts, alcoholics.¹¹⁰ Heavy chronic alcohol use is associated with a wide variety of diseases, and alcohol has been estimated to cause approximately twenty thousand excess disease deaths per year.¹¹¹ More than one-third of all crime leading to state prison sentences is committed under the influence of alcohol,¹¹² as is an even greater proportion of domestic assault, sexual assault, and the physical and sexual abuse of children, all of which are under-reported and under-punished.¹¹³ Tens of thousands die annually and

107. *See id.*

108. *See* SPECIAL REPORT, *supra* note 70, at 24. "An estimated 18 million adults 18 years old and older currently experience problems as a result of alcohol use. These problems may include symptoms of alcohol dependence such as loss of memory, inability to cut down on drinking, binge drinking, and withdrawal symptoms." *Id.*

109. *Id.*; *see also* Nadelmann, *supra* note 48, at 943.

110. For a discussion of the logical structure of problem drinking and other compulsive behavior, *see* Schelling, *supra* note 59, at 96-97; *see also* H. FINGARETTE, HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE 2-7 (1988) (arguing cogently against the identification of all problem drinkers with the disease entity "alcoholism," but failing to demonstrate that drinking is never compulsive behavior).

111. SPECIAL REPORT, *supra* note 70, at 11; *see also* U.S. DEP'T OF TREASURY AND U.S. DEP'T OF HEALTH AND HUM. SERVS., 96TH CONG., 2d Sess., Report to the President and the Congress on Health Hazards Associated with Alcohol and Methods to Inform the General Public of These Hazards 1-28 (Comm. Print 1980) (summarizing many of the health hazards scientifically proven to be associated with alcohol consumption) [hereinafter ALCOHOL REPORT]. Moreover, cirrhosis of the liver, which is a disease primarily attributed to alcohol, is the sixth most common cause of death in the United States. *See Alcohol is No Remedy for Heart Disease*, N.Y. Times, Dec. 4, 1987, at A38, col. 3.

112. BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1986, at 39 (1989) (reporting that 18.5% of prisoners were under the influence of alcohol at the time of the offense, while another 18.1% were under the influence of both drugs and alcohol).

113. *See* Hamilton & Collins, *The Role of Alcohol in Wife Beating and Child Abuse: A Review of the Literature*, in DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIP BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR 253-67 (J. Collins ed. 1981); *see also* NATIONAL COMM. FOR PREVENTION OF CHILD ABUSE, NCPCA FACT SHEET NO. 14 (Feb. 1989).

many more are maimed in alcohol-related traffic accidents, drownings, and fires, including thousands of people who were not drinking themselves.¹¹⁴ Alcohol's contribution to industrial accidents and decreased economic productivity is unknown.

One possible conclusion to be drawn from this catalogue of catastrophes would be that alcohol should be assigned its rightful place in Schedule I of the Controlled Substances Act.¹¹⁵ This is a conclusion with some appeal. But just as the costs of controlling illicit drugs do not of themselves justify legalization, the extensive damage caused by alcohol abuse is not, in and of itself, sufficient to justify re-Prohibition. The costs of criminalizing alcohol would be high; there are other means of reducing alcohol-related damage; and not all alcohol users incur, or cause, harm related to their drug use. Many users testify that they derive pleasure and relaxation from drinking, that it contributes to sociability, and that they drink responsibly and behave responsibly while drinking, doing no harm to others and suffering nothing worse than an occasional hangover.¹¹⁶

This testimony need not be taken at face value. Drug users can and do deceive themselves about the damage they incur and the damage they do to others. However, neither should such testimony

114. "In 1986, there were approximately 46,056 highway deaths of which 23,987 (52.1 percent) were alcohol related." NATIONAL COUNCIL ON ALCOHOLISM AND ALCOHOL RELATED PROBLEMS (1987) (citing NATIONAL CENTER FOR STATISTICS AND ANALYSIS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT OF TRANSP., FATAL ACCIDENT REPORTING SYSTEM (1986)). Approximately 11,000 non-automobile accidents in 1980 were attributable to alcohol use. *Id.*

115. See *supra* note 106 and accompanying text.

116. See, e.g., ALCOHOL REPORT, *supra* note 111, at i (concluding that moderate alcohol consumption has been related to reductions in stress, tensions, and coronary disease); Powell, *Treatment and Perceived Blood Pressure Control Among Self-Reported Hypertensives—Behavioral Risk Factor Surveillance System*, 257 J. A.M.A. 2889, 2890 (1987) (recognizing that alcohol consumption can be useful in lowering blood pressure); Stampfer, Colditz, Willett, Speizer & Hennekens, *A Prospective Study of Moderate Alcohol Consumption and the Risk of Coronary Disease and Stroke in Women*, 319 NEW ENG. J. MED. 267, 272 (1988) (concluding that moderate consumption of alcohol can have beneficial health effects); Wilber, *Is All Alcohol Equal? The Chemist Say Yes, But the Answers May be More Complicated*, 94 SCI. DIG. 17 (1986) (noting a recent study conducted by the Johns Hopkins School of Medicine for the Alcoholic Beverage Medical Research Foundation which concluded that moderate beer consumers appeared healthier than non-consumers, reporting illness 13% less often); see also Shedle & Block, *Adolescent Drug Use and Psychological Health: A Longitudinal Inquiry*, 45 AM. PSYCHOLOGIST 612, 612-13 (1990) (showing that adolescents who had engaged in some drug experimentation, primarily with marijuana, were better adjusted socially and emotionally than those who had never used drugs or those who used them heavily. While no causal relationship between some drug use and psychological adjustment is suggested, the study does suggest, at least, that drug experimentation does not necessarily harm adolescents).

be ignored. Benefits are an essential part of a cost-benefit calculation, and consumers—even drug consumers—have information about benefits. However, an explanation and analysis of the purported benefits of drug use is notably absent from the debate over legalization.

Even if it turned out that the total benefits of alcohol availability—the sum of consumers' and producers' surpluses from its use and sale—were exceeded by its total costs, that alone would not establish the case for its re-prohibition. It would still have to be shown that the excess of costs (including black market and enforcement costs) over benefits would be less under some practicable form of prohibition than it is now. The larger the existing market, the higher those added costs of implementing prohibition are likely to be. One can regret Repeal without wishing to reverse it.

But consider those "other means" of reducing the costs alcohol imposes on drinkers and others. What are they? To what extent can they reduce costs while preserving benefits?

Education in schools and communities is an attractive option, but the evaluation literature is mixed.¹¹⁷ The most hopeful result is from a study in Kansas City which found that alcohol use among sixth and seventh-graders was reduced by half as the result of an integrated (expensive) drug education program.¹¹⁸ If those reduced rates of early use (delayed ages of onset) translate into lower rates of later heavy use, that result would be very significant indeed. Longitudinal studies, however, have yet to be done.

While advertising hard liquor is banned in the broadcast media,¹¹⁹ it is advertised freely in magazines and newspapers. Beer and

117. Compare BENNETT PLAN, *supra* note 6, at 49-53 (stressing the need for education) with Kaplan, *supra* note 35, at 42-43 (concluding that education will not do much to lower drug use). Bush Administration representatives on the National Commission for Drug-Free Schools have repeatedly resisted including alcohol in anti-drug messages in schools.

118. Kolata, *Community Program Succeeds in Drug Fight*, N.Y. Times, June 11, 1989, at 33, col. 1. The study involved 22,500 students in 42 schools in the Kansas City area. *Id.* Some schools implemented experimental programs designed to encourage students to resist using drugs and alcohol, while other schools simply continued their normal programs. *Id.* at cols. 2-3. The experimental programs included educational "sessions at school, homework assignments that involved role playing with family members about family rules on drug use, and newspaper articles and television and radio spots on resisting drugs." *Id.* at col. 3. When asked about their alcohol use over the course of a month, 4.2% of the students in the experimental program reported that they had drunk alcohol, whereas 9.4% of the students not in the program reported drinking alcohol. *Id.* at col. 4. Cigarette smoking and marijuana use by students in the experimental program declined by similar percentages. *Id.*

119. The Bureau of Alcohol, Tobacco and Firearms has jurisdiction over alcohol advertising and, pursuant to its authority, has restricted both the content and scope of advertising. See 27 U.S.C. §§ 201-12 (1988) (empowering the Bureau of Alcohol, Tobacco and Firearms

wine advertising is essentially unrestricted. Much of that advertising appears to be directed at adolescents; this unfortunate fact would not be easy to alter by legislation. More comprehensive advertising bans would be of doubtful value in reducing consumption; they might also deprive consumers of price information, solidifying current market shares and reducing competition, to consumers' loss. There are also forms of promotion—such as sponsoring sports events, coupons and free samples—that a mass-media advertising ban simply cannot reach.

More promising is negative advertising, which should be directed at all the costs of alcohol use, and not just drunken driving. In 1970, when advertisements for cigarettes were banned from radio and television,¹²⁰ taking the rare but powerful anti-smoking advertisements with them, cigarette consumption actually increased.¹²¹

Another way to reduce alcohol-related damage would be to offer treatment services to those who wanted to quit. But extensive evaluation literature has failed to identify systematic advantages of even quite rigorous treatment over voluntary self-help through Alcoholics Anonymous.¹²² Environmental and demographic factors predict success much more strongly than the type of treatment.¹²³

Mechanisms for seller liability, though perhaps attractive on moral grounds, are similarly limited in their likely practical effects.¹²⁴ Nor could more draconian restrictions on the time and place

to regulate alcohol advertising). Moreover, several states have enacted even more comprehensive bans on alcohol advertising pursuant to their regulatory power under the twenty-first amendment. *See, e.g.*, FLA. STAT. ANN. § 561.42(10)-(12) (West 1988); KAN. STAT. ANN. § 41-714 (Supp. 1985); MASS. ANN. LAWS ch. 138, § 24 (Law Co-op. 1981); MISS. CODE ANN. §§ 67-1-85, 97-31-1 (1972 & Supp. 1986); OKLA. STAT. ANN. tit. 37, § 516 (West Supp. 1986); UTAH CODE ANN. §§ 32-7-26 to -28 (1986).

120. *See* 15 U.S.C. § 1335 (1982) (prohibiting cigarette advertisements on any medium over which the Federal Communications Commission has jurisdiction); *see also* Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99 (1988).

121. *See* Hamilton, *The Demand for Cigarettes: Advertising, the Health Scare, and the Cigarette Advertising Ban*, 54 REV. ECON. STAT., 401, 411 (1972); Warner, *The Effects of the Anti-Smoking Campaign on Cigarette Consumption*, 67 AM. J. PUB. HEALTH 645, 649 (1977); *see also* Polin, *supra* note 120, at 102 (noting that cigarette companies "perceived the ban as far preferable to the anti-smoking commercials required by the FCC on stations which ran cigarette advertisements.").

122. *See* H. FINGARETTE, *supra* note 110, at 76-80.

123. *See id.*

124. *See, e.g.*, *Garrison v. Heublein, Inc.*, 673 F.2d 189, 192 (7th Cir. 1982) (holding that a manufacturer and distributor of vodka were not liable for failing to warn consumers of the "common propensities" of alcohol); *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690 (Tenn. 1984) (holding that a manufacturer has no duty to warn consumers of the

of retail sale be expected to change patterns of use and abuse significantly.

There may be more promise on the user-accountability side. It might help if courts and informal mechanisms of social control stopped accepting alcohol intoxication as a mitigating circumstance in cases of unpleasant or criminal behavior. One possible sanction for alcohol-related misbehavior—drunken driving, violent crime or disorderly conduct—would be a personal drinking ban, which might be enforced by routine chemical monitoring.¹²⁵ This approach could have real promise for alcohol and for other illicit drugs, but there is no current movement to put it into practice.

The current alcohol control regime purports to ban alcohol use by children. However, in the absence of vigorous enforcement measures, "leakage" from older to younger drinkers has made this ban a paper blockade. Heavy drinking is more common among adolescents, to whom it is forbidden, than among adults.¹²⁶

Part of this failure lies in enforcement; giving minors alcohol is not treated, by law or custom, with the harshness ordinarily associated with dealing drugs to children. But even aggressive enforcement cannot change the fact that making a drug legal for adults will raise its availability to minors. Every adult is a potential source of alcohol for children, and the attractions of the drug are increased by its identification with being grown-up. Moreover, age restrictions are not only arbitrary, they are obviously arbitrary—selling a beer to a

dangers associated with alcohol since the dangers of consumption are commonly known); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578 (Tex. Ct. App. 1987) (finding no duty on the part of a beer manufacturer to warn since it is commonly known that excessive consumption may impair those motor skills necessary to safely operate an automobile). *But see Hon v. Stroh Brewery Co.*, 835 F.2d 510, 516-17 (3d Cir. 1987) (finding that it was not possible to conclude, as a matter of law, that the dangers associated with consuming alcohol were commonly known).

Recently, Congress enacted a statute requiring all alcoholic beverages manufactured, imported or bottled for sale in the United States to contain a warning label. *See* Alcoholic Beverage Labeling Act of 1988, §§ 201-10, 27 U.S.C.A. §§ 213-19a (West Supp. 1989). A consequence of this recent legislation, is that the likelihood of success with seller liability suits has been further complicated. For a discussion of the Act's effect on both past and future alcohol warning cases, *see* Note, *The Requisite Specificity of Alcoholic Beverage Warning Labels: A Decision Best Left for Congressional Determination*, 18 HOFSTRA L. REV. 943 (1990) (authored by George Arthur Davis).

125. Note, however, that such monitoring would be extremely difficult due to alcohol's simple chemistry, which leaves no distinctive metabolites to be detected in urine.

126. Williams & Vejnaska, *Alcohol and Youth: State Prevention Approaches*, in YOUTH AND ALCOHOL ABUSE: READINGS AND RESOURCES 102, 115-16 (C.M. Felsted ed. 1986).

twenty-year old is a crime, but selling it to him three months later is licit commerce. This matters because a drinking age, unlike a minimum age for a driver's license, is not self-enforcing. Unless a punishment for reselling alcohol to minors is designed that is severe enough to deter adults, not so severe as to tie up the courts with cases going to trial, and obviously appropriate to the crime, heavy leakage across the age barrier will no doubt continue.

The only regulatory institution now in force which has significant potential as a mechanism for controlling alcohol abuse is alcohol taxation. Such taxation discourages consumption by making the drug more expensive, but American alcohol taxes have been declining in real terms since the Korean War.¹²⁷ Even if the social costs of crime and costs to the drinkers are excluded, alcohol taxes fall markedly short of the costs to society of alcohol consumption. It has been estimated by one study that there is an external social cost, excluding tax, of forty-eight cents per ounce of alcohol, while the average sale and excise taxes (federal and state) add up to only twenty-three cents per ounce.¹²⁸ Beer, the alcohol product most widely used by adolescents, is particularly undertaxed,¹²⁹ with the result that cheap beer is less expensive at the retail level than many name-brand soft drinks.

Alcohol taxes ought to be significantly higher and alcohol in beer should be taxed as heavily as alcohol in liquor.¹³⁰ Fixing the magnitude of an increase, however, is complex. The costs of raising taxes include lost consumers' surplus, some redistribution of the total tax burden toward the poor, and further impoverishment of those who cannot or do not quit heavy drinking. A very steep tax increase might also lead to the development of a black market in untaxed alcohol with attendant costs of enforcement and likely injury caused by adulterated products.

The central problem with taxation is that it is by nature nondis-

127. See SHADOW OF PROHIBITION, *supra* note 45, at 71.

128. See Manning, Keeler, Newhouse, Sloss & Wasserman, *The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?*, 261 J. A.M.A. 1604, 1608 (1989) (citing DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, PUBLIC REVENUES FROM ALCOHOL BEVERAGES (1985)).

129. See, e.g., 26 U.S.C. § 5051 (1982).

130. Thomas Schelling makes a vigorous counterargument on the beer-vs-liquor point: since drunkenness is far more likely to result from imbibing alcohol in concentrated form, tax discrimination against distilled spirits is rational. Personal Communication with Thomas Schelling (Jan. 14, 1989). Against this argument must be weighed the role of beer and wine (particularly wine coolers) in initiating adolescents and even children to alcohol use.

criminating. In theory, every drink should be taxed according to its own social costs. Some drinks do no harm, and therefore ought not be taxed; other drinks impose extraordinary costs, and thus should be taxed heavily. However, the practical barriers to multiple levels of taxation are all but insurmountable. Taxation set to cover average social cost is sure to put too high a price on most use and not enough on some. Another mechanism is therefore required.

The obvious solution is to prohibit drinking entirely by persons whose drinking carries social costs above the level set by taxation. Youthful drinking is not the only type of drinking which causes disproportionate harm. Heavy drinking by anyone, drinking by "compulsive" users (i.e., those whose drinking is no longer under their deliberate self-control) and drinking by those who commit crimes or act recklessly while intoxicated all fall into this category.

All of these types of use could be prohibited. Children and those whose use has led to crime or recklessness could be forbidden from purchasing alcohol entirely, and there could be an absolute limit as to the maximum quantity of alcohol anyone could purchase in a given period. A central database of ineligible purchasers could be maintained, or, if that proved costly or infeasible, all persons could be licensed to purchase alcohol as they are to drive, with licenses revocable for alcohol-related offenses, including resale to unlicensed individuals.

Such "positive" licensure is an attractive strategy. It could be conditioned on passing a written test on drinking safety, as is now done for driving. The drinkers' licenses might be issued in conjunction with drivers' licenses, and might in fact be the same documents with different colors. Licensure could allow relatively easy enforcement of personal quantity limits by a system similar to the system used to keep credit card holders within their credit limits. It could allow "teetotalers" to identify themselves—and thus, perhaps, to make themselves eligible for lower auto, life and health insurance premiums—and it could allow those who wish to become teetotalers the crutch of tearing up their drinkers' licenses.

But licensure would have its costs as well. A number of practical problems, some more difficult than others, suggest themselves immediately. State licensing would interfere with interstate travel¹³¹ and, therefore, a national system might be required. The administra-

131. Interstate travel could be affected if one state has a more restrictive licensing system than another state. As a result, a citizen of a state which required a license may travel to a nearby state to purchase alcohol if that nearby state had no license requirement.

tion of quantity restrictions would require a central computer, and appropriate safeguards would need to be instituted to protect confidentiality. Everyone, not just young adults, would need to be "carded" in bars, in liquor stores, and at social functions where alcohol was distributed without charge.

Cocktail parties in private homes raise complex regulatory issues. For example, hosts of such parties would need either to "card" their guests or to know their legal status, and they would need some waiver of quantity limits to buy enough alcohol for their guests. Employment discrimination against drinkers might need to be regulated, or perhaps forbidden in most occupations and required for a few.

Perhaps the most intractable questions involve alcohol use by pregnant women.¹³² Both of the available regulatory choices—allowing pregnant women their ordinary alcohol allotment or denying pregnant women the drinking rights enjoyed by others—are unappealing, for different reasons.

Finally, licensure would involve significant enforcement costs, especially because access to alcohol is made, in some cases, inversely proportional to the motivation for obtaining it. Leakage is sure to be significant, though its specific features depend on regulatory details. For example, if personal alcohol limits were high, light drinkers would have a strong incentive to sell their excess to others at a profit; if the limits were low, much harmless drinking would be curtailed, and a black market encouraged.

Despite these problems, a regime consisting of taxation and licensure has strong potential to control the costs of alcohol use, including the costs of its own enforcement, while maintaining most of the benefits of legal availability.

This regime departs from the dichotomy which currently governs American drug control: prohibition or free commerce.¹³³ It concedes that the social costs of a flat ban are too great to justify prohibition, but does not replace it with free drug commerce¹³⁴ and offers

132. See SPECIAL REPORT, *supra* note 70, at xxiii, 165-98. Women who drink excessively during their pregnancy can be prosecuted for felony child abuse, even though there currently is no child abuse statute covering fetuses. See *Case Against Pregnant Woman Is Dismissed*, N.Y. Times, Feb. 3, 1990, at 10, col. 3. One of the difficulties in making out a prima facie case, however, is that injury must exist for abuse to occur and it often takes years to determine if the fetus was in fact injured by its mother's drinking. See *id.*

133. See J. BAKALAR & L. GRINSPOON, *supra* note 36, at 1-34 (discussing the problem of how a free society should deal with drug use and abuse and balance the interests of health and safety against the need for individual freedom).

134. Cf. SHADOW OF PROHIBITION, *supra* note 45, at 63 (noting the importance of mar-

a middle way, one that might be called "grudging toleration," with strict controls to decrease consumption and minimize harms.

If the category of "grudgingly tolerated vice" could be successfully institutionalized, over time it might provide a framework for the control of some other licit and illicit drugs. With a working alcohol control regime in place, the alcohol problem would be considerably smaller, at which time a proposal to make our marijuana problem more like our alcohol problem might sound attractive, or at least more attractive than it does now.

But at the moment, there is no socially recognized category of "grudgingly tolerated vice," nor are there working models. In the absence of such models, new legalization regimes are likely to tend towards the relatively unrestricted availability which characterizes alcohol. The costs of such availability suggest that those who advocate the legalization of now-illicit drugs might best begin the process of drug control reform by proposing and testing reforms of current alcohol policy.

B. *Legal Marijuana?—Specifying a Regulatory Regime*

If one of the currently illicit drugs had to be chosen for legalization, marijuana would be the most obvious candidate.¹³⁵ Indeed, those who argue in favor of legalizing "drugs" often argue as if marijuana is the typical case,¹³⁶ while opponents of legalization concentrate their fire on heroin and cocaine. Several facts combine to make marijuana prohibition look like a questionable bargain:

•Marijuana is the most widely used of the illicit drugs.¹³⁷ An estimated sixty six million Americans have tried marijuana at least

ket regulation to contemporary alcohol policy); Aaron & Musto, *supra* note 45, at 161 (commenting on the "sanctification" of private enterprise which historically accompanied American alcohol control).

135. See generally L. GRINSPOON, *MARIJUANA RECONSIDERED* (2d ed. 1977). For a detailed consequentialist analysis of marijuana legalization and decriminalization, see M. KLEIMAN, *supra* note 66.

136. See, e.g., Kaplan, *supra* note 35, at 37 (noting that marijuana is the most widely used illegal drug, the least socially costly, and is "the drug that promises the lowest public health costs if legalized."); Nadelmann, *supra* note 16, at 25-26 (claiming that there is little evidence that occasional marijuana consumption would cause much harm).

137. See NATIONAL INST. ON DRUG ABUSE, *OVERVIEW OF THE NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 2-4* (1989) (noting that in a 1988 survey, 25.8 million Americans used marijuana or hashish in the month prior to the questionnaire submitted) [hereinafter *HOUSEHOLD SURVEY OVERVIEW*]; Kerr, *supra* note 16, at 24, col.1 (commenting that in a federal survey, 18 million people smoke marijuana at least once a month, 5.8 million people use cocaine on a monthly basis and there are currently 500,000 regular heroin users in this country).

once, and 6.6 million people in this country in 1988 reported that they use the drug once a week or more.¹³⁸ Fewer than three million Americans, by contrast, have ever tried heroin.¹³⁹

•Despite its prohibited status, marijuana is very easy to obtain. Although there is some evidence of short-term shortages of low-potency marijuana, eighty-five percent of high school seniors continue to report they could get the drug when and if they wanted it.¹⁴⁰ Thus, a substantial fraction of those who would use marijuana if it were legal are probably using it currently.

•Government expenditures on marijuana enforcement are quite high. It is estimated that the Federal Government alone has spent \$636 million on marijuana enforcement in 1986.¹⁴¹ Similar calculations suggest that expenditures in 1988 were \$968 million.¹⁴² Thus, prohibition is expensive.

•Marijuana has by far the lowest ratio of measured harm to total use of all the illicit drugs. A substantial fraction of all regular marijuana users become at least daily users for some period of time, but this becomes a chronic condition for relatively few.¹⁴³ The most frightening fact about marijuana is that the number of heavy daily users, people who spend most of their waking hours under the influence, is quite large: a few million Americans at any given time.¹⁴⁴ But even the existence of this rather obvious "problem" population must be inferred from data about the drug market rather than being directly observed in the form of deaths, injuries, crimes¹⁴⁵ or skid-row personal collapse.¹⁴⁶ Thus, even if prohibition and enforcement were very successful in reducing marijuana consumption, questions could still be raised about the benefits of that reduction.

138. HOUSEHOLD SURVEY OVERVIEW, *supra* note 137, at 3.

139. *Id.* But cf. *Heroin Comes Back*, TIME, Feb. 18, 1990, at 63 (reporting a rise in heroin use because crack addicts have begun to take heroin to combat the severe depression that usually follows a crack-induced high).

140. YOUTH SURVEY, *supra* note 97, at 154 table 27a.

141. M. KLEIMAN, *supra* note 66, at 156.

142. *Id.*

143. YOUTH SURVEY, *supra* note 140, at 31-33.

144. See M. KLEIMAN, *supra* note 66, at 16-17 (noting that "[t]he three million users at the top of the marijuana-consumption distribution smoke, on average, five to ten joints per day apiece, enough to remain intoxicated for most of their waking hours . . .").

145. See Kaplan, *supra* note 35, at 47 (noting that there have been no allegations that "marijuana use helps to cause predatory crime, in part because the drug is cheap, in part because it has a tranquilizing effect.").

146. M. KLEIMAN, *supra* note 66, at 16-17.

Marijuana prohibition, then, seems like an expensive, largely ineffective effort to control a relatively modest problem. It is no wonder that legalization of marijuana is offered as an obvious and relatively risk-free "first step" in the deployment of legalization.¹⁴⁷ Nevertheless our experience with alcohol should make us skeptical of claims that any drug legalization is "risk-free." Even the best control regimes have significant costs, and the control regime that actually emerges from a legalization process might not be the best one.

Upon reflection, it is not at all clear how legalization could be expected to reduce the total costs of marijuana abuse and its control. Consider the following questions:

- What would the price of legal marijuana be?
- At what potency levels would it be available?
- What persons would be permitted to buy the drug?
- What restrictions would be imposed on drug commerce?
- How would the regulatory regime be enforced?

The two most frequently proposed marijuana legalization options—decriminalization on the one hand¹⁴⁸ and regulated commerce in the legal drug on the other hand¹⁴⁹—offer very different answers to the final three questions above. While both are ostensibly proposals for "legalization," these differences make them entirely distinct policies.

"Decriminalization" would make marijuana possession legal, or, like traffic violations, only mildly punishable. Import, processing, and distribution of the drug would retain their illicit status.¹⁵⁰ Such a regime, under which dealers are targeted but users are not, has been instituted in a number of states¹⁵¹ and in the Netherlands.¹⁵² It has

147. Nadelmann, *supra* note 48, at 945 (suggesting that the first step towards reform of drug policy, legalizing marijuana, is relatively risk-free).

148. See *infra* notes 150-60 and accompanying text (outlining and discussing the basic tenets of decriminalization).

149. See *infra* notes 161-66 and accompanying text (discussing the regulated commerce alternative).

150. "Decriminalizing" marijuana would place it in the same legal category as alcohol during Prohibition; legal to have and to use, but not to sell.

151. Eleven states have thus far eliminated incarceration as a penalty for possession or use of small amounts of marijuana. SEE ALASKA STAT. § 11.71.070 (1989); CAL. HEALTH & SAFETY CODE § 11357(b) (Supp. 1990); COLO. REV. STAT. § 18-18-106(3)(a)-(b) (1986); ME. REV. STAT. ANN. tit. 22, § 2383 (Supp. 1989); MINN. STAT. ANN. § 152.027(3)-(4) (Supp. 1990); MISS. CODE ANN. § 333.7404(d) (1989); NEB. REV. STAT. § 28-416(4)-(5) (1989); N.Y. PENAL LAW §§ 221.05-55 (McKinney 1989); N.C. GEN. STAT. § 90-95 (Michie 1985); OHIO REV. CODE ANN. § 2925.03 (Anderson 1987); OR. REV. STAT. § 475.992(4)(f) (1989).

152. See Nadelmann, *supra* note 16, at 29 (discussing the Netherlands' experience with

been endorsed by a wide variety of national organizations¹⁵³ and, in a recent National Law Journal survey, by a surprising proportion of longtime prosecutors.¹⁵⁴

The aim of decriminalization is to create enforcement savings without any great increase in consumption costs. The potential savings are obvious. The 327,000 people arrested for marijuana possession in 1988¹⁵⁵ would once again be on the right side of the law, and the extensive investigative and punishment resources now applied to them—mostly by local jurisdictions—could be used elsewhere.¹⁵⁶

It appears unlikely that decriminalization would lead to large increases in marijuana consumption.¹⁵⁷ Both survey evidence and the experience of decriminalized states suggests that fear of arrest plays only a modest role in discouraging marijuana use.¹⁵⁸ Since commerce in the drug would remain forbidden, there would be no reason to expect major changes in availability or public attitudes. If use were legal, it might be possible to reduce its best-documented health hazard—lung damage—by encouraging the use of water-filtered smoking devices to replace the ubiquitous “joint.”

However, decriminalization also has its costs. A policy which eliminates one of the deterrents to drug use should be expected to increase consumption at least minimally.¹⁵⁹ By leaving the black

decriminalizing cannabis in the 1970's); Jan van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717 (1990) (discussing the Netherlands' experience with decriminalization); see also Nadelmann, *supra* note 48, at 944 (noting that after decriminalization took place in the Netherlands, marijuana use among those aged 15 and 16 decreased from 3% in 1976 to 2% in 1985 and for those aged 17 and 18, marijuana use decreased from 10% to 5% within a similar period).

153. Bonnie, *The Meaning of "Decriminalization": A Review of the Law*, 10 CONTEMP. DRUG PROBS. 277, 278 (1981) (citing the American Bar Association, National Education Association, American Public Health Association, National Council of Churches, Consumer's Union and the Governing Board of the American Medical Association); see also Kaplan, *supra* note 35, at 38 (discussing a report by the National Academy of Sciences, Committee on Substance Abuse and Habitual Behavior suggesting that “current policies directed at controlling the supply of marijuana should be strongly reconsidered”).

154. Coyle, *supra* note 10, at S2 (surveying 181 chief prosecutors nationwide or their top drug deputies, and reporting that 25% of the longtime prosecutors voted in favor of decriminalization of marijuana).

155. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES 1988, at 167-68 (1989) (finding that marijuana possession accounted for 28.3% of the 1,155,200 drug abuse arrests in 1988).

156. See Coyle, *supra* note 10, at S3.

157. See generally Maloff, *A Review of the Effects of the Decriminalization of Marijuana*, 10 CONTEMP. DRUG PROBS. 307 (1981).

158. *Id.* at 308-12.

159. See *id.*

market untouched, but making consumption easier, thereby increasing demand, decriminalization benefits black-market marijuana dealers. Rational marijuana traffickers ought to fear legalization above all things, but they should regard decriminalization as an entirely good idea. An ingenious middle course, now law in Alaska,¹⁶⁰ allows the growing and consumption of small quantities at home for personal use. This presumably reduces the size of the commercial black market while preserving most of the potential benefits of decriminalization.

In effect, decriminalization is a proposal for a redistribution of enforcement costs: it makes user-associated problems smaller and dealer-associated problems bigger. The balance of advantage is not self-evident.

Allowing licit commerce would be a vastly different policy. Such a regime could tax marijuana, license users, limit quantity and potency and so on. It is plausible that such a regime, constructed on the model of grudging toleration, would have the effect of vastly reducing the enforcement problem, even though this potential benefit is reduced by the fact that marijuana use is so great among age groups for whom it would presumably remain illegal under a regulatory regime. Several billion dollars in annual revenue would become available to various levels of government, most of it transferred from the revenues of illicit businesses.

However, legalization could, at the same time, lead to dramatic increases in consumption. Under prohibition, marijuana is available to a determined buyer but still far less easy to find and of a less consistent quality than most legal commodities. Under a regulatory regime, it would become vastly more available. Buying marijuana would be as quick and easy as buying a chocolate bar.

Some proponents are likely to reply that any resulting consumption increase would be of little significance. Like occasional and moderate drinking, occasional and moderate marijuana use is with-

160. In Alaska, possession of less than an ounce of marijuana *in public* is only punishable by a fine of no more than \$100. ALASKA STAT. § 11.71.070 (1989); *see also id.* § 11.71.080 (providing that "for purposes of calculating the aggregate weight of live marijuana plants, the aggregate weight shall be the weight of the marijuana when reduced to its commonly used form."); *see also* Bonnie, *supra* note 153, at 278.

Even more significant than the decriminalization of marijuana with respect to possession in public, is the fact that Alaska's highest court has held that smoking and possessing marijuana *in private* is a constitutionally protected right. *See* Ravin v. State, 537 P.2d 492 (Alaska 1975). The extent to which Alaskans who smoke marijuana also use homegrown marijuana instead of buying it on the black market is unknown.

out evident harm. However, there are two sorts of use which have significant social costs: use by children and very heavy use. Preventing growth of either of these user populations must be a design criterion for any legalization strategy.

Effective prevention of such growth would require taxation, licensing, and quantity restrictions similar to those described for alcohol, with all their associated problems.¹⁶¹ In particular, there would be laws proscribing sale to minors, who now make up a large minority of marijuana users.¹⁶² If enforcement of this law were lax, consumption would grow; if it were severe, enforcement levels might not decrease much from the current regime. Some of the details might differ: because marijuana is so much more compact than alcohol, marijuana leakage from adults to children and other ineligible users could more easily take on the characteristics of illicit enterprise than does the leakage of alcohol.¹⁶³ Because marijuana legalization involves a change in legal status, it would also have important social effects, including the effects of use by role models. It may be that such acceptability would make marijuana use no worse a problem than cigarette smoking; but making the marijuana problem more like the cigarette problem is not a desideratum.

Marijuana varies widely in its potency. The concentrations of tetrahydrocannabinol (THC), marijuana's main active principle, vary from less than three percent to more than ten percent.¹⁶⁴ There is reason to think that the more potent product poses greater risks of overintoxication, though less potent marijuana exposes its users to more lung damage for the same drug experience. Marijuana users believe the subjective effects of high potency "connoisseur" grade to be qualitatively different from the commercial product.¹⁶⁵ This raises another policy design problem. Should there be limits, beyond label-

161. See *supra* text accompanying notes 127-34 (discussing the problems associated with the taxation and licensing of alcohol).

162. See YOUTH SURVEY, *supra* note 140; PRESIDENT'S COMM'N ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 50 (1986) (noting that 23% of youths aged 16 and 17, 8% of youths aged 14 and 15, and 2% of youths aged 12 and 13, used marijuana at least once per month) [hereinafter PRESIDENT'S COMM'N].

163. Cf. Kaplan, *supra* note 35, at 39 (predicting the same situation arising with respect to cocaine, which is even more accessible to minors because it has the added feature of not leaving the "telltale aroma of smoke.").

164. See E. BRECHER & EDITORS OF CONSUMER REPORTS, LICIT AND ILLICIT DRUGS 404-05 (1972) (discussing the varying THC levels of marijuana grown within the United States); W. NOVAK, HIGH CULTURE: MARIJUANA IN THE LIVES OF AMERICANS 177-80 (1980) (discussing the various qualities and varieties of marijuana).

165. W. NOVAK, *supra* note 164, at 187-95.

ling requirements, on marijuana potency? If so, a black market might develop in illegal high-potency marijuana; if not, the newly legal marijuana industry might compete to provide more potent (and therefore possibly more psychologically dangerous) forms of the drug. Perhaps tax rates could be adjusted to discourage very-high-potency marijuana without flatly forbidding it.

Setting tax rates itself poses a difficult problem. Untaxed or lightly taxed marijuana would be significantly cheaper than it is on the current black market; a pre-rolled "joint" might cost a few cents, like a tobacco cigarette or a tea bag. Significant increases in consumption could be expected to result from such a sharp decline in price.

Heavy taxation, however, risks the possibility that the black market would continue to profit from selling untaxed marijuana. Some heavy users who now pay for their marijuana from their earnings as marijuana dealers might turn to property crime instead.¹⁶⁶ At best, heavy taxation would require serious enforcement efforts.

Marijuana legalization, then, has the potential to make some things better and others worse. The magnitude of these changes under any specific regulatory regime is a matter for further conjecture and analysis; whether they add up to a good or bad trade depends on what is likely to happen and on what weights are assigned to different aspects of the problem. But the spectrum of the possible results of marijuana legalization is much broader than some of its proponents seem to believe. Low-tax, high-potency legal marijuana could lead to severe social costs within user populations of the greatest concern; high-tax, low-potency marijuana could sustain black markets and their associated costs while increasing consumption more modestly. Decriminalized marijuana could simultaneously lead to lower law enforcement expenditures and increased criminal wealth and power.

If legalizing marijuana were to lead to modest increases in heavy drug use and drug use by minors (say ten percent), it could reasonably be counted a success. If, instead, those levels were to triple, and marijuana potency were to rise, it would have to be counted as an expensive and difficult-to-reverse failure. In the absence of any quantitative estimate of the probabilities of these two outcomes, legalizing marijuana has to be rated as a gamble, and a

166. This potentially dangerous result is more relevant to heroin or cocaine, where economically-motivated user crime is a major feature of the current illicit market, than to marijuana.

high-stakes gamble at that.

C. *Legal Cocaine?—The Pricing Paradox*

More than any other drug, "crack" symbolizes the drug problem of the latter half of the 1980s.¹⁶⁷ The smokable form of cocaine provides a powerful but short-lived drug experience for a few dollars per dose.¹⁶⁸ Its unpleasant after-effects, relieved by another pull at the pipe, keep some users coming back for more as long as their money holds out.¹⁶⁹ The spread of violence related to crack dealing¹⁷⁰ and of crack-related law enforcement costs has fueled the drive for legalization. But the invention of crack makes the legalization of cocaine a less plausible, rather than a more plausible, strategy. Crack makes cocaine a drug peculiarly ill-suited to legalization.¹⁷¹

In the 1970s, cocaine was quite expensive.¹⁷² Taken intranasally in the form of powder, the effects of a small dose were sufficiently subtle that experienced users couldn't reliably tell whether they were taking cocaine or a placebo in double-blind trials.¹⁷³ Its user base was relatively small and mostly affluent.¹⁷⁴ It was possible to argue that powder cocaine, the rich people's problem, did not merit particularly vigorous social intervention; drug use by the rich has fewer external costs than use by the poor because rich users have private resources with which to absorb the costs of their use.

Three things happened in the late 1970s and early 1980s to shatter this relatively serene picture. The first was a technical inno-

167. See BENNETT PLAN, *supra* note 6, at 3 (noting that crack is responsible for the intensifying drug-related "chaos"); see also *supra* note 1 and accompanying text.

168. See Morley, *What Crack Is Like*, NEW REPUBLIC, Oct. 2, 1989, at 12-13.

169. See *id.*

170. See, e.g., *A Tide of Drug Killing*, NEWSWEEK, Jan. 16, 1989, at 44-45 (attributing the increasing murder rate within the United States to increased drug activity); *Another Bloody Year*, TIME, Jan. 8, 1990, at 53 (noting that new homicide records were set in at least seven major cities in 1989, and quoting New York Assistant Police Chief Raymond Kelly as attributing the dramatic rise in murders to crack.).

171. See *People Are Resisting*, U.S. News & World Rep., Feb. 19, 1990, at 18 (William J. Bennett stating that legalization is "not going anywhere" because crack, which has no maintenance dosage, simply cannot be legalized).

172. Wilson & DiIulio, *supra* note 31, at 22-23 (noting that cocaine in its powdered form was relatively expensive and used mainly by the affluent until the introduction of low priced crack which has greatly increased use in all segments of society); see also PRESIDENT'S COMM'N, *supra* note 162, at 15 (noting that while cocaine was once considered a drug for the wealthy, it is now used by individuals of all socioeconomic groups).

173. Van Dyke & Byck, *Cocaine*, 246 SCI. AM. 128, 139 (1982).

174. Wilson & DiIulio, *supra* note 31, at 22.

vation. Users learned how to "freebase"—to convert cocaine to a smokable form—which gave a far more intense and short-lived drug experience.¹⁷⁵ The second was a marketing innovation. Dealers learned to do the conversion from powder to "base" and to package single-dose units as "crack."¹⁷⁶ The third was a collapse in black-market prices, due in part to a concentration of federal enforcement resources on markedly ineffective interdiction efforts¹⁷⁷ and in part to the failure of the overall enforcement effort to grow fast enough to keep pace with the growing market. These three transformations spread the use of cocaine down the socioeconomic spectrum and across the country.

Economist Milton Friedman has suggested that the invention of crack was a consequence of the illegality of cocaine.¹⁷⁸ But there is no reason to think that the diffusion of new technology would have been slower, or the price collapse less precipitous, in a legal market; the converse is actually more plausible.¹⁷⁹

Legalizing cocaine in a world where it will be converted to crack has costs and benefits very different from legalizing cocaine that will be snorted as powder. The potential benefits are great, since the illegality of crack is clearly responsible for many of its most significant costs. Crack dealers trade gunshots on the streets of numerous urban neighborhoods.¹⁸⁰ Crack dealing is also a lucrative business, able to offer financial opportunity in areas where little licit opportunity exists.¹⁸¹ Turning crack into a regulated and legal com-

175. See COCAINE: A CLINICIAN'S HANDBOOK 176-77 (A. Washton & M. Gold eds. 1987) (providing an historical background to the development of free-basing cocaine within the United States) [hereinafter COCAINE]; J. BAKALAR & L. GRINSPOON, *supra* note 36, at 279-81.

176. See COCAINE, *supra* note 175, at 177 (observing that the emergence of crack "represent[ed] a new strategy in the sale and marketing of street cocaine").

177. See generally REUTER, CRAWFORD, & CAVE, SEALING THE BORDERS: THE EFFECTS OF INCREASED MILITARY PARTICIPATION IN DRUG INTERDICTION (1988) (analyzing the consequences of heightened military involvement in drug interdiction efforts and discussing the effects of such involvement on marijuana and cocaine use).

178. Friedman, *supra* note 13, at A16, col. 3-4 (arguing that cocaine's prohibited status contributed to its high cost and that "'crack' . . . was invented because the high cost of illegal drugs made it profitable to provide a cheaper version.").

179. See Kleiman, Wall St. J., Sept. 29, 1989, at A15, col. 2 (letter to the editor stating that "[c]rack . . . was not invented by or for poor users looking for a cheaper substitute, but by rich cocaine users looking for a more intense drug experience.").

180. Wilson & DiIulio, *supra* note 31, at 21 (citing Los Angeles, Newark, Chicago, New York City, and Washington D.C., and comparing the violent conditions in the cities to "Beirut on a bad day."); see also *supra* notes 1-5 and accompanying text.

181. See T. WILLIAMS, *supra* note 5, at 8 (reporting that "[m]any teenagers are drawn to work in the cocaine trade simply because they want jobs, full time or even as casual la-

modity would separate economically-motivated lawlessness from the demand for an inexpensive high. The illegal crack-distribution industry would shrink, much to the relief of neighborhoods now held captive by street drug markets.¹⁸² Youth gangs and criminal groups would lose influence. Removing the financial incentives the crack business offers youth would help restore families and schools.

The question still remains, however: what would happen to consumption and to the death, damage and crime caused by the drug itself? Crack did not become popular because it was illegal. It is popular because the demand for the cheap, intense high that it provides is great, especially, perhaps, in poor, urban areas.¹⁸³ Speculation about why this should be—lack of financial opportunity, single-parent families, racism¹⁸⁴—does not change this fact.

Many of the effects of crack remain unclear; its recent development means that available knowledge is scanty and unreliable, and unusually dependent on investigations by the popular press. However, a number of factors suggest that the costs of legalization in the form of increased drug abuse might be substantial.

The crack-using population is much smaller than the marijuana-using one; there are still many areas where crack is relatively difficult to get, although it is becoming more widely available. There is thus more to lose from legalizing crack than from legalizing marijuana, in terms of the number of people to whom the drug would become newly available.

Crack generates compulsive use very differently from depressants like heroin and alcohol. It has been estimated that one crack

bor—the drug business is a 'safety net' of sorts, a place where it is always possible to make a few dollars."); Massing, *Crack's Destructive Sprint Across America*, N.Y. Times, Oct. 1, 1989, § 6 (Magazine), at 8, col. 1 (DEA agent explaining that it is very easy to become a crack entrepreneur, because "[f]or a small investment you can buy some cocaine, convert it to crack in the kitchen and begin distributing.").

182. See *supra* note 3.

183. See Morley, *supra* note 168, at 12-13 (commenting that crack is "attractive to the poor, and wildly popular among those who had no prayer of ever achieving that comfortable station in life [because crack is like a drug that can] . . . chemically induce feelings of upper-middle-classness.").

184. Although crack use does not appear to correlate with race, the perception of the "crack problem" often has strong racial overtones. See e.g., Fitzgerald *supra* note 49, at 19 (commenting that New York state's substance-abuse agency estimates that 400,000 New Yorkers used illegal drugs on a weekly basis in 1987, and that while two thirds of this frequent user group were whites, 91% of the drug related state prison convictions were Blacks or Hispanics); France, *supra* note 1, at 44 (noting that "inner city minorities have suffered the most from drug-related violence and criminal penalties, though drug abuse is spread throughout the population.")

user in six becomes a repeat binge user.¹⁸⁵ This ratio is about as bad as it could be; high enough to mean that widespread use will generate widespread destruction, but low enough to seem a risk worth taking to many adolescents.

The harm done by crack use is orders of magnitude greater than that done by marijuana. Crack is a much more potent psychoactive. It does its users significant physiological damage, and is especially debilitating to fetuses in utero.¹⁸⁶ The psychological effects of the drug are strong enough to detach many users from their neighborhoods, jobs, schools and families. Long-term use may lead to a particularly anti-social condition known as "stimulant psychosis," characterized by aggressive behavior.¹⁸⁷

Nor is it clear that, on balance, legalization would even decrease predatory crime. Surely, crime by dealers would fall, but crime by users is another story. If the legal price were high (near the current black-market price of five dollars per dose) and increased availability led to a substantial increase in the number of compulsive users, the result presumably would be an increase in income-producing crime to pay for crack, with licensed sellers replacing street dealers as the recipients of the proceeds of burglary. This would be compounded by the fact that those crack users who now support their habits by dealing would find themselves out of business and in need of a new income source.

If, on the other hand, the legal price were low (near the pharmaceutical price of five dollars per gram, or about twenty-five cents per dose) one can only imagine the resulting increase in drug abuse damage and in pharmacologically-generated violent crime. Perhaps user licensure and quantity restrictions could limit the health costs of a low-tax legalization regime. However, it is hard to imagine how they would do so, given the strong compulsion generated by crack in some of its users, without simply re-creating the current black market with an expanded customer base created by legal experimentation.

In sum, now that crack is here, neither high-tax legal cocaine

185. See *Raise Cigarette Prices, Save Lives*, N.Y. Times, Aug. 28, 1989, at A16, col. 1.

186. BENNETT PLAN, *supra* note 6, at 44 (estimating that 100,000 "cocaine babies" are born each year); Zuckerman, Frank, Hingson, Amara, Levenson, Kayne, Parker, Vinci, Aboagye, Fried, Cagral, Timperi & Bauchner, *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 NEW ENG. J. MED. 762 (1989) (discussing the effects on infants of cocaine and marijuana use during pregnancy); see French, *supra* note 4, at B1, col. 4.

187. See Estroff, *Medical and Biological Consequences of Cocaine Abuse*, in COCAINE, *supra* note 175, at 28-29.

nor low-tax cocaine would be likely to leave us with a smaller cocaine problem than we now have. Thus, abandoning cocaine prohibition is unattractive, and attention should instead be focused on ways to make the enforcement of that prohibition less costly and more effective.

V. LEGALIZATION AND DRUG ABUSE CONTROL

This Article's central argument, that the costs imposed by markets in licit psychoactives are significantly greater than those imposed by drug prohibition, is a policy analysis. Its consequentialist approach is unlikely to sway those—either libertarians who laud drug legalization in the name of liberty or “cultural conservatives” who decry it in the name of morals—who appeal to principles rather than consequences.

But even as libertarians and “cultural conservatives” reject the terms of consequentialism, those who accept the calculus of costs and benefits would do well to consider whether the debate over legalization is itself well framed. The pragmatic question about drug control policy is how to manage the availability of a wide range of existing and potential psychoactives to get the best mix of cost and benefits. Changing drugs' legal status is only one of many possible interventions which can effect that mix. Less dramatic proposals, which offer the potential of real progress with minimal risks, deserve at least equal attention.

Without changing the legal status of alcohol, we could create a new regulatory regime to make it less widely abused and responsible for less crime.¹⁸⁸ Without changing the legal status of marijuana, we could reduce enforcement costs greatly with little or no increase in abuse. Changing the legal status of cocaine and crack seems ill-advised, but that does not imply that current enforcement practices could not use dramatic reform.

The challenge of drug policy is to find least-cost solutions to the problems created by the age-old fact that some human beings take more of various mind-altering substances than is good for them or their neighbors, and by the modern fact that the variety of available psychoactives is rapidly increasing. To concentrate on changing labels from “legal” to “illegal” is to miss all of the hard work and most of the social importance that accompanies that challenge.

188. See *supra* notes 105-34 and accompanying text.

